

Award No. 7020

Docket No. TE-6990

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Hubert Wyckoff, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

**THE ATCHISON, TOPEKA AND SANTA FE RAILWAY
COMPANY—Coast Lines**

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Atchison, Topeka and Santa Fe Railway that:

1. The Carrier acted arbitrarily, capriciously and discriminatively when it summarily dismissed Mr. H. L. Darrah, Night Wire Chief, San Bernardino, California, from its service on June 29, 1953; and that

2. H. L. Darrah, who was reinstated to his position beginning November 19, 1953, shall now be paid for all wages lost between June 29, 1953 and November 19, 1953, together with full restoration of all rights to the same extent as if he had remained in active service of the Carrier.

OPINION OF BOARD: Claimant with 29 years of service held a regular assignment as Night Wire Chief with assigned hour 3:45 P.M. to 11:45 P.M. At the conclusion of his shift on June 29, 1953 the Manager-Wire Chief determined that there was an accumulation of business requiring overtime to keep the work current. Claimant had released his Telegrapher-Printer-Clerk at 10:50 P.M. account illness; and Claimant was the only employe available to work overtime that night.

The Manager-Wire Chief through the Relief Wire Chief gave Claimant a written instruction to work overtime until the accumulation of business was cleared up, to which Claimant replied, "I don't feel like it." The Manager-Wire Chief walked over, repeated the instruction verbally and received the same response. Claimant was then asked if he was refusing the request to work overtime, to which he replied, "If you want to put it that way, yes I refuse." Whereupon the Manager-Wire Chief removed Claimant from service and charged him with insubordination. He was dismissed but on appeal he was restored to service with seniority and other rights intact but without back pay.

First. We may assume for the purposes of this case that an employe may justifiably decline to obey an instruction to perform overtime work, if he is ill or if the performance of the work will endanger his health.

The response given to the instruction—"I don't feel like it"—without further explanation, and Claimant gave none, was ambiguous. Out of context, it might mean that the man was too ill to work any longer; or it might mean that he simply preferred to do something else.

The Organization takes the position that Claimant was ill, that the Manager-Wire Chief knew it and that any construction of the response, except as a plea of illness, is unreasonable.

The Carrier takes the position that a controversy existed in this office over the right of the Carrier to require overtime work and that Claimant's refusal to obey the instruction was based, not upon illness, but rather upon a desire to bring this controversy to a head.

There is ample evidence in this record to support either of these conclusions.

Two years before his dismissal, Claimant was hospitalized for several months with a combination of serious ailments after which he resumed work subject to the following restrictions imposed by the Carrier's Chief Surgeon:

that he should not engage in any work that required unusual exertion; and should not work above ground, around moving equipment, alone in any position of responsibility or where sudden death would be hazardous to other employees.

About two months before his dismissal he suffered a recurrence of one of his ailments; and about one month before his dismissal he had again resumed his employment subject to the same restrictions.

For some time immediately prior to the dismissal a considerable amount of overtime work had been required of the men employed in the office where Claimant worked. This resulted in complaints from the employees; and failure to resolve the differences of opinion resulted in a good deal of friction, particularly between Claimant and the Manager-Wire Chief. Claimant was the Local Chairman and he had complained about the back log of work to the Manager-Wire Chief who had replied that he was trying to get an increase in force but was unsuccessful.

About two weeks before the dismissal Claimant refused to obey an instruction to work overtime. When requested for an explanation by the Manager-Wire Chief, Claimant first challenged the authority of the man who gave the instruction and then discussed the condition of the office and the provisions of the Agreement, but gave no personal reason for his refusal. No disciplinary action was taken against him.

At the hearing Claimant testified that overtime "can be worked if mutually agreed upon" and that he did not consider overtime work to be "a part of his normal duties."

In view of the foregoing considerations we are unable to conclude that the Carrier was arbitrary, capricious or unreasonable in deciding that the response to the instruction was insubordinate.

Second. The Organization further contends that there was a prior commitment made to Claimant that, due to his illnesses, the Carrier's management did not expect him to perform any overtime service. There is evidence to support this contention, but there is also evidence which flatly contradicts it.

It is not our function to determine the credibility of witnesses or to weigh positive evidence such as this.

Third. Finally the Organization contends that the Manager-Wire Chief had no authority to give the instruction. The argument is that Claimant and

the Manager-Wire Chief were no more than fellow-employees by reason of Article XXI Section 3-a & b and Operating Department Rule 915. The validity of this argument is open to considerable doubt; and there are several practical difficulties with it. Claimant did not challenge the instruction upon this ground when it was given. Moreover, the record is replete with the Manager-Wire Chief's instructions to others to work overtime and their acknowledgments. And finally at the hearing Claimant freely admitted that the Manager-Wire Chief was his supervisor and that under Rule 915 he reported to and received instructions from the Manager-Wire Chief.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employee involved in this dispute are respectively carrier and employee 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 Claimant was accorded a fair and impartial hearing. The decision of the Carrier was not arbitrary, capricious or unreasonable and is supported by evidence. The disciplinary action taken by the Carrier should stand.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 24th day of June, 1955.