

Award No. 30561
Docket No. MW-31189
94-3-93-3-196

The Third Division consisted of the regular members and in addition Referee M. David Vaughn when the award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Soo Line Railroad Company (former Chicago,
(Milwaukee, St. Paul and Pacific Railroad
(Company)

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

- (1) The Carrier's decision to assess Extra Gang Foreman Roger D. Berg a letter of censure for alleged failure to properly perform his duties and failure to follow instructions on August 26, 1991 was without just and sufficient cause, on the basis of unproven charges and in violation of the Agreement (System File C-04-92-C380-02/8-00078 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 Barillas' 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.

Claimant is employed by the Carrier as an Extra Gang Foreman. His seniority dates from 1974. As of August 26, 1990, Claimant was assigned in charge of a Rock Dumping Crew under the supervision of

the Roadmaster. By letter dated August 28, 1990, he issued Claimant a "letter of warning" (Carrier's characterization) or "letter of reprimand" (Organization's characterization), which stated:

"On August 26, 1991 you failed to properly perform your duties as Extra Gang Foreman. You failed to follow my instructions that you and your crew assist on quality control work with the Sled Gang. In fact, we discussed these instructions that same day, as we had on previous occasions.

Be advised that any future failure to perform your duties as instructed will result in disciplinary action. Be governed accordingly."

The Organization requested a hearing, which was held. At the hearing, the Roadmaster testified that he had instructed Claimant in person to have his crew assist in quality control work with the sled gang, but the crew had not done so. Claimant and Trackman P. Barillas (who was summoned by the Organization) testified that they had followed their usual work routine and that the Roadmaster had given no such instructions - that, indeed, he had not been in personal contact with Claimant on the day in question.

Following the hearing, the Carrier notified Claimant that the letter would remain in his record. The Organization appealed the Carrier's decision, which the Carrier upheld on November 15, 1991. The Organization protested the Carrier's determination on appeal; the Parties were unable to resolve the dispute through the steps of the grievance procedure, and it was referred to this Board.

The Organization argues that the Claim was not untimely, since the letter constituted discipline, and the right to submit a claim dates from the Carrier's November 15 determination, on appeal following the investigative hearing, to retain the letter in Claimant's record. With respect to the merits of the claim, the Organization asserts that the Carrier bore the burden to prove Claimant's commission of the offense by substantial, probative evidence. It urges that the Carrier failed to meet that burden, in that its only support for the letter consisted of the testimony of the Roadmaster, which it characterizes as contradictory and, therefore, not credible. Against the Roadmasters' testimony, the Organization submitted the testimony of Claimant and Trackman P. Barillas, which proved that no in-person conversation took place between the Roadmaster and Claimant on the day in question and that no instruction was given. The Organization urges, therefore, that

the claim be sustained and that the letter be removed. It also urges that Trackman Barillas be compensated for time spent as a witness.

The Carrier argues that the letter was simply a warning, and not discipline, with the issuance of the letter the event from which the 60 day period to file a claim - rendering the claim untimely. It also argues that the hearing was an unfair treatment hearing, with the Union carrying the burden to prove its complaint. The Carrier asserts that the Organization did not meet its burden of proof; and it urges that the Claim be denied.

The letter accused Claimant of disobeying supervisory instructions and threatened him with discipline if he did so again. It was disciplinary in intent, tone and effect. The Board is persuaded that it represented discipline, rendered the hearing investigatory in nature for purposes of triggering the disciplinary provisions of the Agreement, and placed on the Carrier the burden of proving its case by substantial evidence. Under the disciplinary procedure, the 60 day period for filing a claim dated from the Carrier's denial of the Organization's post-hearing appeal; and the Claim was not untimely.

The evidence as to what happened on the day at issue is in conflict: the Roadmaster testified as to one set of events, Claimant and Barillas to another set of events. The evidence cannot be harmonized. The testimony of the Roadmaster was vague and contradictory as to the events of the morning; only his assertions that he gave instructions, and Claimant disobeyed them, remained unshaken. The testimony of Claimant was that he had, in fact, performed his duties and that any deviation from the expected routine had been to address legitimate problems. Both Claimant and Barillas testified that the Roadmaster had not been present or had conversation with Claimant on the date claimed. The determination of credibility of the testimony was for the hearing officer; however, where, as here, the Roadmasters' testimony was vague, internally inconsistent, and uncorroborated, the Board discounts or disregards the testimony in the face of corroborated, facially credible, consistent evidence to the contrary. The Board concludes that the Carrier did not meet its burden of establishing the claimed misconduct by substantial credible evidence on the record as a whole. A sustaining award is, therefore, required.

As to the Organization's claim for wages and expenses for Trackman Barillas, the record contains no rule, or evidence of a practice, in support of the request; it fails for lack of proof.

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 the Third Division

Dated at Chicago, Illinois, this 9th day of November, 1994