Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 28725
THIRD DIVISION Docket No. MW-29367
91-3-90-3-280

The Third Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr. when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(CSX Transportation, Inc.
(Former Chesapeake and Ohio Railway Company-
Southern Region)

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Federal Railroad Safety Act of 1970 (45 U.S.C. 441) as amended by the Rail Safety Improvement Act of 1988 when, beginning September 14, 1988, it discriminated against and harassed Track Inspector Roy Griffith and Assistant Track Inspector Albert Osterbind for providing testimony to the Federal Railroad Administration concerning unsafe conditions on the Carrier's property [System File C-M-4740/12(89-80) COS].

(2) The claim as presented by former General Chairman G. L. Hockaday on November 10, 1988 to Division Engineer J. E. Rahmes shall be allowed as presented because Division Engineer Rahmes failed to disallow the claim in accordance with Rule 21(h).

(3) The Carrier further violated the Federal Railroad Safety Act of 1970 (45 U.S.C. 441) as amended by the Rail Safety Improvement Act of 1988, when, on November 16, 1988 it discriminated against and harassed Track Inspector Roy Griffith and Assistant Track Inspector Albert Osterbind by placing them under covert surveillance in retaliation for Messrs. Griffith's and Osterbind's testimony to the Federal Railroad Administration concerning unsafe conditions on the Carrier's property [System File C-M-4763/12(89-106)].

(4) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants R. Griffith and A. Osterbind shall each be allowed twenty thousand dollars ($20,000.00) for each incident of harassment or discrimination beginning sixty (60) days prior to November 10, 1988 and continuing until the Carrier ceases and desists from all harassment and discrimination against the Claimants.

(5) As a consequence of the violations referred to in Part (3) above, Claimants R. Griffith and A. Osterbind shall each be allowed twenty thousand dollars ($20,000.00) for each incident of harassment or discrimination beginning sixty (60) days prior to January 12, 1989 and continuing until the Carrier ceases and desists from all harassment and discrimination against the Claimants."

FINDINGS:

The Third 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 were given due notice of hearing thereon.

The Claim as stated above originated as two separate Claims, the circumstances of which are discussed further below. This matter is before the Board as a consequence of the Federal Railroad Safety Act of 1970, as amended in 1988 ("FRSA"). Provisions of the Act pertinent hereto are as follows:

> §441. Protection and rights of employees
>
> (a) Filing of complaints; institution of proceedings; testimony
>
> A common carrier by railroad engaged in interstate or foreign commerce may not discharge or in any manner discriminate against any employee because such employee, whether acting in his own behalf or in a representative capacity, has --
>
> (1) filed any complaint or instituted or caused to be instituted any proceeding under or related to the enforcement of the Federal railroad safety laws; or
>
> (2) testified or is about to testify in any such proceeding. . . .
>
> (c) Resolution of disputes
>
> (1) Any dispute, grievance or claim arising under this section shall be subject to resolution in accordance with the procedures set forth in section 153 of this title.
>
> (2) In any proceeding with respect to which a dispute, grievance, or claim arising under this section is brought for resolution before the Adjustment Board (or any division or delegate thereof) [or] any other board of adjustment created

> under section 153 of this title, such dispute, grievance, or claim shall be expedited by such Board or other board and be resolved within 180 days after its filing. If the violation of subsection (a) or (b) of this section is a form of discrimination other than discharge, suspension, or any other discrimination with respect to pay, and no other remedy is available under this subsection, the Adjustment Board (or any division or delegate thereof) or any other board of adjustment created under section 153 of this title may award the aggrieved employee reasonable damages, including punitive damages, not to exceed $20,000."

Thus, this matter is subject to resolution by the Board under the procedures of Section 153 of the Railway Labor Act and the provisions of the Rules Agreement between the Carrier and the Organization. The matter was the subject of a Referee Hearing by the Board on January 28, 1991, the first date on which such Hearing could be arranged under current National Railroad Adjustment Board financial constraints. The Organization and the Carrier were present at the Hearing and offered argument to the Board.

