

The Third Division consisted of the regular members and in addition Referee Charlotte Gold when award was rendered.

(Brotherhood of Maintenance of Way Employees  
PARTIES TO DISPUTE: (  
(Soo Line Railroad Company

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

(1) The dismissal of Pump Repairer H. T. Johnson for alleged '... theft of company property and unauthorized use of a company vehicle ... in violation of Rule 607 and Rule 609 of the General Code of Operating Rules.' was arbitrary, unwarranted and based on unproven charges (System File D355 #0928J/800-16-B-76).

(2) The Claimant shall be reimbursed for all wage loss suffered, made whole with seniority and all other rights unimpaired and his record cleared of the charges leveled against him."

FINDINGS:

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

The carrier or carriers and the employe or employees involved in this dispute are respectively carrier and employees within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

Following a hearing held on January 28, 1987, into his alleged unauthorized removal of Soo Line material (seven pieces of lumber) from Carrier's property, his unauthorized use of a Soo Line vehicle, and his unauthorized possession of Soo Line tools at his home, Claimant was discharged from Carrier's service.

In its appeal, it was the Organization's contention that Claimant was employed in the type of service that required him to work alone and develop his own work schedule and methodology and that he had removed the lumber for the purpose of building an extension for a fuel barrel tower at home.

From a review of the entire record, including the transcript of the investigation, this Board finds substantial support for the Organization's contentions. Claimant's position was apparently one requiring considerable independence. While assigned to Shoreham, Minnesota, he was responsible for maintaining facilities over a 200-mile area. It is also apparent from the record that Claimant's Supervisor had sanctioned Claimant's working on Carrier projects in his home in the past, as well as the use of a Carrier truck and equipment.

The primary questions that arise in the present case is whether Claimant should have attempted to work at home in this instance without gaining prior permission from his Supervisor and whether it was his intent to steal the lumber and any tools found in his home that may have belonged to Carrier.

Given the presence in his workshop of a plan for building the extension for a fuel barrel tower, it is clear to this Board that the lumber Claimant took was intended for that purpose. At best, the evidence in the record as to the ownership of the tools found in Claimant's workshop is confusing. Since Claimant had worked on other Company projects, it may well be that some of the tools did belong to Carrier.

From Claimant's reactions when confronted by the police, it is evident that he was aware that his activities could be viewed with suspicion. While he did work independently, he did not have permission for his actions in this particular instance.

Undoubtedly, Claimant acted with more independence here than Carrier deemed acceptable. But given the entire circumstances of the case, this Board believes that a letter of warning would have been sufficient to place Claimant on notice that he must always obtain prior permission for such projects in the future. Claimant's dismissal shall be reduced to a letter of warning. He shall be reimbursed for all wages lost and made whole, with seniority and all other rights unimpaired.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest:   
Nancy J. Dwyer - Executive Secretary

Dated at Chicago, Illinois, this 16th day of October 1989.

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

INTERPRETATION NO. 1 TO AWARD NO. 28159

DOCKET NO. MW-28458

NAME OF ORGANIZATION: Brotherhood of Maintenance of Way Employees

NAME OF CARRIER: Soo Line Railroad Company

This case involves an Interpretation of Third Division Award 28159. In that dispute, the Organization sought, among other things, the reimbursement of Claimant "for all wage loss suffered" as the result of his termination from service. The Claim was sustained in accordance with the Findings of the Board.

In the present case, the issue is whether Carrier is entitled to deduct any outside earnings received by Claimant during the period of his discharge. The Organization argues that such a deduction is not warranted, since Carrier did not raise this matter during the on-property handling of the dispute.

It further contends that Rule 13-6 (g) of the Agreement does not address the issue of offsetting other earnings and notes that unlike many other railroads, Carrier failed to negotiate such a provision into its Agreement. At the same time, Claimant's outside work activities were not necessarily in lieu of his regular job with Carrier, but may well have been performed in addition to any job that he had with the railroad.

Finally, the Organization maintains that Claimant should be compensated from January 7, 1987, the date he was removed from service, to December 4, 1989, the date he returned, rather than from February 5, 1987, the date of his discharge.

In the main, Carrier argues that its responsibility to make Claimant "whole" requires it to pay no more than what Claimant would have earned had he been employed by the railroad during the period in question and that no punitive damages are warranted. Payment is limited to the pecuniary loss suffered by the injured party. Both Carrier and the Organization presented prior Awards in support of their respective positions.

This Board has carefully reviewed these decisions and concludes that, in those instances where the facts of the case most closely approximate those present here, the better reasoned Awards are supportive of Carrier's position. As in Awards 4 and 13 of Public Law Board No. 1437, there was no mention of the deduction of outside earnings in the governing Agreement and the Awards called for pay for all time lost. In an Interpretation of those Awards, the Board concluded that:

"In the absence of a prevailing past practice or a contractual provision explicitly or implicitly barring deduction of outside earnings, and neither is present here, the Board is of the opinion, and so finds, that the common law rule of mitigation of damages applicable to personal Contracts of employment is also controlling in this case."

This reasoning assumes that the payment of monies over and above that normally earned by a Claimant during the period in question would constitute the payment of punitive damages. Regardless of whether the issue is addressed on the property, this general principle applies. As noted in Third Division Award 1638:

"This conforms to the rule that the employe should be made whole and, at the same time, eliminates punitive damages which are not favored in law. It conforms to the legal holding that the purposes of the Board are remedial and not punitive; that its purpose is to enforce agreements as made and does not include the assessing of penalties in accordance with its own notions to secure what it may conceive to be adequate deterrents against future violations. The power to inflict penalties when they appear to be just carries with it the power to do so when they are unjust. The dangers of the latter are sufficient basis for denying the former."

This Board notes that in its Submission, Carrier points out that it has no intention of depriving Claimant of his vacation credit, RUIA benefit eligibility, or railroad retirement benefits. Thus, we cannot conclude, as the Organization does, that our Findings here will have an adverse effect on Claimant.

At the same time, however, we agree with the Organization that Carrier is required to make Claimant whole from the time that he was removed from service without pay. We find no support for the Organization's suggestion that Claimant's outside earnings came from a job or jobs that he normally would have held in addition to his regular railroad employment, nor are we able to determine from the record whether Sunday, December 3, 1989, would not have been an assigned work day for Claimant, as the Organization suggested.

Referee Charlotte Gold sat with the Division as a Member when Award 28159 was rendered, and also participated with the Division in making this Interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest;

  
Nancy J. Deyer - Executive Secretary

Dated at Chicago, Illinois this 28th day of February 1991.