

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 25647
Docket Number MW-25625

Nicholas **Duda**, Jr., Referee

(Brotherhood of Maintenance of Way **Employees**
PARTIES TO DISPUTE: (
(Southern Pacific Transportation Company
((Eastern Lines)

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

(1) The dismissal of Track Laborer **B. Roberts** for alleged violation of Rule "**M810**" and "**M811**" was arbitrary, unwarranted and on the basis of unproven charges (System File W-83-52).

(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 beginning March 3, 1983.

OPINION OF BOARD: Claimant was initially employed by the **Carrier on May 3, 1976**. At the time of his dismissal in May, 1983, he had been employed approximately eight years.

For the week of February 21 through February 25, 1983, Claimant was assigned to Extra Gang 445 at **Ennis**. That Extra Gang was scheduled to work the next week beginning on February 28. Claimant did not report on February 28 or anytime that week.

On March 3, 1983, the Carrier sent him a letter alleging that he had failed to protect his vacancy on February 28, thereby violating Rules **M810** and **M811** concerning absence from work without proper authority. For the alleged violation, the Carrier dismissed Claimant,

At Claimant's request a hearing was arranged and held on March 30, 1983. A number of witnesses were presented and examined concerning events and conversations at various times in February, 1983.

On April 5, 1983, the Carrier notified Claimant that 'after careful consideration [of the transcript of the March 30, 1983 hearing], it is my decision that the charge of dismissal shall be sustained".

The Organization denies a violation of **M810** and/or **M811**, contending that Claimant **"took** his vacation [the week of February 28, 1983] with the approval of his Foreman'. In addition, the Organization contends that even if Claimant had violated the absentee rules, dismissal was an excessive penalty. In that regard the Organization maintains that reliance by the Carrier in its **ex parte** submission on **Claimant's** prior discipline record was improper.

About the only evidence in this case not contradicted is that Claimant worked on February 25, 1983, and did not work on February 28, 1983. The evidence about most of the key facts is in conflict. Claimant and members of Gang 445 testified to one version of the facts. Contrary facts are alleged by witnesses called by the Carrier.

Claimant, supported by several other **members** of Gang 445, said that he went to his **Foreman** and Assistant Foreman on the morning of February 25, 1983, and requested **vacation** the next week. They testified that he had requested their presence to be witnesses to his conversation with the Foreman, who orally granted the vacation request. The Foreman, supported by the Assistant Foreman denied receiving and/or granting a vacation request for February 28, 1983.

All Employees had been notified several weeks earlier by posted notice that the Foremen were no longer authorized to grant vacation schedules or changes, requests for which had to be sent to the **Ennis** office in writing or by telephone; if approved, notice of change or changes would be mailed to the Employees. Because of the new procedure for vacation scheduling, the Carrier claims that the vacation change by the Foreman as alleged by Claimant would have been improper. Claimant and every other witness on his behalf denied having seen the vacation scheduling notice or knowing that changes could no longer be granted orally and solely on the Foreman's authority. The Carrier points out that the Foremen testified that they knew of their changed authority and would not have entertained or made such a requested change. Furthermore, the Stenographic Clerk who keeps records of assignment and vacation of Maintenance of Way Employees testified that he came to see Claimant on February 25 for the express purpose of offering Claimant choice of work the next week beginning February 28; Claimant elected to continue working at **Dennis and** elected to fill the **Machine Operator Helper** vacancy on Extra Gang 445. The Clerk also testified that Claimant and several other Employees asked him on February 25 to review the procedure for vacation schedules and he explained the new-procedure, Some of the Employees recollect the Clerk's explaining the vacation change procedure, but they do not recall whether Claimant was present during that explanation.

Determination of the charge against Claimant depends on whether the Foreman granted Claimant permission to be on vacation the week of February 28, 1983. That issue, of course, depends on evaluation of the testimony in terms of relevancy, reliability, competency and persuasiveness. Resolving evidentiary conflicts is the function of the Trier of the Facts, not of this Board. Responsibility and authority of the Board in discipline cases has been considered on a number of occasions. In this regard, the following quotation from Third Division Award 13179 is pertinent.

"In discipline cases, the Board sits as **an** appellate forum. As such our function is confined to determine whether:

(1) Claimant was afforded a fair and impartial hearing;

"(2) The finding of guilty as charged is supported by substantial evidence;

"We do not weigh the evidence de **novo**. If there is material and relevant evidence, which if believed by a trier of the facts, supports the finding of guilt, we must affirm the finding."

Claimant did not report on February 28, 1983. **He** avers that he had obtained permission from his Foreman to be absent on vacation. To prove that **excuse, Claimant presented evidence, but the Trier of Fact**, based on the total record, did not find that Claimant had been excused. He found the Claimant guilty of the charge. That finding was not unreasonable and was supported by substantial evidence.

The Carrier sustained the dismissal based on the transcript of the formal hearing. In the handling of the dispute on the property, the Carrier had not relied upon prior discipline in support of the dismissal. There was no reliance by the Carrier on the Claimant's prior discipline record until the written submission to this Board.

"It is well settled that new issues or defenses cannot be raised for the first time before the Board. This principle applies to an **Employee's** prior record as well as any other issue." (Third Division Award No. 24273)

Similarly. in Third Division Award 24098, the Board stated as follows:

"It has long been established that all evidence being considered by the Board must be handled between the parties on the property. The evidence in form of a past record should have been handled with the Union prior to the time the case was appealed to the Board. The delineated record has not been made part of the record as handled on the property, it has not been subject to scrutiny, review, or comment by the Organization."

Under the circumstances, Claimant's past record is not properly before this Board. Thus, the only question is whether dismissal is appropriate solely for the February 28, 1983 offense. Refusal to protect an assignment is certainly a serious offense. **While** significant discipline is appropriate, however, under the circumstances of this case, dismissal is excessive and arbitrary. Therefore, the Board will direct the reinstatement of **Claimant without pay for lost time with seniority and other rights** unimpaired.

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 Employes involved in this dispute are respectively Carrier and Employes 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

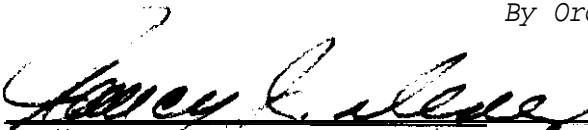
That the discipline was excessive.

A W A R D

Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 30th day of September. 1985

