

NATIONAL RAILROAD **ADJUSTMENT** BOARD

THIRD DIVISION

Award Number 25185
Docket Number MW-25077

M. David Vaughn, Referee

PARTIES TO DISPUTE: ((Brotherhood of Maintenance of Way **Employees**
(Seaboard System Railroad
(Atlanta and West Point Railroad Company)

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

(1) The dismissal of Cook M.J. Miller for alleged insubordination was without just and sufficient cause [System File 37-AWP-82/7/12-39(82-1025 K3)].

(2) The claimant shall be reinstated with seniority and all other rights unimpaired and he shall be compensated for all wage loss suffered.

OPINION OF BOARD: Claimant M. J. Miller was employed as a Cook on the morning of December 29, 1981, while assigned to a surfacing gang headquartered in camp cars and on duty, Claimant apparently fell while mopping a camp car floor and suffered injury to his neck and shoulder. Claimant completed preparation of the noon meal for the gang, then drove his personal automobile to the location where the gang was working and reported the injury to his Foreman. Claimant's Foreman completed the Carrier's required accident report and instructed Claimant to return to and remain at the camp car to await the arrival of the Assistant Roadmaster, who would accompany Claimant to the Carrier's Doctor.

Claimant returned to the camp cars as instructed, but, after less than forty-five minutes, Claimant left the camp cars, driving his personal automobile, when the Assistant Roadmaster did not arrive. Claimant did not report to the Carrier-designated Physician that day, nor did he return to the camp cars. Records at the Clinic from which Claimant did obtain treatment indicate that he did not arrive there until 5:00 p.m. on December 29, 1981.

The Assistant Roadmaster finally reached Claimant by telephone at his home at 6:00 p.m. on the 29th and told Claimant that he would take Claimant to the Carrier's Doctor the following morning. Claimant refused, stating that the Physician who had treated Claimant had told Claimant to stay home. Claimant then hung up on the Assistant Roadmaster, who called back and told Claimant that he would be sending an ambulance the next morning, December 30, 1981, to take Claimant to the Carrier's Doctor. The next morning, the Carrier did furnish an ambulance in which Claimant was driven to the Doctor. Claimant refused to allow the attendants to assist him. He walked to the ambulance and was driven to the Carrier's Doctor in a sitting position. After examination, the Carrier's Physician set a second appointment and recommended that Claimant not return to work until he was examined again.

Claimant did not keep the second appointment on January 4, 1982, allegedly because of a misunderstanding as to its time, and he showed up about two and one-half hours late for the appointment as rescheduled for January 5, 1982. Following that examination, the **Doctor** released Claimant for duty.

Immediately following the examination on January 5, 1982, the Carrier gave Claimant a copy of a notice of termination **for** insubordination, based on the incident of December 29, 1981. Carrier's General Rule 17 prohibits insubordination. It states in part, "**insubordination...subjects** the offender to dismissal". That document also notified Claimant of the Carrier's intention to conduct **an** investigatory hearing on January 7, 1982 to determine whether **Claimant's** conduct was violative of the Rule.

Claimant did not, at the time he received the letter, object to the date of the hearing or request to reschedule it; however, the next day, Claimant had a message left with the Assistant Roadmaster that he was going out of town on unspecified personal business. Claimant did not then request a postponement of the hearing, which was held as scheduled on January 7, 1982. Following the hearing, the Carrier notified Claimant that he was terminated, based on the evidence adduced at the hearing. Claimant's appeals were unsuccessful, and the claim was brought before this Board.

The Carrier contends as an initial matter that the initial claim was filed with the Carrier more than ten days after the termination letter was received and that the claim is, therefore, untimely under the applicable Agreement. Non-compliance with applicable, agreed-upon **time** deadlines is a valid reason to dismiss a claim. Here, however, there is no indication that Claimant, as opposed to someone in his household, actually received the Carrier's letter at the date it was received at his house; indeed, there is evidence that Claimant was out of **town** until some time less than ten days prior to the time the appeal was filed. under such circumstances, the Board declines to hold that the claim was untimely.

With respect to the merits of the claim, the Organization contends that the December 29th incidents did not evidence insubordination, that the Carrier improperly introduced at the hearing evidence with respect to incidents other than December **29th**, including his failure to attend the hearing, and that the penalty imposed was excessive.

The Board agrees that the Carrier may only base its disciplinary determination on evidence adduced with respect to the incidents for which the Claimant has been given notice. Since the Carrier's notice of hearing referenced only the December 29th incident, the Carrier's action must be justified based on evidence with respect to the incidents of that date.

There is, however, substantial evidence that Claimant's conduct on December 29th was insubordinate: Claimant's Supervisor ordered him to wait at the camp cars for the Assistant Roadmaster to take him for medical treatment to the Carrier-designated Physician but that Claimant failed to do so. In light of the Carrier's obligation to ensure **employee** safety and its potential exposure to injury claims, the Carrier's insistence on providing assistance to injured employees and requiring that they be seen by a Carrier-designated Physician is not unreasonable; and the disobedience of the Supervisor's direct order was serious, and not a mere technicality.

The Organization argues that, if Claimant disobeyed the order, he did so because the injury was painful, and the Board accepts the concept that some injuries might be so painful and require such immediate attention as to allow employees to resort to self-help to obtain treatment. However, the evidence here does not indicate that Claimant had such an injury. Following the alleged injury, Claimant finished fixing the noon meal, drove to report the incident to his Supervisor, returned to the camp cars, and, after he left, spent the time between about 1:00 p.m. and 5:00 p.m. doing something other than obtaining treatment. The next day, Claimant was walking, refused assistance from the ambulance attendants, and rode to the **Doctor** in a sitting position.

There is, in short, substantial evidence in the record to support the Carrier's determination that Claimant's actions on December 29th were insubordinate and were not excused.

The Organization argues that the penalty imposed was, in any event, excessive. As indicated, the Board believes that non-compliance with the Carrier's orders and procedures with respect to the treatment of injuries is a serious matter. Even so, dismissal is a severe penalty. Here, however, the Carrier made a part of the record and considered in assessing the penalty the five disciplinary charges which had been brought against Claimant between April of 1978 and the date of his dismissal, all of which were based upon Claimant's failure or refusal to carry out orders. Three of those incidents occurred in the year 1981. Under such circumstances, the Board cannot conclude that the penalty of dismissal **was** arbitrary or excessive.

Accordingly, the claim must be denied.

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 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

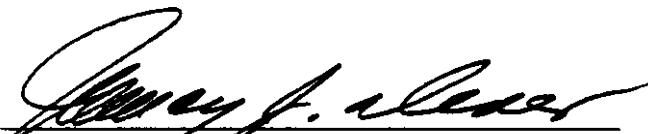
That the Agreement was not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 14th day of December 1984.