According to the Organization, a Claim addressed to the Division Engineer was initiated by the General Chairman under date of November 10, 1988, reading as follows:

> "Pursuant to the Federal Railroad Safety Act of 1970 (45 U.S.C. 441) as amended by the Rail Safety Improvement Act of 1988, claim is made for damages sustained by Track Inspector Roy Griffith and Assistant Track Inspector Albert Osterbind on account of the Carrier's retaliatory action taken in response to their provision of testimony regarding rail safety conditions on the Carrier's property to the Federal Railroad Administration (FRA).
>
> On September 12, 1988 Roy Griffith and Albert Osterbind met with, and provided information to, the Federal Railroad Administration regarding unsafe conditions within their knowledge which have occurred on the Carrier's property. Thereafter, on September 14, 1988, at the Assistant Division Engineer's office in Richmond, Virginia, Roy Griffith and Albert Osterbind were questioned by Doug Arthur, Assistant Division Engineer, and Jim Henderson, Roadmaster. During the course of that interrogation, the Carrier officials alleged that Messrs. Griffith and Osterbind provided track inspection records to the FRA. Further, Mr. Arthur threatened Messrs. Griffith and Osterbind that:

'If any records come back from the FRA that have Track Inspector copy on them, we will have to take disciplinary action. They are personal, confidential records. If the FRA wants to inspect the CSX records, they know that they have to go to Huntington. Don't get yourselves into a situation to do that. You should have known better if you did do it.'

and:

'Don't get yourselves into a situation to present Company records to an outsider. Concerning both of you, so far as I am concerned, we don't do a thing about it. You were on your own time, but what I am saying is that if those records come up and FRA presents them to us, we will have to take some kind of disciplinary action. Do you understand what I am saying?'

and:

'Don't get yourselves into a situation where you are leaving yourselves open for discipline.'

and:

'So I am saying don't get yourselves into a situation where you are going to force me to take some action OK?'

Thus, the Carrier has threatened discipline in retaliation for provision of testimony to the FRA.

In addition, Carrier has violated its obligations under the Act by:

1. Discriminatorily retaining Roy Griffith's personal track inspection records in its control. All of the other Track Inspectors are allowed to keep their records in their homes; and,

2. Requiring Roy Griffith to make a special accounting for all overtime, in a manner which is not required of other Track Inspectors.

This discriminatory treatment is the Carrier's reaction to Mr. Griffith's provision of testimony to the FRA.

Therefore, this claim requests that the Carrier cease and desist from all harassment and discrimination against Roy Griffith and Albert Osterbind, and for punitive damages as contemplated by the Act in the amount of $20,000.00 for each incident of harassment or discrimination. This claim should be regarded as continuing, dating from sixty (60) days prior to its service on the Carrier, and continuing until the relief requested is fully granted."

The record includes a receipt for certified mail signed by a Carrier representative on November 14, 1988.

On January 25, 1989, the General Chairman wrote to the Senior Manager, Labor Relations, indicating that he had received no response to the November 10, 1988 Claim and that "the Carrier is therefore in violation of Rule 21" and that "The claim should be paid in full as presented. . . ."

In the meantime, on January 12, 1989, the General Chairman initiated a second or supplementary Claim with the Division Engineer, as follows:

"Pursuant to the Federal Railroad Safety Act of 1970 (45 US C. 441), as amended by the Rail Safety Improvement Act of 1988, claim is made for damages sustained by Track Inspector Roy Griffith and Assistant Track Inspector Albert Osterbind on account of the Carrier's retaliatory action taken in response to Roy Griffith's and Albert Osterbind's provision of testimony regarding rail safety conditions on the Carrier's property to the Federal Railroad Administration (FRA).

As noted in the Organization's claim dated November 10, 1988, Roy Griffith and Albert Osterbind met with and provided information to the FRA regarding unsafe conditions, within their knowledge, which have occurred on the Carrier's property. Carrier officials subsequently interrogated Mr. Griffith and Mr. Osterbind regarding their alleged provision of track inspection records to the FRA.

Carrier officials have further retaliated against Mr. Griffith and Mr. Osterbind on account of their provision of information to the FRA, to wit:

On November 16, 1988, in the vicinity of the crossing of the C&O and RF&P Railroads at Doswell, Virginia, both you and Roadmaster Henderson followed Mr. Griffith and Mr. Osterbind, and then attempted to surreptitiously observe Mr. Griffith and Mr. Osterbind by hiding behind buildings and cuts of cars.

As a result of Mr. Griffith's and Mr. Osterbind's observation of your attempt at covert surveillance, Mr. Griffith and Mr. Osterbind have suffered mental stress levels in excess of those normally associated with this employment.

Thus, as a direct consequence of Mr. Griffith's and Mr. Osterbind's provision of testimony to the FRA, and as part of a pattern of harassment, which included those occurrences referenced in the Organization's claim of November 10, 1988, the Carrier has, through its agents or officials, harassed and retaliated against Mr. Griffith and Mr. Osterbind through surveillance, or the creation of an impression of surveillance. Therefore, this claim requests that the Carrier cease and desist from all harassment and discrimination against Roy Griffith and Albert Osterbind, and for punitive damages as contemplated by Albert Osterbind, and for punitive damages as contemplated by the Act in the amount of $20,000.00 for each incident of harassment or discrimination. This claim should be regarded as continuing, dated from sixty (60) days prior to its service on the Carrier and continuing until the relief requested is fully granted."

