

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 30997
Docket No. MW-31364
95-3-93-3-172

The Third Division consisted of the regular members and in addition Referee Martin H. Malin when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
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(SOO Line Railroad Company

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

- (1) The Carrier's decision to assess Extra Gang Foreman Mark A. Pfeiffer a letter of censure for alleged failure to properly perform his duties and to allow his crew to work unsupervised on August 23, 1991 was on the basis of unproven charges and in violation of the Agreement. (System File C-03-92-C380-01/8-00079 CMP).
- (2) As a consequence of the violation referred to in Part (1) above, the Claimant shall have the letter of censure and any reference thereto expunged from his personnel file and the Organization shall be reimbursed for payment of lost wages and expenses associated with witness Feit's attendance at the hearing pending the resolution of this dispute."

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 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.

On August 28, 1991, Claimant was issued a letter of censure by the Project Roadmaster which stated that on August 23, 1991, he "failed to properly perform your duties as Extra Gang Foreman. At starting time you were visiting with the Timekeeper and an Assistant Foreman at Lake Wisconsin, while your crew was approximately five miles away working unsupervised." On September 8, 1991, Claimant requested an unjust treatment hearing. The hearing was scheduled for and held on October 16, 1991. On October 24, 1991, Carrier's Assistant Division Manager-Engineering advised Claimant that the letter would stand. On November 6, 1991, the Organization appealed that decision to Carrier's Vice President for Labor Relations, who denied the appeal on November 15, 1991. The Organization filed the instant claim on January 8, 1992.

The Organization contends that the claim is timely. The Organization acknowledges that Rule 47(a) requires that claims be filed within sixty days from the date of the occurrence on which the claim is based. The Organization argues that the claim is based on the Vice President's denial of Claimant's appeal on November 15, 1991.

On the merits, the Organization contends that the evidence failed to support the charge that the Claimant failed to perform his duties and left his crew unsupervised. The Organization argues that the testimony clearly established that the Claimant was performing his duties, albeit at a location away from his crew, and that his crew was supervised by two Assistant Gang Foremen.

Carrier contends that the claim was not timely. Carrier argues that the occurrence giving rise to the claim was the issuance of the letter on August 28, 1991. Even if the claim did not occur until after the unjust treatment hearing, in Carrier's view, the latest date from which the sixty-day filing period should be measured was October 24, 1991, the date that Carrier refused to remove the letter from Claimant's personnel file. In either event, the claim was filed more than sixty days later.

On the merits, Carrier contends that the Project Roadmaster's testimony supports the letter. Carrier concedes that the record contains conflicting testimony, but argues that under such circumstances, the Board should defer to the findings made on the property.

The issue of timeliness turns on the relationship between Rules 18 and 47. Rule 18 provides, in relevant part:

- "(b) An employe who has been disciplined or dismissed, or who considers himself unjustly treated, shall be given a fair and impartial hearing before the officer designated by the Railroad Company to handle such matters, provided that request for hearing is made in writing to the Division Engineer within ten (10) days from date of advice of discipline or complaint. The hearing shall be held within ten (10) days from date of request for hearing and decision shall be rendered within ten (10) days from the date the hearing is completed.
- (c) An employee dissatisfied with a decision shall have the right to appeal to the highest officer designated by the Railroad Company to handle such cases, provided that request is made in writing to the officer to whom appeal is made (and copy furnished to the officer whose decision is appealed) within twenty (20) days from date of advice of the decision. The appeal hearing shall be held within twenty (20) days from date of request for hearing and decision shall be rendered within twenty (20) days from the date the hearing is completed."

Rule 47 provides in relevant part:

- "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 employe involved, to the office of the Carrier authorized to receive same, within 60 days from the date of the occurrence on which the claim or grievance is based...."

Thus, the issue is whether the occurrence is the issuance of the letter, the decision following the unjust treatment hearing or the denial of the appeal from that decision. This issue was decided by this Board in Third Division Award 30561, decided between these same parties. In that case, Carrier had issued the claimant a letter of censure, the claimant requested and received an unjust treatment hearing, Carrier declined to remove the letter, the claimant appealed and Carrier denied the appeal. The Board held that the sixty-day period for filing a claim began to run when Carrier denied the appeal. That holding was consistent with prior decisions of the Board. See, e.g., Third Division Awards 19601, 17595. We follow them and hold that the occurrence from which the sixty-day period began to run was Carrier's final decision denying the appeal on November 15, 1991. Accordingly, we conclude that the claim was timely.

Turning to the merits, our review of the record finds that there is insufficient evidence to allow the letter to remain in Claimant's personnel file. The only evidence in support of the letter was the Project Roadmaster's testimony that he observed the Claimant at Lake Wisconsin at 6:00 AM on August 23, 1991, talking with the Timekeeper and an Assistant Foreman, while Claimant's crew was supposed to be reporting for work at a location several miles away. The Roadmaster did not ask the Claimant or the other two employees what they were doing, nor did he undertake any other action to determine what they were doing. Furthermore, the Roadmaster did not check with the other location to determine whether the crew was, in fact, unsupervised.

Claimant and the Timekeeper testified to the railroad duties that Claimant was performing at Lake Wisconsin at 6:00 AM on the date in question. That testimony is unrefuted. Also unrefuted is Claimant's testimony that his crew was supervised at that time by two Assistant Foremen who were on duty at the other location. The charges contained in the letter are supported only by the Project Roadmaster's speculation based on a brief observation on which he failed to follow up. Such speculation is not evidence. By allowing the letter to stand, Carrier subjected Claimant to unjust treatment in violation of the Agreement. Accordingly, we will order Carrier to remove the letter from Claimant's record.

The Organization also seeks reimbursement for lost wages and expenses for the Timekeeper who was a witness in the unjust treatment hearing. That part of the claim must fail because the record contains no evidence of a practice of granting such reimbursement or of a rule requiring it. See Third Division Award 30561.

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AWARD

Claim 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 Third Division

Dated at Chicago, Illinois, this 26th day of July 1995.