

**PUBLIC LAW BOARD NO. 6394**

**AWARD NO. 24**

Parties to Dispute:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES**

**AND**

**NORFOLK SOUTHERN RAILWAY COMPANY**

Statement of Claim:

Claim on behalf of G. A. Clare for restoration of Foreman rights and pay for all time lost as a result of his thirty-five day actual suspension from service and forfeiture of foreman seniority following a formal investigation on December 22, 2003, in connection with insubordination in that he failed to follow instructions to work his gang until 5:30 p.m. winterizing switches in Elkhart Yard.

(Carrier File MW-DEAR-03-25-LM-377)

Upon the whole record and all the evidence, after hearing, the Board finds that the parties herein are carrier and employee within the meaning of the Railway Labor Act, as amended, and this board is duly constituted by agreement under Public Law 89-456 and has jurisdiction of the parties and subject matter.

This award is based on the facts and circumstances of this particular case and shall not serve as a precedent in any other case.

**AWARD**

After thoroughly reviewing and considering the transcript and the parties' presentations, the Board finds that the claim should be disposed of as follows:

Claimant G. A. Clare entered service of the Carrier on March 1, 1999, and was working as a Foreman of a three man extra gang at Elkhart Yard on November 25, 2003. During his job briefing that morning, Claimant was instructed by the Assistant Division Engineer to winterize switches in Elkhart Yard with the other two members of his crew. They were all to "work until dark," which his supervisors specified to be 5:30 p.m. As the normal quitting time for this crew (i.e., the time they were to be at their lodging facility) was 5 p.m., this meant they were being required to work overtime.

At approximately 4:45 p.m., Claimant called his Track Supervisor and notified him that the crew had quit for the day. When reminded that they were instructed to work until 5:30 p.m., Claimant advised his Supervisor that he had let the two men go early because they did not want to work any longer. Claimant was instructed to recall the men and have them work until dark as instructed, but he was only able to contact one of the two men, and that was at 5:15 p.m. Although Claimant remained on duty until 5:30 p.m., neither of the men on his crew returned to the yard to perform further service on the date at issue.

By letter dated November 25, 2003, Claimant was instructed to attend an investigation scheduled for December 22, 2003, in connection with a charge of insubordination for failing to follow instructions to work until 5:30 p.m. winterizing switches on November 25, 2003. The investigation was held as scheduled, during which the Claimant testified that he had let the men quit prior to 5:30 p.m. because he felt intimidated by one of the men on the gang.

Subsequently, by letter dated January 9, 2004, Claimant was advised that he had been found guilty of the charge, and he was assessed a 35 day suspension. Also, his Foreman's seniority was forfeited, and he could not attempt to regain it for a period of one year.

One procedural matter was raised during the appeal process. The General Chairman took exception to the fact that Claimant was held out of service prior to the investigation, noting that he was of no danger to himself or any other employee. The Board notes that there are legitimate reasons for removing employees from service pending investigation, and that a charge of insubordination is generally considered to be an acceptable reason for doing so. Therefore, it was not improper for the Carrier to withhold Claimant from service pending the investigation.

Notwithstanding the foregoing, the charge of insubordination was not proven in this case; rather, it is a case of failing to follow instructions. The distinction is a matter of willfulness on the part of the employee. The term 'insubordination' usually refers to an employee's direct refusal to submit to the authority of a duly authorized supervisor, and it is usually addressed by dismissal from service. In this case, however, it is clear from the record that this is a case of a relatively young foreman being coerced by one or two members of his crew, each with almost 30 years of seniority, into failing to follow instructions to work overtime. Claimant's failure to follow instructions was, therefore, not a willful and deliberate refusal to obey a direct order. Indeed, the Carrier apparently realized that this was not a clear case of insubordination because it did not dismiss Claimant, instead issuing a substantial penalty in the form of a 35 day suspension.

Although not guilty of insubordination, the Claimant was guilty of failure to follow instructions to have his crew work overtime cleaning switches. He was also guilty of lack of judgment in handling the senior employees in his charge. Claimant could have, and should have, spoken to his supervisor before allowing his crew to leave the yard prior to 5:30. Had he enlisted the assistance of his supervisor, the outcome would certainly have been different. That is, the onus of failing to follow instructions would have been shifted from the Claimant to the crew members.

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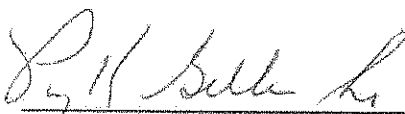
Further, the fact that he stayed at the yard until 5:30 does not mitigate his failure as foreman of the crew to ensure that his crew complied with the instructions he was given during the job briefing that morning. It does, however, mitigate against the charge that he was insubordinate.

The claim will be denied in part and sustained in part. Under the circumstances, the Board finds that the imposition of a 35 day suspension was not excessive. Also, the denial of Claimant's seniority rights to work as a foreman was appropriate as a temporary measure, but not a permanent one. His failure appears to be the result of youth and inexperience, and his suspension and temporary loss of foreman's rights should serve as progressive discipline.

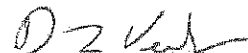
Therefore, Claimant's foreman seniority rights shall be reinstated effective December 1, 2004. As of that date, he shall be allowed to exercise his foreman or assistant foreman seniority through the bidding process or placement on a vacant position, but he may not displace a junior employee as the means for this initial exercise of seniority. After he has successfully bid to a foreman or assistant foreman position, he may freely exercise his seniority rights under the terms of the collective bargaining agreement in effect between the parties.



Mark D. Selbert  
Chairman and Neutral Member



P. K. Geller  
Organization Member



D. L. Kerby  
Carrier Member

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