Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 13524
Docket No. 13400
00-2-98-2-89

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

(Brotherhood Railway Carmen Division
(Transportation Communications International Union
PARTIES TO DISPUTE: (
(Springfield Terminal Railway Company

STATEMENT OF CLAIM:

"Claim of the Committee of the Union that:

1. That the Springfield Terminal Railway Company violated the terms of our current agreement, in particular Rule 13.1 when they arbitrarily assessed a fifteen (15) day suspension to Roger J. Chisholm as a result of an investigation held on February 4, 1998.

2. That accordingly, the Springfield Terminal Railway Company be ordered to compensate Carman Roger J. Chisholm in the amount of eight (8) hours for each workday he was withheld from service commencing February 24, 1998 through and including March 10, 1998."

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 were given due notice of hearing thereon.

The Claimant, a 9-year Carman at the time assigned to Carrier's Car Repair facility at Lowell, Massachusetts, was dispatched to Rockingham Junction, Newfields, New Hampshire, on January 15, 1998 to change worn brake shoes on a freight car. After replacing a number of shoes, he released the car to the Train Dispatcher shortly after noon on that date. When picked up later that day, the car was reported by the crew of the operating freight train to be missing the R#4 brake shoe. Following Investigation and Hearing, the Claimant was found responsible for failure to properly repair and inspect the car and assessed the 15-day, disciplinary suspension now before the Board for review.

The gist of the Organization's challenge to the Carrier's action is that it failed to meet its burden of proving that the Claimant was responsible for the missing shoe. There is, it argues, no record evidence that the Claimant had any responsibility or knowledge of that problem. Importantly, there is evidence that the car was moved from the site where he made his repairs before it was picked up for delivery to the next available train. The Organization further asserts the procedural argument that the Carrier's entering into evidence a cautionary memo given to the Claimant in 1993 was inappropriate and should not have been relied upon in its assessment of the degree of discipline.

For the reasons stated below, a sustaining award is required. The Carrier bears the burden of demonstrating the existence of facts warranting the discipline it imposes. In that process, it must, under the Agreement, afford the Claimant a fair and impartial Hearing in which to state his defense, free of unnecessarily inflammatory or prejudicial material. Here, over the repeated objections of the Claimant's Union representative, a lengthy letter from the Carrier to the Claimant issued on March 17, 1993 was received into evidence for the explicit purpose of "assisting is assessing discipline in the event that you're found guilty of the charge levied against you."

That communication, on which the Organization was not copied, holds out as it purpose to "express our concerns about your performance as a Carman." It goes on at length about the Claimant's low production on various occasions, confirms discussions about those incidents, and, although resulting in no discipline, indicates that is intended to serve as a "letter of caution."

The Organization cites prior Awards of this Division expressing disapproval of serving up such letters at Investigations, including Second Division Award 12698 . In that matter, as in others, the Board concluded that such communications simply document counseling sessions and are not discipline per se so as to invoke Rule 34. The Board denied the claim, but in dicta noted as follows:

> "The organization is concerned that this counseling memorandum will be used later for disciplinary purposes. However, as held in previous awards on this property, this type of memorandum cannot be used in any form or manner associated with discipline at any time. Nor may it be used as a determinate of the degree of discipline that may be assessed in any future formal disciplinary action. To do so would be an improper use on the carrier's part." [1]

In apparent agreement with at least aspects of that sentiment, the Carrier on February 27, 1997 responded as follows after the Organization protested the inclusion of such memos in record transcripts as part of a claimant's "prior record":

> ". . . It is your position that conference memos should not be mentioned as prior discipline and that such memos should not be used 'in any shape of form in association with discipline.'
>
> . . . You are right when you say that memos which document discussions with an employee concerning such issues as attendance and safety are not part of the employee's discipline record and should not be introduced at the close of a hearing as part of the discipline record. However, you are wrong when you state that such memos should not be associated with the disciplinary process at all. Such documentation can and should be introduced as part of the evidence which supports the charges against the employee, evidence which can show that the employee was aware of a problem, had been trained or warned concerning a certain type of

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[1] Carrier cites *Second Division Award No. 8062* (Dennis) (1979) as the better authority on the issue. We agree. That decision re-affirms two long-standing principles: the discipline of employees without hearings is prohibited, but letters of warning are not discipline. The Board also notes, however, that the manner in which a warning letter is worded calls for scrutiny, lest it indicate that the employee is *guilty* of misconduct which would assure that he would be considered a second offender if brought up again for further offenses in the future.

behavior, and continued to disregard the Carrier's efforts in his behalf. . . .

The Carrier will endeavor to keep such memos out of the employee's discipline record but will continue to introduce these memos as evidence, where appropriate, that we are resorting to discipline only after other less formal, non-disciplinary efforts have failed."

In this instance, the March 17, 1993 cautionary letter admitted in evidence accuses the Claimant of a number of failings, primarily related to low productivity. Although the Carrier's January 20, 1998 Notice of Hearing advised the Claimant that his "service record may be reviewed at the investigation," the Organization had never received a copy of the cautionary letter. In receiving it into evidence at the Investigation over objections, the Hearing Officer expressly noted that he did so not as "part of the evidence which supports the charges" or to demonstrate that the Claimant "was aware of a problem," or "had been trained or warned concerning a certain type of behavior," which were the limited purposes for which the Carrier committed to use such documents in February 1998. Indeed, the letter would not on its face fit comfortably within these self-imposed guidelines as its subject matter bears little if any relation to the missing brake shoe issue incident under consideration at the Claimant's Hearing. Instead, the Hearing Officer admitted the document "for the purpose of assisting in any assessment of discipline, if he's found guilty."

Conventional practice in this and other industries is to view letters of warning as helpful to employees, providing counsel without the need for formal disciplinary action that besmirches his or her record and stigmatizes the employee as guilty of rule infractions. In our view, given the explicit purpose for which the six-year-old cautionary letter was admitted, it may be reasonably inferred that having concluded the Claimant was responsible for the missing brake shoe, the Carrier imposed a more severe penalty than it may have otherwise considered appropriate absence the prior letter. The net result is one of treating him as a second offender in reliance on unproved charges—exactly the harm that prevailing Second Division Authority attempts to avoid.

For the reasons stated above, the 15-day suspension imposed on the Claimant shall be reduced to five days, and the Claimant shall be made whole for the difference in time out of service.

AWARD

Claim partially 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 Second Division

Dated at Chicago, Illinois, this 27th day of July, 2000.