

NATIONAL RAILROAD ADJUSTMENT BOARD  
SECOND DIVISION

Award No. 10676  
Docket No. 10621  
2-BN-EW-'85

The Second Division consisted of the regular members and in addition Referee Jonathan Klein when award was rendered.

(International Brotherhood of Electrical Workers  
Parties to Dispute: (  
(Burlington Northern Railroad Company

Dispute: Claim of Employees:

1. That in violation of the current Agreement, Communication Crew Linemen F. H. Weibert, R. A. Smith, and B. B. Gaughenbaugh were unjustly suspended from the service of the Burlington Northern Railroad at 3:00 P.M. January 14, 1983 and received a letter of reprimand which was placed on their personal records, all without the required fair and impartial investigation.

2. That the Burlington Northern Railroad failed to provide the subject Communication Crew Linemen sharp climbing hooks, or the apparatus to sharpen them, and also failed to recognize and respond to the unsafe climbing conditions near Hastings, Nebraska on January 14, 1983.

3. That accordingly, the Burlington Northern Railroad be ordered to compensate F. H. Weibert, R. A. Smith and B. B. Gaughenbaugh 1.5 hours each at the pro-rata rate for wages lost as the result of this violation of the Agreement, and that they be ordered to remove the letters of reprimand from the subject Communication Crew Linemen personal records. In addition, the Burlington Northern Railroad be instructed to supply its employees with safe climbing equipment and be put on notice by this Board to discontinue the policy present here which intimidates employees through wage loss to climb under unsafe conditions.

FINDINGS:

The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes 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.

Claimants were assigned to Carrier's communications Line Crew headquartered at Alliance, Nebraska. In the early part of January, 1983, an ice and sleet storm broke Carrier's communication lines for telephone, message and Dispatcher service in the vicinity of Hastings, Nebraska. The Claimants were assigned to repair the downed lines and to restore service.

On January 14, 1983, the Claimants notified their Crew Foreman that due to fatigue and high winds they felt unsafe in continuing to climb poles to make the necessary repairs. It is the subject of heated dispute between the parties as to whether the Claimants were justified in their refusal to continue to climb based upon safety considerations. In addition to the adverse weather conditions, the Claimants argued that faulty climbing equipment contributed to their inability to complete their assigned task.

At 3:00 p.m. on January 14, 1983, the Crew Foreman, acting upon instructions from the Carrier's local Supervisor, suspended Claimants for the remainder of the work day. On January 17, 1983, each Claimant was presented with letters prepared by the Carrier's Communications Supervisor, and asked to acknowledge receipt of same with their signatures. The three identical letters contained the following language:

"It has come to my attention that on the afternoon of January 14, 1983, you refused to climb poles claiming that it was too windy. At the same time in the near vicinity, we had ten (10) linemen that were able to climb in a safe and productive manner.

Continued refusals to work other than when you feel like working will lead to disciplinary action."

The threshold issue before this Board is whether the quoted letter represents a letter of guidance, opinion or warning as the Carrier contends, or whether as the Organization argues it represents discipline and, therefore, Rule 30(a) of the Agreement was violated as no "fair and impartial investigation" was conducted.

This Board has noted in past awards that it is necessary to make ad hoc determinations in each case as to whether such personnel action falls within the ambit of the disciplinary Rule. Award No. 7588, Second Division. As stated in Award No. 8062, Second Division, "Care must be taken not to indicate that the Employee is guilty of misconduct that would practically assure that he would be considered a second offender if brought up on charges for a similar offense in the future."

Management rights include the right to voice an opinion as to the performance of an employee's work assignment, and to use letters of warning to change an employee's behavior short of discipline and its attendant procedures. As stated in Award No. 7588, "Bona fide counseling is practical 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." (Emphasis supplied).

We find that the letters placed in the Claimants' files in this case are essentially accusatory and make a finding of fact that the employees were guilty of culpable misconduct. The letters make a finding of fact that the Claimants had refused to perform the work assigned to them. Common sense dictates that the language of the letters in question can only be read as charging the Claimants with insubordination for their refusal to climb poles as ordered. This Board is not bound in its characterization of the letter as discipline by the presence or absence of expressly accusatory language such as "dishonestly," "desertion," "immorality" or "disloyalty." Rather, the entire letter must be carefully examined for the clear import of the language used. (For example, compare the following language in the letter held to be disciplinary in Award No. 7588, Second Division: "Any future cases of insubordination will not be tolerated and should the occasion arise, will lead to disciplinary action being taken," to the portion of Claimants' letters which reads: "Continued refusals to work other than when you feel like working will lead to disciplinary action." There is no talismanic quality to the word "insubordination," the absence of which should preclude finding that this letter is indeed disciplinary in nature.")

It is also important to note that the Claimants were suspended, although for a short period of time, from service by Carrier's personnel. Both the language of the letter and suspension make the instant case disciplinary in nature, and would assure "second offender" status to the Claimants under a system of progressive discipline if a determination of guilt was made on subsequent charges. The failure of the Carrier to comply with Rule 34 under the facts and circumstances of this case requires that the Claim for one and one-half hours compensation for each Claimant, and removal of the letters of reprimand from their files be, and is hereby sustained.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Second Division

Attest:

  
Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 4th day of December 1985.

