

NATIONAL RAILROAD **ADJUSTMENT** BOARD

THIRD DIVISION

Award Number 25156
Docket Number **MW-25259**

Paul C. Carter, Referee

(Brotherhood of Maintenance of Way **Employees**
PARTIES TO DISPUTE: (
(Missouri-Kansas-Texas Railroad Company

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

(1) The dismissal of Machine Operator **J. J. Searles** for alleged violation of "Rule **M**" and "Rule **L**" was without just and sufficient cause (System File **100-58/2579**).

(2) The claimant shall be reinstated with seniority and all other rights unimpaired, his record shall be cleared of the charges leveled against him and he shall be compensated for all **wage loss** suffered.

OPINION OF BOARD: Prior to the occurrence giving rise to the dispute herein, Claimant, who entered Carrier's service January 7, 1980, was employed as a machine operator, assigned to Extra **Gang** 366, and was **working** under the supervision of Roadmaster D. W. Beaver and Extra **Gang** Foreman **J. C. Mankin, Jr.**

On May 4, 1982, Claimant was notified by the Division Engineer:

"Please arrange to report to the M-K-T Depot, **McAlester**, Oklahoma, at 9:00 A.M., Wednesday, May 12, 1982, for a formal hearing to be held to develop the facts and determine your responsibility, if any, when without permission you failed to report for duty April 1, 1982, as well as your **unauthorized** use of Company telephone March 22, 1982.

In this formal hearing you will be charged with violation of Rule **M**, part quoted below, of **the M-K-T** Lines 'Rules for the Maintenance of Way and Structures, effective January 1, 1982, and General Rule '**L**' of Circular No. DP-2 issued by the Department of Personnel under date of **November** 23, 1973 and effective January 1, 1974, which read as follows:

Rule **M** (Part reading) 'Employees must report at the appointed time, devote themselves exclusively to their duties, must not absent themselves, nor exchange duties with **or** substitute others in their place without proper authority.'

Rule '**L**' '**Long** distance telephone circuits provided by the Company are reserved exclusively for transaction of Company business. Use of these circuits for personal business by an employee, and **placing** of personal **long** distance calls from Company phones, either by direct dialing **or** otherwise, where such calls are charged to the Company, is strictly prohibited.'

"Please be present at the above mentioned time and place. **You** may have representation and any such witnesses you may desire to appear in your **behalf**."

The hearing commenced as scheduled on May 12, 1972, was recessed about **2:12** P.M. on that date, and resumed at 10:00 A.M., June 8, 1982.

A transcript of the hearing has been made a part of the record. Following the hearing, Claimant was notified on June 10, 1982, of his dismissal from the service.

In the hearing, in response to a question by the Roadmaster, who was the conducting officer, **Claimant** stated that he was not familiar with and did not understand the rules that he was charged with violating. On questioning by his representative, Claimant stated that he had never heard of and was completely unaware of General Rule "**L**" of Circular DP-2, referred to in the letter of charge. No evidence was introduced that Claimant was **or** should have been familiar with the rule.

The Foreman testified that he was present when the Claimant used Carrier's telephone at North **McAlester**, Oklahoma, to make a long distance call to the General Chairman, and that he told Claimant that he would have to pay for the call. The Claimant testified that he told the Foreman that he would pay for the call, and also told the Agent on duty that he would pay for it. There is no evidence that the Foreman told the Claimant that the telephone call to his Union representative was prohibited or contrary to any rule. The Agent testified that he did not recall Claimant offering to pay for the long distance telephone call. **There** is nothing to indicate that Claimant did actually pay for the long distance call.

As to the charge for being absent from duty without permission **on** April 1, 1982, there is **no** dispute that Claimant did not report for duty on April 1, 1982. **He** claimed that his absence **on** that day was due to sickness; that he could not obtain prior permission to be **absent** due to sickness; but that he called the agent about 8:00 A.M. to leave a message to the Roadmaster **or** Foreman. The Agent testified that Claimant did not call him but that there were several people in the office at the time and it was possible that someone else could have answered the telephone. In the investigation Claimant introduced a **statement from Doctor Lonnergan**, dated May 12, 1982, reading:

"To Whom It may concern:

I saw Mr. Jim **Searles** in (sic) Thursday, March 25th for allergic rhinitis which had become particularly bad. I treated him with a decongestant at that time. By his report his allergies became severe the following week forcing him to miss work April 1-2. Please excuse him from work during this time."

Our attention has also been called to Rule 4, **Article** 7, of the applicable Agreement, reading in part:

"...Permission must be secured in the usual way from foreman **or** supervisor for temporary absence for any duration, except in cases of illness, when foreman or supervisor must be notified as soon as possible.'

Claimant was absent on April 1 and 2, 1982, and there is evidence that on April 2, 1982, the Roadmaster went by to see the Claimant. Claimant was not charged for his absence on April 2, 1982.

Based upon the entire record, the Board concludes that some discipline was warranted, but that permanent dismissal was excessive. we will award that Claimant be restored to service with seniority and other rights unimpaired, but without any compensation for time lost while out of 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 Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 30th day of November 1984.