

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 22484  
Docket Number MW-22692

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 Foreman Juan Esquivel

'for your alleged absence without proper  
authority from your assigned position as  
Foreman of Section Gang No. 102, on Thurs-  
day, September 22, 1977'

was without just or sufficient cause, on the basis of unproven charges  
and was exceedingly and excessively disproportionate to the charge (System  
File Case No. 11174-1978-BMWE Local Case No. 223 Maint. of Way).

(2) The claimant's record shall be cleared of the charge and  
he shall be reinstated with pay for all time lost and with seniority and  
all other rights restored."

OPINION OF BOARD: Claimant had been in Carrier's service since November 1,  
1954. He had seniority as a foreman from April 12,  
1962.

On September 26, 1977, claimant was notified that a formal  
investigation would be held on September 30, 1977, to determine facts and  
place responsibility for claimant's absence from his assigned position as  
Foreman of Section Gang No. 102 on September 22, 1977. In the notice  
claimant was advised that he could have a representative and/or witnesses  
as desired. The investigation was held as scheduled. Claimant was present  
at the investigation but did not have a representative present. On  
October 11, 1977, he was notified of his dismissal from the service.

The Board has carefully reviewed the transcript of the  
investigation and find that none of claimant's substantive procedural  
rights was violated.

From our review of the transcript of the investigation it is clear that claimant was absent from his gang on September 22, 1977, without permission of the Roadmaster or any other officer. The claimant testified that he left the gang in charge of the Assistant Foreman and went to check on problems at other locations that he considered of importance to the railroad, including the cutting of a branch off of a tree that he had been told was brushing the faces of the engineer and the brakeman. Claimant was performing service for the Carrier even though he was absent from his gang.

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During the handling of the dispute on the property and after the dispute had been referred to this Board, the Carrier made offers to restore claimant to the service. However, each offer contained certain restrictions on the claimant's exercise of seniority. At any rate, they were compromise offers that were not accepted, and have no standing in proceedings before this Board.

After full consideration of all the facts in the case, and considering claimant's years of service, with no record of being involved in prior disciplinary proceedings, the Board finds that while claimant was subject to some discipline, the penalty of dismissal was excessively severe. A disciplinary suspension of no more than 60 days would have been appropriate.

We will award that the penalty assessed be reduced to a 60-day disciplinary suspension, following which claimant shall be reinstated with seniority rights unimpaired, and compensated for net wage loss, if any, as provided in Rule 20 of the applicable Agreement.

**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 Employee involved in this dispute are respectively Carrier and Employee 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 imposed was excessive.

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Claim sustained to the extent indicated in the Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

ATTEST:

AW Pauls  
Executive Secretary

Dated at Chicago, Illinois, this 24th day of August 1979.

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 22484

Docket Number MW-22692

Paul C. Carter, Referee

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

ON REMAND FROM THE  
UNITED STATES DISTRICT COURT,  
NORTHERN DISTRICT OF CALIFORNIA,  
NO. C 80 2084 WWS

INTERPRETATION TO AWARD 22484, DOCKET MW-22692

We are called upon to render an interpretative opinion with respect to Award No. 22484 concerning the meaning of the language "net wage loss."

Claimant Esquivel was dismissed from Carrier's service on October 11, 1977. In Award No. 22484, issued on August 24, 1979, the Board held:

"We will award that the penalty assessed be reduced to a 60-day disciplinary suspension, following which claimant shall be reinstated with seniority rights unimpaired, and compensated for net wage loss, if any, as provided in Rule 20 of the applicable Agreement."

Rule 20 of the applicable collective bargaining Agreement provides in part:

"If final decision decrees that charge against the employee is not sustained, the record shall be cleared of the charge. If the employee has been suspended or dismissed, he shall be reinstated and paid for net wage loss, if any, suffered by him. If employee is suspended, suspension shall date from the time taken out of service."

The record shows that the 60-day disciplinary suspension extended from September 22, 1977 to November 22, 1977. The record now shows that the period of time involved, in excess of the 60-day disciplinary suspension, was November 23 1977 to October 1, 1979.

The Carrier contends that in arriving at claimant's "net wage loss" for the period that he was out of service beyond the 60-day disciplinary suspension, it is entitled to take credit for claimant's earnings from his privately owned and operated landscaping business. The Organization contends that in computing "net wage loss" only amounts earned as wages from employment for another employer may be offset against the gross earnings otherwise payable pursuant to the Award.

The Organization points out that claimant owned and, along with another member of his family, operated a landscaping business both prior to and during part of the time involved and contends that it would not be proper to deduct earnings from that business in arriving at claimant's "net wage loss."

The Board has been furnished no figures showing claimant's wage loss from the Carrier for the period November 23, 1977 to October 1, 1979; nor have any figures been furnished showing claimant's earnings from the landscaping business during that period. The Carrier states that information furnished indicated that claimant's landscaping business generated, during the period that he was out of service, income substantially in excess of the amounts generated in the four years prior to the date of claimant's discharge. It would appear logical that with claimant being able to devote his entire time to the landscaping business while out of Carrier's service, the business would generate more income. There is evidence in the record that claimant made no effort to seek other employment to mitigate his damages other than his business.

The Board holds that Carrier is entitled to take credit for any increased earnings of claimant's landscaping business for the period November 23, 1977 to October 1, 1979 in arriving at the "net wage loss" of claimant. This would make claimant whole for any wage loss that he suffered. The claimant should furnish to the Carrier proper information, or copies of his income tax returns, for the four-year period prior to his discharge, and for the period involved herein, so that such determination can properly be made.

This interpretation is also in response to Carrier's request for interpretation as contained in its letter to the Board dated October 30, 1980.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

ATTEST:

  
Executive Secretary

Dated at Chicago, Illinois, this 16th day of March 1981.

