

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 31489
Docket No. TD-31878
96-3-94-3-205

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

PARTIES TO DISPUTE: (American Train Dispatchers Department Of The
(Brotherhood Of Locomotive Engineers
(
(Consolidated Rail Corporation

STATEMENT OF CLAIM:

"Claim No. 1 - System Docket TD-201

Please accept this grievance in behalf of J. H. Barnett for letter dated October 28, 1992 regarding his attendance from January 1992 through October 1992 ...

Claim No. 2 - System Docket TD-203

This is a grievance filed under Rule 17. On October 27, 1992, you advised Mr. R. H. Gielarowski that because of his attendance record from the last of July 8, 1992 additional absences have occurred. The problem is, you provided a copy of a letter addressed to L. H. Smith and used it against dispatcher Gielarowski...

The ATDA request this letter of October 27, 1992 be rescinded and no mention of it be made again."

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 October 28, 1992, the Assistant Division Transportation Superintendent wrote to Claimant Barnett, advising him as follows:

"Your attendance has been reviewed January 1992 through October 1992, and your record is as follows:

[the letter then listed 14 dates of absences]

Please be advised future attendance irregularities will not be tolerated and may subject you to disciplinary action."

On October 27, 1992, the Assistant Division Transportation Superintendent wrote to Claimant Gielarowski as follows:

"Your attendance since our letter of July 8 (copy attached), continues to be inconsistent with Conrail's standards. Additional absences for August 12, 1992, September 17, 18, 19 and 28, 1992 have been recorded.

It is the responsibility of each employee to render regular and consistent service. It is imperative regular attendance be achieved.

Future excessive absenteeism will not be tolerated and may subject you to disciplinary action."

The Organization contends that the issuance of these letters violated Rule 18, which provides, in relevant part:

Except as provided in Section 3 of this rule, employees shall not be suspended nor dismissed from service without a fair and impartial hearing, nor will an unfavorable mark be placed on the employee's record without written notice to the employee with copy to the Office Chairman.

The Organization argues that the letters constituted unfavorable marks on the Claimants' records. The Organization contends that by placing the letters in Claimants' personnel files, Carrier essentially took disciplinary action without complying with Rule 18.

Carrier argues that the letters were cautionary and not disciplinary. Carrier contends that the letters did not cite any alleged Rule violations and were within Carrier's right to caution employees concerning their behavior.

The Board reviewed the letters carefully and evaluated them against prior Awards of this Board. As the prior Awards make clear, the wording of such letters is crucial in determining whether they are disciplinary or cautionary.

Third Division Award 31116, which involved the same parties, sustained a claim and held a letter to be disciplinary and the manner of its issuance to have violated Rule 18. The letter in that case cited the claimant for violating two specific Operating Rules and advised:

"No further action is contemplated for the above violations at this time; however, please be advised these violations are also violations of FRA and FCC Regulations which, in some cases, could result in fines to the employee involved...."

The Board reasoned, in part:

"As written, the letter goes beyond counseling. It is accusatory and clearly charged that the Claimant violated certain Operating Rules.... Not only does the letter allude to the possibility of future disciplinary action, but, it obviously concludes the Claimant is guilty of the alleged violations."

Other Awards sustain similar claims based on similar findings that supposedly counseling letters accuse the claimants and find them guilty of specific Rules violations. See, e.g., Third Division Award 29583; Second Division Award 12513. On the other hand there is considerable precedent indicating that letters which merely caution employees concerning their future conduct are not disciplinary, even when placed in their files and even if they indicate that future misconduct may result in disciplinary action. See, e.g., Second Division Awards 12923, 12842; Public Law Board No. 3400, Award 18.

The letters in the instant claims did not accuse the Claimants of any specific Rules violations, nor did they find that the Claimants violated any Rules. They merely cautioned the Claimants concerning their attendance records and counselled that continued poor attendance may lead to disciplinary action. Measured against the line drawn in the ample precedent on point, these letters are cautionary rather than disciplinary. No violation of Rule 18 has been established.

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AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 23rd day of May 1996.