

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 Employees  
(National Railroad Passenger Corporation (Amtrak)  
Northeast Corridor

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

(1) The Carrier violated the Agreement when it issued Mr. S. Carlton a disciplinary letter dated May 18, 1988 and subsequently failed and refused to allow Mr. Carlton an appeal hearing as requested in his letter dated May 23, 1988 in accordance with Rule 74 (System File NEC-BMWE-SD-2170).

(2) As a consequence of the aforesaid violation, the May 18, 1988 disciplinary letter and any and all reference thereto shall be removed from Mr. S. Carlton's record."

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 employees 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.

Under date of May 18, 1988, the Claimant received the following communication from a Carrier official:

"SUBJECT: Letter of Instruction

On Tuesday, May 17, 1988, you were involved in an incident involving Mr. D. Borkoski, Assistant Supervisor, and yourself. By your action in failing to put on welding sleeves as instructed by Mr. Borkoski and by your argumentative behavior toward Mr. Borkoski, you were in violation of the following Rules of Conduct:

Rule L: Obeying Instructions

[Rule quoted]

Rule F: Employee Conduct (Parts 1 and 2)

[Rule quoted]

Rule B: Safety (First Paragraph)

[Rule quoted]

This Letter of Instruction will serve as notice that any further violation of the above may result in disciplinary action."

Shortly thereafter, the Claimant made written application for an appeal hearing under Rule 74, which reads in pertinent part as follows:

"DISCIPLINE

(a) An employee who considers that an injustice has been done him in discipline matters and who has appealed his case in writing to the appropriate Assistant Chief Engineer (Track, C&S/ET, Structures) within fifteen (15) days, shall be given a hearing."

The Carrier responded by stating, "the Carrier does not grant appeal hearings for letters given to employees since they are not aggrieved in any fashion and suffered no loss of compensation." The Carrier further suggested that the only proper avenue for appeal is Rule 75, which reads in pertinent part as follows:

"OTHER THAN DISCIPLINE

When it is considered that an injustice has been done with respect to any matter other than discipline, the employee affected, or the duly accredited representative, as defined in Rule 83, on his behalf, may within fifteen (15) days present his case in writing to the appropriate Assistant Chief Engineer (Track, Structures, C&S/ET, Equipment)."

The Organization argues that the "Letter of Instruction" was, in fact, disciplinary in nature and therefore is properly subject to an appeal hearing under Rule 74. By the Carrier's refusal to grant such a hearing, the Organization seeks to have the letter removed from the Claimant's file.

The Board concurs with a long series of Awards holding that communications to employees (variously called counseling letters, letters of warning, or letters of instruction) can easily become disciplinary in nature. This is carefully set forth in Second Division Award 8062, which stated in part as follows:

"Carrier in this case has clearly enunciated in its written policies and in its submission for this proceeding that it did not consider the challenged letters to be letters of discipline, but rather thought of them as letters of warning. We will hold Carrier to its commitment in any future cases we may decide involving this issue. We fully support Carrier's position that warning letters are not disciplinary and should not be viewed as such. A problem arises, however, in the way warning letters may be worded. 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. We have decided in a recent case on this issue (Award No. 7588, Second Division) that letters containing accusations of guilt for a specific act should be considered disciplinary in nature and subject to investigation and a full and impartial hearing before being placed in an Employee's file."

In this instance, the Board finds that the Carrier has clearly gone beyond "instruction" to the Claimant, exceeding the usual advice as to future conduct. Here, as in traditional disciplinary matters, the Claimant was advised that he was in "violation" of specific Rules and was told that any "further violation may result in disciplinary action." This is qualitatively different from a "warning" or a "counseling." It places in the Claimant's file a record of Rule violation assessed by the Carrier in the absence of the appeal procedure provided in Rule 74. Left undisturbed, such record could well be used in determining the severity of a disciplinary penalty in any future offense. It is such a formulation to which Second Division Award 8062 alludes when it states, ". . . letters containing accusations of guilt for a specific act should be considered disciplinary in nature." Awards cited by both the Carrier and the Organization also make this same distinction.

The Board, therefore, does not challenge the Carrier's contention that its Letters of Instruction may, in general, be non-disciplinary in nature. In this instance, however, the letter is confined to determination of guilt of Rule violation in a specific instance. To have this on record is clearly disciplinary. The timely request for a Rule 74 hearing was in order. The Carrier's failure to accede to such request requires that the Claim be sustained.

A W A R D

Claim sustained.

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Award No. 28920  
Docket No. MW-28861  
91-3-89-3-261

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest:

  
Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 29th day of August 1991.