

The Second Division consisted of the regular members and in addition Referee Dana E. Eischen when award was rendered.

Parties to Dispute: ( System Federation No. 162, Railway Employees'  
( Department, A. F. of L. - C. I. O.  
( (Carmen)  
( Southern Pacific Transportation Company

Dispute: Claim of Employees:

1. That the Southern Pacific Transportation Company unjustly placed a letter of reprimand on the personal record of Carman, G. N. Gonzales, without allowing him an investigation.
2. That the Southern Pacific Transportation Company remove letter of reprimand from G. N. Gonzales' personal record.

Findings:

The Second 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 waived right of appearance at hearing thereon.

In this claim, Mr. G. N. Gonzales seeks removal from his personal file of a letter dated August 8, 1975, reading as follows:

"Houston - August 8, 1975  
PR File

Mr. G. N. Gonzales:

On August 7, 1975 you were brought to the office of Assistant Plant Manager M.H. Cargill, where your failure to comply with instructions of Air Brake Foreman Mr. A. G. Fleissner was discussed. These instructions were that you should mark pieces of air brake equipment with your identification mark so that should this piece of equipment be rejected on the test rack it could be returned to the same employee who had worked the valve. You informed Mr. Fleissner that you would not mark these valves as instructed.

"In the presence of your Committeeman A. Lazo and Nick Contreras you were instructed that you would have to follow instructions of your supervisor.

Any future cases of in-subordination will not be tolerated and should the occasion arise, will lead to disciplinary action being taken.

A copy of this letter is being placed on your personal record.

Original Signed  
W.L. McINTYRE  
W.L. McIntyre (MHC)

MHC/kh

cc: Mr. M.H. Cargill  
Mr. Nick Contreras  
Mr. A. Lazo"

There is no question that the August 7, 1975 conference, referred to in the letter, took place but there is some conflict regarding the purpose of the meeting and what was said. In any event, the crux of the instant dispute is whether the letter of August 8, 1975 and its placement in Claimant's personal record constituted the imposition of "discipline" by Carrier. The Organization, on behalf of Claimant, contends that it is discipline and therefore Rule 34 of the Agreement was violated because there was no "fair and impartial investigation". Carrier, for its part, insists that the letter was not, nor was it intended to be, discipline. Specifically in its Ex Parte Submission Carrier asserts that the "letter is a record of the employee's history and it was Carrier's intention to record a minor incident of resistance to authority by Claimant."

Upon careful consideration of the record we are persuaded beyond doubt that the letter in question and its permanent placement in Claimant's personal record amounted to an imposition of discipline without affording the employee the contractual rights he is guaranteed by Rule 34. In so holding we wish to make it clear that we endorse strongly the principles of progressive discipline to which most informed managements adhere, whether specifically required by contract or not, i.e., a system of escalating penalties varying from oral reprimands and with warnings through suspension of various durations culminating in the ultimate industrial penalty of dismissal. Of course, there are some cases in which imposition of a very severe penalty at the outset is warranted by the circumstances, usually because of the egregious nature of the misconduct. Also we understand and appreciate the differences between discipline of an employee for admitted or proven wrongdoing and counselling an employee so that he/she may avoid wrongdoing and consequent discipline.

Bona fide counselling is practiced and intended to inform an employee and whether oral or written is not essentially accusatory and does not make a finding of fact that the employee was guilty of culpable misconduct.

In each case of this type it will be necessary to make ad hoc determinations as to whether the personnel action at issue is in the nature of counselling and thus outside the ambit of Rule 34 or in the nature of discipline and thus within the coverage of such a rule. In the instant case there can be no doubt that the letter of August 7, 1975 purports to make findings of fact regarding Claimant's conduct, implicitly makes a finding that Claimant was guilty of insubordination and imposes a penalty of a written reprimand for his alleged misconduct. Not only is the letter itself disciplinary in nature, but its placement in Claimant's file practically assures that he would be treated as a "second offender" under a progressive discipline system should Carrier, in the future, bring him up on charges, find him guilty and decide to impose discipline under Rule 34. Since we find the letter and its placement in Claimant's file to be discipline and there is no question that Rule 34 was not complied with before the imposition of that discipline, we shall sustain the claim.

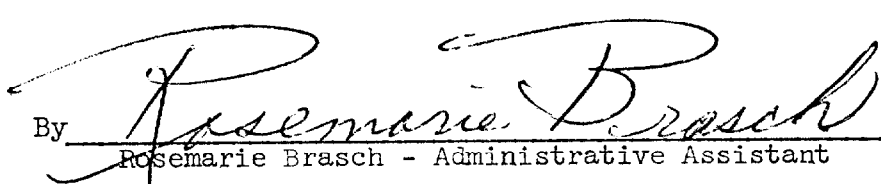
A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Second Division

Attest: Executive Secretary  
National Railroad Adjustment Board

By

  
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 12th day of July, 1978.