

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 25589
Docket Number MW-25655

Paul C. Carter, Referee

(Brotherhood of Maintenance of Way **Employees**
PARTIES TO DISPUTE: {
(National Railroad Passenger Corporation

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

(1) The dismissal of **Trackman L. Martinez** for alleged violation of "Rule **K**" and "Rule **L**" was excessive and disproportionate to such charge (System File BMW-E-D-024).

(2) The claimant shall be reinstated with seniority and all other rights unimpaired and he shall be compensated for all work days lost in excess of sixty (60) days.

OPINION OF BOARD: Prior to his dismissal, Claimant herein **was** employed as a **trackman** at Chicago, Illinois. On May 17, 1982, he **was** instructed to appear for investigation on May 24, 1982, **on** the charge:

'Your responsibility for your failure to comply with **that** portion of the National Railroad Passenger Corporation Rules of Conduct '**K**' and '**L**' which read:

"RULE '**K**':

"Employees must report for duty at **the** designated time and place... and comply with instructions from their supervisor.

"RULE '**L**':

"Employees shall not **...be** absent from **duty...without** proper authority.'

"In that. while assigned as a **Trackman**, you failed to comply with your supervisor's instructions and you failed to receive proper authority for your absences **on** the following days: April 19, 1982, **May** 10, 11, 12, 13 and 14, 1982."

The record shows that **on** February 19, 1982, notice was issued by Carrier's Resident Engineer to personnel of all crafts assigned to the Engineering **Department** outlining the proper procedure to be followed by Engineering Department personnel in receiving authority to be absent from duty, which notice was posted on bulletin boards throughout the facility, The notice reads:

"Date February 19, 1982

"TO: ENGINEERING DEPT. PERSONNEL-ALL CRAFTS

"FROM: R. A. NEDZESKY

"SUBJECT: AUTHORIZATION TO BE OFF DUTY

"TO BE POSTED ON BULLETIN BOARD

'EFFECTIVE IMMEDIATELY...The proper authorization to be absent from duty, for whatever reason, must be secured through PERSONAL contact with Mr. Laycox or myself. Calling the Answering Service will not be acceptable.

"The office is generally open by 6:45 A.M. This will give ample time to call in before starting time. The phone numbers are 930-4069 or ~~930~~-4070.

"Any combination of 3 late arrivals, early departure. or missed days, will result with a formal investigation to determine the facts and your responsibility, if any, and could possibly result with discipline action.

"Please be governed accordingly.

"(Sgd) R. A. NEDZESKY
Resident Engineer. "

The Claimant did not appear at the investigation scheduled for May 24, 1982, nor did he request a postponement, although a representative of the Organization was present in Claimant's behalf. The record **does** show, however, that Claimant had signed a receipt for the notice of the investigation. **The** Organization representative stated in the investigation that Claimant had not contacted him to request postponement. We consider Claimant's actions in not attending the investigation, or requesting a postponement, to be at his peril. **The** investigation was conducted in absentia, which procedure has been upheld in many Awards of this Board.

Following **the** investigation, in which substantial evidence was presented that Claimant had violated Carrier's Rules "K" and "L", and the instructions of February 19, 1982, Claimant was notified of his dismissal from service on May 26, 1982. Following Claimant's dismissal, claim was filed on his behalf by **representatives** of the Organization, and progressed to the Carrier's highest designated officer of appeals on the basis that dismissal was excessive.

In its Submission to this Board, the Organization cites and relies upon what it terms an Absentee **Agreement** of October 26, 1976. The Carrier responds that the October 26, 1976, Agreement applies **only** to that portion of the Carrier known as the Northeast Corridor, and has submitted substantial evidence in support of its position in this respect. It appears that some of the Agreements **are** referred to as "Corporate Agreements" and others as "Northeast Corridor Agreements. " Further, if the **Organization** intended to rely upon the October 26, 1976, Agreement. then certainly such contention should have been raised in the on-property handling, but **was** not. As stated heretofore, the appeal on the property was on the basis that dismissal was excessive. It is well settled that new issues and defenses may not **properly** be raised for the first tim in proceedings before the Board.

Based **upon** the facts developed in the investigation of May 24, 1982, and Claimant's prior disciplinary record, the Board does not find Carrier's action, in imposing the discipline that it did, to be arbitrary, capricious or in bad faith. The claim will be denied.

We point out that an oral hearing was held before this Board on **this dispute**, with the Referee present, beginning at 2:30 P.M., June 21, 1985, at which hearing the Claimant was present and participated; also an Organization representative was present and participated, as well as representatives of the Carrier.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

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

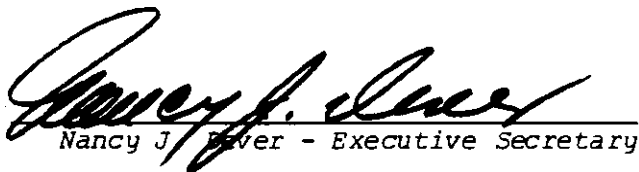
That the Agreement was not violated.

. A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dwyer - Executive Secretary

Dated at Chicago, Illinois, this 22nd day of August 1985.