

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 21837
Docket Number MS-22021

Herbert L. Marx, Jr., Referee

PARTIES TO DISPUTE: (United Steelworkers of America, AFL-CIO
(The **Newburgh** and South Shore Railway Company

STATEMENT OF CLAIM: (1) That Maintenance of Way Laborer, Gary Snyder was unjustly held out of service and subsequently discharged from this Carrier's service.

(2) That accordingly, the Carrier be ordered to restore **claimant** back to service with **all** his seniority rights unimpaired and that he be compensated for all lost pay and benefits beginning with August 27, **1976**, until the final settlement of this claim.

OPINION OF BOARD: **Claimant** was employed as a track laborer by the **Newburgh and** South Shore Railway Company. On August 27, **1976**, the maintenance gang to which **claimant** was assigned was programmed to perform overtime work replacing a piece of broken rail located on the property of the United States Steel Corporation. Carrier's Maintenance of Way forces normally and regularly performed such work on a for-hire basis for the Steel Company.

On this date **claimant** refused to perform the scheduled overtime work. As a result of this refusal, he was required to attend **an** investigation on September **7, 1976**, "*** * *** to determine whether you were insubordinate in violation of Rule '**K**' of this Carrier's rules *** * ***". Following the completion of the investigation, Claimant Snyder was **dismissed** from Carrier's service.'

The dismissal was subsequently appealed on the property and has come to this Board for review and final **adjudication**. Petitioner has advanced several contentions as the basis of their appeal on behalf of claimant, the most important of which concern themselves with:

1. Alleged mitigating **circumstances**;
2. The right of Carrier to require **overtime performance**;
3. The degree and severity of **the** discipline assessed.

Based upon our review of the entire record in this case, we conclude that:

1. There were no "mitigating circumstances" present in this case which could justify **claimant's** refusal to perform the overtime work as directed. Petitioner's argument relative to **claimant's** "constitutional rights to privacy" is not **germane** here. The rights of an **employee/employer** relationship stem from the terms and conditions of the **collective** bargaining agreement. This Board is empowered only to interpret such negotiated agreements. We may not become involved in interpretations of constitutional rights which may or may not exist. **"* * * the redress of the individual civil and constitutional rights of the claimants must be sought before some other forum than this Board."** (Second Division Award No. 5491 (Knox)). There is nothing in the record before us which exempts **claimant** from **making** his reasons for desired absence known to his employer.
2. The record contains no information which indicates or implies that Carrier may **require** the performance of overtime work **only** in emergency situations. In the absence of specific rules restricting such **performance**, Carrier is the sole determinant of when overtime work is required. A review of the record in this case indicates that Carrier's **request** for overtime work was not limited to claimant, but rather encompassed the entire gang plus additional forces as well. The work was necessary - if not of an emergency nature. **Claimant** was not privileged to refuse **performance** without a **&&reason**. See award Nos. 20805, 20265, 20183 of this Division. From the record in this case we find no alternative to the conclusion that **claimant** was insubordinate and therefore subject to discipline.
3. The severity of the discipline assessed causes us some concern. There is no question but that we subscribe to the general proposition that insubordinate actions on the **part** of an **employee** are serious and that if not corrected, they undermine the entire discipline structure without which no organization can function. However, here we have a situation where there is no record of prior derelictions **and** admissions by Carrier that the employee is a "good **worker**". Claimant has been out of service for more **than** a year. We are inclined to believe that the discipline imposed has served its purpose. Accordingly, we **shall** order the return of claimant to service with seniority unimpaired, but without any payment for the time he has been out of service. We further counsel claimant that repeated offenses of this nature need not be tolerated by Carrier and that proven recurrences of this type of unacceptable conduct will result in his termination by **Carrier**.

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 **Employee** 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 imposed was excessive.

A W A R D

Claim sustained to the extent indicated in Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: *G.W. Pauls*
Executive Secretary

Dated at Chicago, Illinois, this 6th day of January 1978.