

**Form 1          NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 33842  
Docket No. MW-34654  
99-3-98-3-314**

**The Third Division consisted of the regular members and in addition Referee Steven M. Bierig when award was rendered.**

**(Brotherhood of Maintenance of Way Employees  
PARTIES TO DISPUTE: (  
(Duluth, Missabe and Iron Range Railway Company**

**STATEMENT OF CLAIM:**

**“Claim of the System Committee of the Brotherhood that:**

- 1.     The discipline [restricted to laborer for ninety (90) days] assessed Foreman P. E. Bergman for his alleged failure to follow instructions of his supervisor in connection with work required on Saturday, May 24, 1997 was without just and sufficient cause and based on an unproven charge.**
- 2.     As a consequence of the aforesaid violation, Foreman P. E. Bergman shall have his record cleared of the charges leveled against him and he shall 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.

At the time of the incident on May 23, 1997, Claimant had 19 years of service with the Carrier and had established seniority as a Section Foreman. On May 23, 1997, Claimant was assigned as a Section Foreman at Iron Junction, Minnesota. The Claimant's scheduled workweek was Monday through Friday from 7:00 A.M. to 3:00 P.M. In May 1997, Claimant was suffering from cancer and was undergoing regular radiation treatments that required that he leave work at 3:00 P.M., Monday through Friday. The Carrier knew of this situation. While had been advised to avoid significant overtime as it would lead to fatigue, there is evidence that he worked overtime before and after the instant incident.

On Friday, May 23, 1997, at approximately 7:30 A.M., Claimant's Supervisor, R. Herring contacted Claimant and told him that both he and his crew were required to work on the following day, Saturday, May 24, 1997. Claimant told Herring that neither he nor his crew was interested in working on May 24. However, there is no evidence that Claimant specifically indicated to Herring that the reason he did not want to work the following day had anything to do with his cancer.

Based on the transcript of the radio conversations which took place on Friday, May 23, 1997 between 2:30 P.M. and 3:00 P.M., Claimant was again informed of the overtime requirement at approximately 2:55 P.M., just before he was to leave to go for his radiation treatment on May 23. The conversation at 2:55 P.M. on May 23 regarding the overtime on May 24 went as follows:

**"Rich Herring:** Hey Paul. Hank Harper said he'd run leader tomorrow but I don't have a foreman and I don't have enough laborers. So...tell your laborers that they're forced and then you'll have to come in also.

**Paul Bergman:** What happened to Brett Laine?

**Rich Herring:** It's not his area.

**Paul Bergman:** Wide coverage?

**Rich Herring:**      **That's not his area, You're the section foreman.**

**Paul Bergman:**      **We'll talk about it.**

**Rich Herring:**      **Talk tomorrow.** (emphasis added)

However, while all of Claimant's crew (except one) did appear the following day on the job, Claimant did not. Claimant testified that he did not notify his crew about the requirement to appear on Saturday. He claimed that he received his notice too late on Friday, though he did have the opportunity to contact his General Chairman to report what Claimant felt was an improper assignment of overtime.

Approximately one week later, Claimant's physician wrote a letter "To whom it may concern" which indicated that Claimant was undergoing treatment which could interfere with his working excessive hours at exceptionally demanding tasks over the next four to six weeks. However, the letter did not relate to the prior week's activity.

By letter dated June 16, 1997, Claimant was instructed to attend an Investigation charged with failure to follow instructions of his supervisor in connection with work required on Saturday, May 24, 1997. Claimant was charged with violating Rules 3, 12 and 13 of the General Rules of Conduct, Rules of the Engineering Department. The Investigation proceeded as scheduled on Tuesday, June 24, 1997. Pursuant to that Investigation, on July 11, 1997, Claimant was restricted to the position of Laborer for 90 days beginning July 14, 1997 and returning to his position as Section Foreman on or about October 13, 1997.

The Organization claims that the discipline was unjust. It claims that Claimant was not "insubordinate" as the term is defined. Claimant's illness prevented Claimant from working the overtime. According to the Organization, it was well known by the Carrier that Claimant had cancer and was undergoing radiation treatments. When Claimant informed Supervisor Herring on May 23 that he did not want to work on May 24, it was logical that he knew that Claimant did not want to work because of his illness and resulting treatment. According to the Organization, there was no need for Claimant to specify this to Supervisor

Herring. Sickness is a valid excuse for being unable to work and that is exactly what occurred here.

Claimant was also charged with not telling his crew of the requirement to work on May 24. Claimant simply did not have proper notice to contact his crew when he was contacted at 2:55 P.M. He had to leave at 3:00 P.M. for his radiation treatments. Further, even though Claimant may not have immediately notified his crew about the responsibility of appearing on May 24, 1997, all of his crew, except for one, showed up as scheduled on May 24. Thus, the Organization claims that Claimant must have informed his crew of the overtime requirement, although it was not as soon as he was notified.

