

**PUBLIC LAW BOARD NO. 7104**

<b>BROTHERHOOD OF</b>	)	
<b>MAINTENANCE OF WAY EMPLOYEES</b>	)	
<b>DIVISION – IBT RAIL CONFERENCE</b>	)	
	)	<b>CASE NO. 14</b>
<b>vs.</b>	)	<b>AWARD NO. 14</b>
	)	
<b>CSX TRANSPORTATION, INC.</b>	)	

**STATEMENT OF CLAIM:**

Claim of the System Committee of the Brotherhood that:

1. The discipline (Record of Coaching/Counseling Letter) placed in B & B Foreman B.R. Hendrickson's personnel file without the benefit of an investigation is unjust, unwarranted and in violation of the Agreement [System File G35655206/12-1457].
2. As a consequence of the violation outlined in Part (1) above, on behalf of Mr. Hendrickson, we request that the letter be removed from his personnel file immediately."

**FINDINGS:**

Public Law Board No. 7104, upon the whole record and all the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that the Board has jurisdiction over the dispute herein; and that the parties to the dispute were given due notice of the hearing and did participate therein.

The facts of this case are not in dispute. The Claimant, B.R. Hendrickson, has been employed by the Carrier since 1973. At the time of the relevant events, Claimant was working as a Building and Bridge (B & B) foreman. On September 14, 2006, Claimant's supervisor, Manager Bridges Philip Helfenberger, submitted the following letter into Claimant's personal record:

Record of Coaching/Counseling Letter Concerning Timely Reports and Audit Inspection

This letter is a record of a jobsite coaching and counseling session on Monday, September 11, 2006 at about 1400 hours at OSF 208.2. As we

discussed and agreed upon that reports and information requested needs to be turned in a timely manner and steps will be taken to accomplish that.

We also discussed the Safety Audit performed on the 31<sup>st</sup> of August. Each foreman was given the audit sheet, and all forms and materials required by the audit at least 2 months prior to the audit. Your truck had several deficiencies, which had not been corrected. Waiting on the day of the audit to inspect tools is not appropriate. There have been more than one occasion after training and Overlap meetings, that each crew was given time to clean, inspect trucks and tools and bring them up to the standard. Your truck was the only one which had deficiencies.

It is important to remember that CSX policies and rules are for the safety and protection of all employees and these rules need to be studied and followed.

This letter will serve as a record of our coaching and counseling and placed in your personnel file.

The Organization filed the instant claim on September 27, 2006, requesting that the letter be removed from Claimant's personal record. The Carrier declined by letter dated October 26, 2006. That letter stated, in relevant part:

The letter within my (J.T. Echler) file does not state that it is not a form of discipline and will not be used in any subsequent disciplinary proceeding as evidence that he had previously violated a rule.

It is apparent, that Mr. Helfenberger, Bridge Supervisor, felt it was necessary to have a coaching and counseling session with Mr. B.R. Hendrickson, as a form of behavior modification, further instructing him formally of his downfalls, rather than resulting at this time to more formal disciplinary actions.

It is well accepted in labor relations in general and in the rail industry in particular that it is far better for employers to counsel with employees before embarking on a program of discipline. They do so in the hope that a perceived problem will be rectified without the need to resort to more serious measures. Employers have the right to memorialize such discussions and to later make mention of the fact that counseling sessions have taken place, but they are not free to argue that either oral counseling discussions or written summaries of those talks constitute the first step in the discipline process.

Rule 25 of the parties' 1999 System Agreement provides, in relevant part:

## **RULE 25 - DISCIPLINE, HEARINGS, AND APPEALS**

### **Section 1 - Hearings**

(a) Except as provided in Section 2 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 upon their discipline record without written notice thereof.

\* \* \*

(d) An employee who is accused of an offense shall be given reasonable prompt advance notice, in writing, of the exact offense of which he is accused with copy to the union representative. The hearing shall be scheduled to begin within twenty (20) days from the date management had knowledge of the employee's involvement. A hearing may be postponed for a valid reason for a reasonable period of time at the request of the Company, the employee, or the employee's union representative. A hearing for a furloughed employee involving other than a major offense shall be automatically postponed and rescheduled within thirty (30) days of the employee's return to service.

### **Section 2 - Alternative to hearings**

(a) An employee may be disciplined by reprimand or suspension without a hearing, when the involved employee, his union representative, and the authorized official of the Company agree, in writing, to the responsibility of the employee and the discipline to be imposed.

The Organization first states that it does not contest the Carrier's right to conduct counseling sessions or dispute their usefulness. However, it asserts, when an accusatory written document, containing unilateral, Carrier opinions which the employee has not had the opportunity to contest, is placed in a personnel file, it becomes a form of discipline. It also asserts that the conclusion is inescapable that this letter could be used against Claimant in the future. Thus, it concludes, Claimant was entitled to a fair and full investigation, and this Board should order the letter removed from his file.

The Carrier asserts that the instant claim is not supported by Rule 25, Discipline, of the parties' June 1, 1999 System Agreement. It states that the Organization failed to demonstrate that the incident at issue fell within the "due process" rights afforded by that Rule, as it is not discipline within its meaning. The Carrier notes that the Agreement does not include any provision barring the Carrier from placing coaching/counseling letters in an employee's file, and further points out that the letter at issue here did not

refer to any possible future disciplinary action. Thus, the Carrier concludes, the claim lacks merit and should be dismissed.

The Board has carefully reviewed the record in its entirety. As the Carrier asserts, precedent indicates that the Carrier may unilaterally issue and maintain a written record of a coaching/counseling session, for the purpose not of preferring charges but to aid the employee in improving behavior, and such action will generally not be considered "discipline" within the meaning of the applicable rules. See NRAB Third Division Award 32927. As has also been recognized, however, a problem may arise in the wording of such a document. If the letter includes accusations of guilt for a specific act, or concludes that the employee has engaged in misconduct, it will be considered disciplinary in nature and subject to investigation and a full and impartial hearing before it can be placed in the employee's file. See NRAB Second Division Award 8062. Thus, the determination of whether the written record of a coaching/counseling session is merely cautionary, in the nature of counseling, or whether it constitutes discipline, is necessarily a fact-specific one, depending upon the language of the particular document at issue.

We agree with the Organization that the letter placed in Claimant's file crossed the line to discipline. Contrary to the situation in NRAB Third Division Award 34219, cited by the Carrier, the letter at issue here does accuse Claimant of wrongdoing in connection with a Safety Audit, referring to his "deficiencies" and conduct which was "not appropriate." The Carrier's October 26, 2006 declination letter states that the purported "counseling" letter was necessary to formally notify Claimant of his asserted "downfalls." Moreover, again unlike the situation in the case cited by the Carrier, the letter at issue does not state in any way that it is non-disciplinary in nature and will not be used against Claimant in the future. Indeed, the Carrier's October 26, 2006 letter, especially its characterization of Carrier's action as an alternative to **more formal discipline**, indicates the opposite.

For all of these reasons, we conclude that letter issued against Claimant did accuse him of specific misconduct, and was disciplinary in nature. We therefore find that the Carrier issued the letter in violation of the applicable discipline rules, and the claim will be sustained.

**AWARD**  
**Claim sustained.**

  
JACALYN J. ZIMMERMAN  
Neutral Member

  
MATTHEW BORZILLERI  
Carrier Member

  
TIMOTHY KREKE  
Organization Member

Dated this 10<sup>th</sup> day of October, 2008.

Oct 10, 2008