

NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISIONAward No. 31116  
Docket No. TD-31545  
95-3-93-3-547

The Third Division consisted of the regular members and in addition Referee Carol J. Zamperini when award was rendered.

PARTIES TO DISPUTE: (American Train Dispatchers Association  
(Consolidated Rail Corporation

STATEMENT OF CLAIM:

"This is a grievance filed under Rule 17 of the existing agreement. Trainmaster Timko advised train dispatcher Romito by letter of his radio conversations on March 26, 1992 and stated that this letter was being placed in his personnel (sic) file. This is a direct violation of the agreement between Conrail and the ATDA. . . .

The ATDA demands that this letter of March 31, 1992 be removed from Mr. Romito's file 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.

The Claimant was employed as a Trick Train Dispatcher in the Carrier's Pittsburgh, Pennsylvania, office. On March 26, 1992, the Carrier monitored the Claimant's radio conversations. The Carrier periodically monitored all employees. As a result of monitoring the Claimant, the Trainmaster issued a letter of caution to the Claimant. The letter read in part:

"Your radio conversations were monitored for the purpose of making Operating Rules Compliance Checks on Thursday, March 26, 1992. You were found to be in violation of NORAC Operating Rules 708 and 709 at the following times: 0940, 0951, 0958, 0959, 1025, 1026, 1029, 1031, 1038, 1039, 1117, 1120, 1132, 1133, 1142, 1148, 1210, and 1355.

Please arrange to contact Mr. R. D. Shilling or Mr. R. A. Chambers prior to April 15, 1992, for a Special NORAC Operating Rules Class concerning radio procedures.

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 in the case of a willful violation.

A copy of this letter will be placed in your personal file. . . ."

The Organization protested the inclusion of the letter in the Claimant's file. They contended the letter violated Rule 18, which reads:

"(a) 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 Office Chairman."

The Organization points out that the Office Chairman never received a copy of the letter sent to the Claimant and the letter was an unfavorable mark as contemplated by Rule 18. As a result of the Carrier's failure to follow the above cited Rule, the letter should be removed from the Claimant's file and never mentioned again.

The Carrier counters that the letter was cautionary and did not constitute discipline. They argue that it did not violate Rule 18 since no discipline was imposed; the Claimant was neither suspended nor dismissed. Furthermore, they contend it is the prerogative of the Carrier to issue a letter of instruction or warning to a Train Dispatcher and to have same included in his/her personnel file. Finally, the Carrier points out that the letter was not placed in the Claimant's discipline record.

The Board cannot agree with the Carrier that the letter issued to the Claimant was not disciplinary in nature. As written the letter goes beyond counseling. It is accusatory and clearly charges that the Claimant violated certain Operating Rules. While the Carrier contends the letter does not constitute an unfavorable mark as anticipated by Rule 18, we cannot agree. The letter states in part: "No further action is contemplated for the above violations at this time; . . ." Not only does the letter allude to the possibility of future disciplinary actions, but, it obviously concludes the Claimant is guilty of the alleged violations. If the Claimant failed to respond, it could be perceived as an admission of guilt relative to the alleged rule violations. Finally, the Board can find no distinction in Rule 18 between discipline files and personnel files. The Rule provides: "nor will an unfavorable mark be placed on the employee's record without written notice to the employee with copy to Office Chairman." There is nothing which would prevent the Carrier from utilizing a cautionary or counseling letter in an employee's personnel file to support the issuance of a more severe discipline if the alleged Rule infraction were to continue. For these reasons, the Board believes the letter, as written, should have been sent to the Office Chairman or not included in the Claimant's personnel file.

AWARD

Claim sustained.

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 1st day of September 1995.