Conversely, the Carrier claims that Claimant violated the relevant Rules when he failed to follow instructions. Claimant failed to notify his crew regarding the work required on May 24 and he also did not appear for work on May 24. According to the Carrier, this violation is compounded because Claimant was told twice on May 23 of his requirement to work on May 24. While the Organization contends that Claimant did not show up on May 24 because of a medical reason, there was no evidence presented showing that he could not do the work or that he ever told Supervisor Herring he could not work based on his illness. The fact that this refusal was unrelated to his illness is confirmed by his own testimony when he indicated that he told Supervisor Herring neither he nor his crew wanted to work on May 24 and explained that it was not their turn to do the work. Finally, while Claimant complained that he was told at the last minute about the work on May 23, and did not have time to contact his crew, he nonetheless had time to call his General Chairman. In sum, the Carrier claims that Claimant is using his illness as an excuse to avoid his responsibilities.

In discipline cases, the Board sits as an appellate forum. We do not weigh the evidence de novo. As such, our function is not to substitute our judgment for the Carrier's, nor to decide the matter in accord to what we might or might not have done had it been ours to determine, but to pass upon the question whether there is substantial evidence to sustain a finding of guilty. If the question is decided in the affirmative, we are not warranted in disturbing the penalty unless we can say it appears from the record that the Carrier's actions were unjust, unreasonable or arbitrary, so as to constitute an abuse of the Carrier's discretion. (See Second Division Award 7325; Third Division Award 16166).

The Board reviewed the instant matter and we find that there is substantial evidence to prove that Claimant committed the Rule violations for which he was charged. He failed to follow the instruction that he notify his crew that they were required to work on May 24, 1997. He also failed to appear for work on Saturday, May 24. As noted above, Claimant freely admitted that he did not tell his crew that they had to work on May 24. While they may have appeared to work, there is no evidence whatsoever that he told them, pursuant to instructions. Thus, there was substantial evidence to support the Carrier's position that he failed to follow instructions.

In addition, we find that there is substantial evidence to support the Carrier's position that Claimant failed to follow instructions when he did not appear for work on May 24, 1997. This is based on a number of reasons. Claimant admitted that he told Herring that he (and his crew) did not want to work on May 24. If he could not work because of his illness, there would have been no reason to include his crew. Further, there is no evidence that he gave any valid reason (including illness) for his not being able to go to work. While the Organization claims that the Carrier knew of Claimant's illness, and thus should have inferred that this was the reason, this is not reasonable. There was evidence that Claimant had worked overtime both before and after this incident. The Doctor's note which indicated that Claimant should curtail his work was not drafted until a week after this incident and only related to the ability of Claimant to work after the note was drafted. Finally, at 2:55 P.M. on May 23, when Claimant told Supervisor Herring that he wanted to speak further with him about the overtime assignment, he specifically told Claimant that they would "talk tomorrow" (the date of the overtime). According to the transcript, the Claimant did not further respond. This can be seen as an acknowledgment by Claimant of the overtime requirement. Based on all this evidence, there is substantial evidence to sustain the Carrier's position on this issue as well.

As one of its defenses, the Organization claimed that Claimant and his crew were not supposed to be the crew that was selected to work overtime pursuant to an agreement between the parties. However, as the Carrier pointed out, the adage of "comply now, grieve later" is applicable in this situation ( Third Division Award 23829; Second Division Award 7643). Here, the Claimant should have worked the overtime as he was instructed and then filed a grievance over it. He did not and thus was in violation.

Based on all this evidence, it is the Board's opinion that there is substantial evidence that Claimant did not follow instructions when he neither told his crew that they were to work on May 24 nor did he appear to work on May 24. As to the severity of the penalty, as indicated above, we will not overturn a penalty unless we can say it appears from the record that the Carrier's actions were unjust, unreasonable or arbitrary. In the instant case, the Claimant received a penalty of being restricted to a Laborer for 90 days. After a review of the penalty and the circumstances of this case, the Board holds that the discipline imposed was too severe. The Claimant in this case has a significant amount of seniority with the Carrier (19 years) with a good record. In light of these considerations, we believe that a 90-day restriction to Laborer was too severe. We believe that a more appropriate penalty would have been to restrict Claimant to the position of Laborer for 45 days. This would have been a more appropriate penalty and would have sent the same message to the Claimant.

**AWARD**

Claim sustained in accordance with the Findings.

**ORDER**

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

**NATIONAL RAILROAD ADJUSTMENT BOARD**  
**By Order of Third Division**

Dated at Chicago, Illinois, this 21st day of December 1999.