

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number **24273**  
Docket Number **MW-24454**

Paul C. Carter, Referee

**PARTIES TO DISPUTE:** ( Brotherhood of Maintenance of Way Employees  
( Denver and Rio Grande Western Railroad Company

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

(1) The dismissal of Track Patrolman **B. L. Hammer** for allegedly 'going beyond authorized track car block limits without authority at East Crescent at **approximately 11:40 P.M. October 14, 1980**' was without just and sufficient cause, arbitrary, wholly disproportionate to the charge **levelled** against **him** and in violation of the Agreement (System File **D-30-80/MW-32-80**).

(2) Track Patrolman **B. L. Hammer** shall be reinstated with seniority and all other rights unimpaired and he shall be compensated for all wage loss suffered."

**OPINION OF BOARD:** Claimant, with about four years of service, was employed as a Track Patrolman at Pinecliffe, Colorado,. On October **17, 1980**, he was notified to attend **formal** investigation at 10:00 A.M., October 20, "... to determine facts and place responsibility, if any, in connection with Motor Car No. **3018** allegedly going beyond authorized track car block limits without **authority** at East Crescent at **approximately 11:40 P.M., October 14, 1980**". The investigation was held as scheduled, following which Claimant was notified on October 24, **1980**, of his dismissal from the Carrier's service.

A copy of the transcript of the investigation has been made a part of the record. In the investigation Claimant's representative objected to the **Trainmaster** reading **into** the record a written statement from the train dispatcher who issued block permits to Claimant. This Board has held in **numerous** awards that written statements from witnesses not present at an investigation are admissible in the absence of contractual prohibition. See Award **19558** and Award **16308** cited therein.

**In** the investigation it was established that Claimant had received track motor car block limits (authorization) to patrol main line trackage between West Clay and East Crescent switch. When he reached East Crescent switch, the switch was lined for the siding and he proceeded to the west end of the siding, from which point he contacted the dispatcher. It was also developed **in** the investigation that, under the rules in effect at the time, in **CTC** territory track car permits (authorization) must be issued for use of sidings. Claimant was in **violation** of the rule **in** operating the track car beyond authorized block limits without authority at East Crescent, as charged.

In its **submission** to the Board, the Carrier cites Claimant's prior service record and relies upon that prior record in support of the discipline imposed. The Organization contends that the issue of Claimant's prior record

was not raised by the Carrier **in** the handling of the dispute on the property and **may** not be raised for the first **time** in submission to this Board. We have carefully reviewed the correspondence covering the appeal on the property and find that no **issue** was raised at any time as to Claimant's prior record. It is well settled that new issues or defenses may not be raised for the first **time** before the Board. **This** principle applies to an employee's prior record, as well as any other issue. See Award **13777**, and Fourth Division Awards **732** and **1203**.

Based upon careful consideration of the record properly before the Board, we conclude that discipline was warranted, but that permanent dismissal **was** excessive. We **will** award that Claimant be restored to the service with seniority and other rights unimpaired, but without any compensation for **time** lost while out of the service.

**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 was excessive.

A W A R D

Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest: Acting Executive Secretary  
National Railroad Adjustment Board

By   
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this **31st** day of March 1983.

