

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 32139  
Docket No. MW-32628  
97-3-95-3-27**

**The Third Division consisted of the regular members and in addition Referee Hyman Cohen when award was rendered.**

**(Brotherhood of Maintenance of Way Employees  
PARTIES TO DISPUTE: (  
(Union Pacific Railroad Company**

**STATEMENT OF CLAIM:**

**“Claim of the System Committee of the Brotherhood that:**

- (1) The discipline (withheld from service pending hearing and subsequent dismissal) of Track Subdepartment Group 19 System Gang employe D. Crespín for allegedly being absent without proper authority on August 16, 20 and 23, 1993 was arbitrary, capricious, without just and sufficient cause and in violation of the Agreement (System File D-209/940149).**
- (2) As a consequence of the violation referred to in Part (1) above, the Claimant shall be reinstated to the Carrier's service 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 August 24, 1993 when he was improperly withheld from service.”**

**FINDINGS:**

**The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:**

**The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.**

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

Following an Investigation, Track Supervisor Ortegon notified the Claimant, by letter dated October 18, 1993 that he had been dismissed from service. Prior to his dismissal, the Claimant, with 15 years of service, held seniority in the Track Subdepartment. At the time of the events which led to the dismissal of the Claimant, he was assigned as a Welder Helper on Gang 9044 under the supervision of Track Supervisor Ortegon.

Turning first to the merits of the dispute between the parties, Rule 604 provides as follows:

**"604. DUTY -- REPORTING OR ABSENCE**

**Employees must report for duty at the designated time and place. They must devote themselves exclusively to the Company's service while on duty. They must not absent themselves from duty, exchange duties, or substitute others in their place without proper authority."**

The language of Rule 604 is simple and unequivocal. The Rule, in relevant part, states that employees are prohibited from being absent from duty "without proper authority."

The Claimant admitted that he violated Rule 604 by his absence on August 16, 20 and 23, 1993. He acknowledged that he did not comply with Rule 604 because "it's nobody else's responsibility but yourself to get yourself to work...."

The Claimant said that he paged Track Supervisor Ortegon on the three days in August. However, merely paging Track Supervisor Ortegon does not constitute proper authority to be absent from duty. Advising or notifying the Carrier of an intended absence is inadequate as authorization for being absent. Advance notice must be combined with the proper authority for the absence. Proper authority to be absent must

be based upon permission from a person in command, such as Track Supervisor Ortegon.

The Claimant was aware of the "proper authority" within the scope and meaning of Rule 604 that was required. He had been granted authority to be absent in the past when he paged his Supervisor and disclosed the reason for his absence. The Claimant admitted that on these occasions Track Supervisor Ortegon had given his verbal authority to be absent. Although he paged Track Supervisor Ortegon on August 16, 20 and 23, the Claimant admitted that no such verbal authority was given. Clearly the Claimant was absent without authority on August 16, 20 and 23, in violation of Rule 604.

The Organization raises several procedural objections which must be addressed. Rule 48 (a) and (o) provide as follows:

**"(a) Except as provided in Paragraphs (k), (l) and (m) of this provision, an employee who has been in service more than sixty (60) calendar days whose application has not been disapproved, shall not be dismissed or otherwise disciplined until after being accorded a fair and impartial hearing. Formal hearing, under this rule, shall be held within thirty (30) calendar days from date of the occurrence to be investigated or from the date the Company has knowledge of the occurrence to be investigated, except as provided hereinafter.**

**\* \* \***

**(o) It is understood that nothing contained in this rule will prevent the supervisory officer from suspending an employee from service pending hearing where serious and/or flagrant violations of Company rules or instructions are apparent, provided, however, that such hearing shall be conducted within thirty (30) calendar days from the date the employee is suspended and a decision rendered within twenty (20) calendar days following the date the investigation is concluded."**

**Contrary to the claim by the Organization, the Carrier did not violate Rules 48 (a) and (o) by withholding the Claimant from service pending the outcome of the Hearing. Rule 48 (o) authorizes the Carrier to withhold the Claimant from service pending the outcome of the Hearing because of the Claimant's serious and flagrant violations of Rule 604.**

**The Claimant violated Rule 604 on three different occasions within a period of seven days. The Claimant's violations of Rule 604 were serious and flagrant. The Claimant's deliberate and repeated absences within such a short period of time amounted to no less than a flouting of his obligation under Rule 604 not to be absent without proper authority.**

**The Organization also contends that the Carrier deprived the Claimant of his right to a fair and impartial Hearing because Track Supervisor Ortegon was not only the Charging Officer, he also rendered the decision following the Hearing and Investigation.**

**In support of its claim, the Organization relies upon Third Division Award 13180 which provides:**

***"Only the hearing officer who presided at the hearing and observed the demeanor of the witnesses was qualified to make findings as to credibility."***

**In Award 13180, there was "conflicting testimony in the transcript of the hearing as to material and relevant facts." Thus, only the Hearing Officer was qualified to make findings of credibility.**

**In this case the material and relevant facts were admitted by the Claimant. He said that unlike past occasions when he was absent, he failed to receive verbal authority from Track Supervisor Ortegon to miss the days of August 16, 20 and 23. Thus, no issue of credibility was raised. Accordingly, the fact that Track Supervisor was both the Charging Officer, and the officer who rendered the decision of dismissal, did not prejudice the Claimant.**

The procedural arguments raised by the Organization are not supported by the record. Thus the Board concludes that the Carrier complied with Agreement due process in the handling of the case.

Having established that the Claimant was afforded Agreement due process and that there is substantial evidence of his serious and flagrant violation of Rule 604, the question which remains to be considered is the assessment of discipline. The Claimant has had 15 years of service with the Carrier. However, his work record since 1989 includes dismissal for being absent without authority, discharge and suspension for other serious offenses.

Accordingly, the Board finds that the Board did not act unreasonably, arbitrarily or capriciously in terminating the Claimant. The claim is denied.

**AWARD**

**Claim denied.**

**ORDER**

**This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.**

**NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division**

**Dated at Chicago, Illinois, this 13th day of August 1997.**