A timely denial response to this Claim was made by the Division Engineer on January 26, 1988.

Further extensive handling on the property was made of both Claims, leading eventually to their referral to this Board for resolution as a combined Claim. Before further discussing such handling and the merits of the Claim, the Board must necessarily dispose of the Organization's procedural argument under Rule 21 as to the November 10, 1988 Claim:

Rule 21 reads in pertinent part as follows:

"(h) Grievance Procedure:

(1) All claims or grievances shall be handled as follows:

A. All claims or grievances must be presented in writing by or on behalf of the employee involved, to the officer of the Carrier authorized to receive same, within sixty (60) days from the date of the occurrence on which the claim or grievance is based. Should any such claim or grievance be disallowed, the Carrier shall, within sixty (60) days from the date same is filed, notify whoever filed the claim or grievance (the employee or his representative) in

> writing of the reasons for such disallowance. If not so notified, the claim or grievance shall be allowed as presented, but this shall not be considered as a precedent or waiver of the contentions of the Carrier as to other similar claims or grievances."

In its Submission, the Carrier offers two responses: the first is that, "Neither [the] Division Engineer . . . nor the Carrier's Senior Manager of Labor Relations . . . received a copy of this November 10, 1988 letter . . . at the time it was supposedly sent." The second is that such Claim, even when initiated as stated by the Organization, did not meet the 60-day time limit for claims filing. The Carrier points out that the Claim refers to events of September 14, 1988. To be valid, according to the Carrier, the Claim would have to be received by the Carrier by November 13, 1988. Even accepting the Organization's certified mail receipt, the Claim was not received until November 14, 1988 and thus, according to the Carrier, is untimely.

As to the Carrier's contentions, the Board notes first of all that a thorough review of the extensive correspondence between the parties fails to disclose that the Carrier ever raised either issue (non-receipt of the November 10 letter or its alleged untimeliness) on the property. This alone is sufficient to find the Carrier's assertions improperly before the Board. Nevertheless, other considerations also defeat the Carrier's stance. The record shows a proof of delivery to the Carrier on November 14, 1988; the Carrier never denied that the signature thereon was that of someone properly authorized by the Carrier to receive Carrier mail. Delivery of the letter thereafter to the addressee (the Division Engineer) was clearly within the Carrier's control and responsibility. As to meeting the 60-day time limit, the Board is guided by the thorough review of this question in Third Division Award 24440, which concluded as follows:

> "The recognized purpose of a negotiated grievance or complaint procedure is to vindicate rights achieved by the agreement. In the process, unsettling uncertainties about those rights are effectively resolved. Bearing in mind that purpose, we deem it to be sound labor-relations policy that doubts as to the precise boundaries of time limits which shut off access to those procedures should, in general, be resolved against forfeiture of the rights sought to be vindicated.
>
> Guided by that policy and by common business practice, we conclude that a fair and reasonable reading of the rule is that a properly-addressed claim is effectively 'presented' when delivered to the U.S. mails, (Williston on Contracts, Third Edition; Restatement of the Law, Contracts, 2d.). This holding is in no way intended to relax the time limits themselves.

> We do not accept the Organization's view that the claim was effectively presented merely by the act of writing the letter stating the claim. It must be shown that the letter was placed in accepted channels of communication. We note the fact that the letter was sent by certified mail and bears an earlier certification number than a similar letter also dated April 28, 1980, (covering another seniority district) (which was actually received by the Carrier on April 29, 1980. Accordingly, we find that the claim before us was delivered to the U.S. mails on the day it was written, April 28, 1980, and that it was effectively presented at that time."

In this instance, while there is no proof of mailing on November 10, it must have been placed in the mails by November 13 at the latest in view of its acknowledged receipt on November 14. Thus, it is within the 60-day time limit.

As a result, the Board is constrained by the clear direction of Rule 21 (h) to allow the Claim. However, the Board will find that the remedy of "punitive damages . . . in the amount of $20,000 for each incident of harassment or discrimination" cannot be allowed "as presented" for reasons which will be discussed further below.

The Board also notes the Carrier's discussion as to the extensive correspondence between the parties, the repeated conferences on the individual Claims, and the method used by the Organization to bring the Claims in combined form to the Board. Suffice it to say that the Board finds that both the Carrier and the Organization had full opportunity to exchange information and argument and that there is no impairment to disposal of the matter by the Board.

