

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 33570
Docket No. MW-34262
99-3-97-3-844**

The Third Division consisted of the regular members and in addition Referee Ann S. Kenis when award was rendered.

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(CSX Transportation, Inc.**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline [thirty (30) day actual suspension] imposed upon employees F. Miller and R. Miller for their alleged insubordination in connection with not reporting for duty on Gang 5XT1 on Saturday, October 26, 1996 was without just and sufficient cause, on the basis of unproven charges and in violation of the Agreement [System File 21 (91)(96)/12(96-1591) CSX].**
- (2) The Claimants’ records shall be cleared of the charges leveled against them and they shall each be compensated for all wage loss suffered.”**

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.

Claimant R. Miller, an employee with 23 years of seniority, was regularly assigned as an Equipment Operator on SPG gang 5XT1, a large tie installation gang. Claimant F. Miller, who was also regularly assigned to SPG Gang 5XT1, had over 24 years of seniority and held a Track Repairman position at the time of the incident precipitating this dispute. The Claimants were regularly assigned to work Monday through Thursday, with Friday, Saturday and Sunday designated as rest days. On the dates pertinent to this case, the gang was working on the Chattanooga Subdivision installing ties.

On October 31, 1996, the Claimants were directed to attend a formal Investigation on the charge of insubordination. Specifically, they were charged with not reporting for duty on Gang 5XT1 on Saturday, October 26, 1996 after permission was denied to be off that day. Following the Investigation on November 6, 1996, each Claimant was assessed a 30-day actual suspension.

The Organization advanced three arguments in support of its contention that the discipline of the Claimants was improper. First, it contended that the Carrier failed to furnish the transcript and discipline letter within the time limits set forth in Rule 39, Section 4 of the Seaboard Agreement. That Rule states that "a decision in writing will be rendered within twenty (20) calendar days from the close of the hearing. A copy of the transcript of evidence taken at the hearing and a copy of the decision will be furnished the employee affected and his representative."

The Organization's procedural objection is in the nature of an affirmative defense, and, as such, it had the burden of proving that the Carrier failed to meet the required time lines. After careful review of the record, the Board finds that the Organization did not meet that evidentiary burden. Prior Awards cited by the Organization establish that the postmark date determines when the Carrier's decision has been rendered. See First Division Award 16366; Fourth Division Awards 1177 and 1995. The record in the instant case lacks that factual predicate. Although the General Chairman asserted in his initial letter of claim that the envelope containing the transcript and discipline letter was postmarked on November 27, 1996, or one day beyond the contractual time limit, the copy of the envelope attached to the parties' Submissions was not readable. Because the actual postmark date cannot be ascertained, and because the assertion of the General Chairman is just that, an assertion and not evidence, we must reject the Organization's contention that the Carrier failed to render its decision in a timely manner.

Second, the Organization argued that the Claimants cannot be considered insubordinate because the order requiring them to work was beyond the contractual authority granted to the Carrier for assigning mandatory overtime. In support thereof, the Organization cites Section 7 - Overtime, which reads, in relevant part, as follows:

“B. The right to work overtime, when required on System Gangs, will accrue first to the incumbent of the position of which the overtime is required. If declined by the incumbent, overtime will be performed by the senior qualified employee in the System Gang indicating a desire to work overtime. If no employee desires to work overtime and overtime is required, the junior qualified employee in the System Gang involved will work the overtime.”
(Emphasis added)

In accordance with the clear terms of the foregoing contractual provision, the Organization asserted, the Carrier was required to utilize and assign all employees junior to the Claimants before it required the Claimants to perform the overtime work. Because the Carrier could not force the Claimants to perform required overtime under these circumstances, it follows that it could not charge the Claimants with insubordination.

The Board does not agree that the provisions of Section 7(B) provide a proper defense to the charge of insubordination. It is very well-established that the “obey now, grieve later” rule applies both to legitimate orders and those orders believed to violate the Agreement. Absent an immediate risk of harm or danger, an employee or employees cannot take upon themselves the interpretation of the provisions of the Agreement, but must perform the work assignment and challenge the order through the grievance procedure. Thus, even if the Claimants in the instant case believed that the order to work overtime was unfair, inappropriate, or in violation of the Agreement, they acted wrongly in presuming they could fail to show up as scheduled without penalty. See Second Division Award 11711; Third Division Awards 22836, 24320.

Finally, the Organization failed to affirmatively establish that the Claimants had proper cause for requesting that they be allowed off on Saturday, October 26, 1996. The record shows that as early as the Monday morning job briefing on October 21, 1996, the gang members were informed that they would be required to work on Saturday and possibly on Sunday. Claimant F. Miller’s statement to the Track Foreman on Friday

that he had "a business to run" and would not be at work the following day was not a justifiable excuse for his failure to work overtime. Similarly, Claimant R. Miller presented no reasonable basis for his absence on Saturday, October 26, 1996. He testified at the Hearing that he had a personal family problem that needed his attention, but he conceded that he did not offer that or any other explanation to the Track Foreman at the time he requested to be off.

Thus, the Board concurs with the Carrier's contention that the charge of insubordination was proven and that discipline was fully warranted. Both Claimants were specifically told that they were denied permission to be off and there was no misunderstanding as to what was required of them. Their misconduct falls under the rubric of insubordination, which is viewed as a capital offense in the railroad industry and in industrial relations generally. The disciplinary suspensions imposed in this case, therefore, cannot be viewed as an abuse of managerial discretion or an unreasonable penalty under the circumstances. Absent any evidence that the Carrier acted in a discriminatory, arbitrary or capricious fashion, we must rule to deny the claim.

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 20th day of October 1999.