

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 39308
Docket No. MW-39575
08-3-NRAB-00003-060359
(06-3-359)

The Third Division consisted of the regular members and in addition Referee Lisa Salkovitz Kohn when award was rendered.

(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference

PARTIES TO DISPUTE: (
(CSX Transportation, Inc.

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier placed an 'Absence Without Permission' letter, dated August 1, 2005, into the personnel file(s) of Messrs. H. Johnston, L. Knott, III, D. Spinner, R. Hunter, Sr., J. Holbrook, E. Adkins, Jr., W. Kincaid, D. Hatfield, R. Higginbotham, D. Martin, M. O'Hair and K. Orsburn, in connection with their alleged unexcused absence from work on July 16, 2005 [System File D21288605/12(05-0960) CSX].
- (2) The claim referenced in Part (1) above, as conferenced with the Carrier by Vice Chairman D. R. Albers on November 29, 2005, shall be allowed as presented because said claim was not disallowed by Director Employee Relations J. H. Wilson in accordance with Rule 24.
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, the Carrier shall now remove the August 1, 2005 'Absence Without Permission' letter from the personnel file(s) of Claimants H. Johnston, L. Knott, III, D. Spinner, R. Hunter, Sr., J. Holbrook, E. Adkins, Jr., W. Kincaid, D. Hatfield, R. Higginbotham, D. Martin, M. O'Hair and K. Orsburn.

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 were given due notice of hearing thereon.

The Claimants established and hold seniority in the Track Department. They were originally assigned and working Monday through Thursday, ten hours per day with Friday, Saturday and Sunday designated as rest days on System Production Gang SPG 6XC4. On Thursday, July 7, 2005, the Claimants' Supervisor advised all employees assigned to SPG 6XC4 to be prepared to work Sunday, July 10 through Friday, July 15, 2005 to meet the operational requirements involved with a work jamboree. The gang worked from July 10 through July 15, 2005 pursuant to that notice. On Thursday, July 14, 2005, SPG 6XC4's Timekeeper instructed the gang members to check out of the lodging facility the first thing Friday morning. They did so, but on the afternoon of Friday, July 15, 2005, their Supervisor advised the entire gang that they would be required to work on Saturday, July 16, 2005. Not only had the employees of SPG 6XC4 checked out of the lodging facility, but according to the Organization, various employees informed their Supervisor that they had appointments to keep, family commitments to tend to and in addition many did not have sufficient funds to remain for another day. The Supervisor excused some employees from working the additional day, but did not excuse the Claimants. The Claimants did not report for work on July 16, 2005.

By letters dated August 1, the Claimants were notified that their absence on July 16, 2005 was unexcused and that a copy of the letter would be placed in their personnel file. This dispute seeks removal of the August 1, 2005 letters from the Claimants' personnel records.

SECTION 7 – OVERTIME of Appendix S of the June 1, 1999 System Agreement, which governs System Production Gangs, states in pertinent part:

“B. The right to work overtime, when required on System Gangs, will accrue first to the incumbent of the position of which the overtime is required. If declined by the incumbent, overtime will be performed by the senior qualified employee in the System Gang indicating a desire to work overtime. If no employee desires to work overtime and overtime is required, the junior qualified employee in the System Gang involved will work the overtime.”

The Organization contends that Section 7. B is inapplicable because the situation was not an overtime problem. Instead, the Organization asserts, the Carrier changed the workweek of SPG 6XC4 on less than one day’s notice, in violation of Section 6. B of Appendix S, which states: “The work week and rest days of SPGs may be changed upon five (5) working days notice and allowance of overtime, if applicable. . . .” The Carrier responds that Section 7.B was applicable, and that the Claimants simply ignored the direction to work overtime the next day, without any advance notice to their supervisor, in violation of Rule 26: “An employee unable to report for work for any reason must notify his supervisor as soon as possible.”

Although the parties presented procedural grounds for ruling on the claim, it is more appropriate to address this dispute on its merits. It should be noted that the August 1, 2005 letters were not a form of discipline. Although the letters confirmed the employees’ “Absence Without Permission,” the letters also stated: “This letter is not a form of discipline and will not be used in any subsequent disciplinary proceeding as evidence that you previously violated a rule. A copy of this letter will be placed on your personnel file to document this occurrence.” In other words, the August 1, 2005 letters were merely letters of warning.

The Board agrees with the sentiments expressed by Second Division Award 8062:

“. . . [L]etters of warning are not disciplinary in nature, and . . . their insertion in an Employee’s file is not in violation of the investigation requirements of most agreements. . . . [L]etters of warning are an important and necessary device that can change an Employee’s behavior and put him back on the track without the stigma of being disciplined and having this become a part of his personnel file and his work record.

On the other hand, it need not be pointed out at this late date that this Board has decided a multitude of cases against carriers who have disciplined Employees without the benefit of a hearing when it is

required by agreement or who have not conducted a hearing in a fair and impartial manner.”

In this case, as in Second Division Award 8062, the Carrier clearly stated in the letters that they were not to be considered as letters of discipline. The Carrier was explicit that the letters could not be used in subsequent proceedings as evidence of a prior Rule violation. As stated in Second Division Award 8062, such representations by a Carrier should be enforced in the event of subsequent disciplinary proceedings. Thus, there was no element of discipline or threat in the letters here, merely a warning about problem behavior.

Under the circumstances presented, it was wrong of the Claimants to withhold their services from the Carrier and appropriate for the Carrier to place the non-disciplinary warning letters in the Claimants' files. However, from all indications in the record, the warning letters have served their purpose and should now be removed from the Claimants' files.

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 29th day of September 2008.