

## 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 Employes  
 { 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  
Rosemarie Brasch - Administrative Assistant

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

REC'D BY  
MURKIN

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