Consideration now turns to that portion of the combined Claim involved in the Claim initiated on January 12, 1989. This refers to an instance of "covert surveillance" of the Claimants while in the course of their track inspection duties. During the claim handling procedure, the Carrier pointed out and the Organization conceded that the date in question was November 15, 1988, rather than November 16, 1988.

Although the November 10, 1988 Claim is sustained on procedural grounds, it is necessary to review the substance of that Claim as a preliminary to considering the January 12, 1989 Claim. In substance, the earlier Claim refers to a meeting of the Carrier's Division Engineer and Roadmaster with the Claimants as to their alleged furnishing copies of track inspection reports to a representative of the Federal Railroad Administration. According to the Claimants, they were told that they would be subject to disciplinary action if "any records come back [to the Carrier] from the FRA that have Track

Inspector copy on them." The Claim further alleged that the Carrier had "discriminatorily" retained one Claimant's track inspection records, where previously the practice was to permit Track Inspectors to retain their copies. In addition, the Claim asserted that one of the Claimants had been the subject of a "special accounting of all overtime." Because this Claim is necessarily sustained on procedural grounds, as discussed above, further review of these allegations, with the Carrier's explanation and defenses, is not warranted here. This information is provided here as background to the timely answered January 12, 1989 Claim. In that Claim, the Organization argues that the Carrier "further retaliated" against the Claimants by "surreptitiously" observing them. According to the Organization, this caused the Claimants to suffer "mental stress levels in excess of those normally associated with this employment."

The Board finds the reported incident to be entirely lacking as a discriminatory or harassing act. First, there is no indication that any action was taken against the Claimants as a result of the observations or even any allegation that the Claimants were working in any improper manner. Second, the Carrier on the property cited a pre-existing manual covering such observations as well as a record of such observations for many employees. There is simply no basis to conclude that observations of the Claimants without warning or foreknowledge was either improper or extraordinary.

Based on the discussion above, the Board will make a denial Award in reference to the Claim as set forth on January 12, 1989.

The Board now returns to the question of appropriate remedy as to the November 10, 1988 Claim which must be sustained on procedural grounds. Had it been appropriate to do so, the Board would have been required to consider the Carrier's position on the merits that the Claimants' alleged act of providing the FRA with their copies of inspection reports was not the type of activity encompassed in FRSA Section 441 (a), quoted above. The Carrier would argue that such was not the filing of a complaint, instituting a proceeding, or testifying in such proceeding under the Act. Rather, the Carrier would argue that the warning about possible disciplinary action simply referred to what the Carrier considered unauthorized distribution of inspection reports (without any indication thereof of subsequent Carrier disposal of such reports). However, since the Claim has been sustained on procedural grounds, it would be without purpose to review this position and the Organization's response.

The Board must now address the remedy proposed in Paragraph (4) of the Claim, namely, "$20,000 for each incident of harassment or discrimination beginning sixty (60) days prior to November 10, 1988 and continuing until the Carrier ceases and desists from all harassment and discrimination against the Claimants." While Rule 21 (h) calls for the granting of a Claim "as presented," the Board cannot sustain the requested remedy which, while relying on the FRSA, flies directly in the face of the Act's provisions.

Section 441 (c) (2) states that the Adjustment Board "may award the aggrieved employee reasonable damages, including punitive damage, not to exceed $20,000" (emphasis added). The Act further does not specify a maximum of $20,000 damages for "each incident." While the Organization is in order to seek damages as specified in the Act, the Claim is obviously excessive and insupportable in solely specifying the maximum award. The Board concludes, therefore, that it retains the right to determine the proper remedy, within the guidelines of the Act, and cannot delegate such function to the initiator of the Claim.

Here, the Board determines that damages are inappropriate, even with the Claim in a sustained posture. Put simply, there is no evidence of actual discipline or impairment based on the September 12, 1988 discussion, the Carrier's decision to retain (while making available) copies of Track Inspector reports, or requiring accounting for overtime work. The September 12 "threat" was possible discipline if it were found that, contrary to rule, the Claimants had divulged Carrier records and if such were presented to the Carrier by the FRA. There is no inference here of discharge or otherwise discriminating as prohibited by the FRSA.

The Board concludes, therefore, that the sustaining of Claim Paragraphs (1) and (2) is sufficient to resolve the matter. Damage to the Claimants sufficient to warrant a monetary award is not demonstrated.

A W A R D

The Claim is resolved by the Board as follows:

Paragraph (1) -- Claim sustained on procedural grounds.

Paragraph (2) -- Claim sustained except as to extent of remedy.

Paragraph (3) -- Claim denied.

Paragraph (4) -- Claim sustained except as to monetary remedy.

Paragraph (5) -- Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 28th day of March 1991.