

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 22744
Docket Number MW-22795

Paul C. Carter, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way **Employees**
(The Western Pacific Railroad Company

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

(1) The dismissal of **B&B Foreman D. B. Ehorn** was without just and sufficient cause, **on** the basis of unproven charges and in violation of the Agreement (Carrier's File Case No. **11316-1978-BMWE**).

(2) The above charges be stricken from the claimant's record, he be reinstated with seniority and all other rights unimpaired and he be compensated for all wage loss suffered, all in conformance with the third paragraph of **Rule 20.**"

OPINION OF BOARD: **On** February 8, 1978, claimant, Foreman of Carrier's B&B Gang 503, was notified:

"Arrange to attend, as principal, a **formal investigation** to be held in the Conference Room of the Western Pacific Railroad, 250 Silver Street, **Elko**, Nevada, at 9:00 a.m., Monday, February 13, 1978, to determine facts and place your responsibility in connection with your alleged theft of gasoline from the Western Pacific Railroad on or about December 20, 1977, **February** 1, 1978, and other occasions extending from June 1977 to the present.

"Arrange to attend this investigation with proper representative and/or witnesses if desired."

The investigation was postponed by agreement, and conducted on February 27, 1978. Following the investigation, claimant was notified **on** March 10, 1978, of his dismissal from service. A copy of the transcript of the investigation has been made a part of the record.

The Organization contends that **claimant** was denied a fair and impartial hearing because the conducting officer denied claimant's representative the opportunity to question one of the witnesses, **B&B** Track Inspector Huff. The Board has carefully examined this aspect of the

investigation. **After** witness Huff had stated that he did not have **any** first-hand knowledge of the facts under investigation, the conducting officer excused him as a witness. Claimant's **representative** protested the ruling, and the conducting officer offered to reverse the ruling if claimant's representative would indicate what pertinent facts the witness **might have** concerning the matter under investigation. The claimant's representative made **no** direct response. Later the claimant indicated **that** he desired to question witness Huff because **written** statements signed by **some** of the gang members had been delivered to Mr. Huff. The conducting officer then renewed his original ruling as witness Huff had previously stated that he had no first-hand knowledge of the matter. While the actions of the conducting officer in this **matter may** not be considered exemplary, under the facts indicated we do not consider his actions sufficiently serious as to constitute reversible error or to void the entire proceedings.

As to the merits of the case, there was substantial evidence produced at the investigation to support the charge against claimant and the Carrier's action in dismissing him from the **service**. We note, however, that in handling the dispute on the property the Carrier, on July 21, 1978, offered to restore claimant to service, without pay for time out of service, subject to the following conditions:

- (1) Mr. **Ehorn** (claimant) shall pass a return-to-service physical examination.
- (2) Upon his return to service **Mr.** Ehorn will be restricted to the exercise of his seniority as a Carpenter; restoration of his seniority as a **Foreman** will be dependent upon his future performance.

The above offer was rejected by the Claimant.

Based upon the facts of record, the Board considers the offer made by the Carrier to be fair and reasonable. We will award **that** the offer, without pay for time lost, again be made to claimant by the **Carrier**, with the stipulation that it may be accepted within sixty days from the date of this Award. In all other respects the claim is denied.

FINDINGS: The Third Division of the Adjustment Board, **upon** the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the **Employees** involved in this dispute are respectively Carrier and **Employees** within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has **jurisdiction** over the dispute involved herein; and

That the discipline be modified as outlined in the Opinion.

A W A R D

Claim sustained to the extent indicated in Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:


Executive Secretary

Dated at Chicago, Illinois, this 29th day of February 1980.