

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD 6302

NMB NO. 200
AWARD NO. 199

PARTIES TO DISPUTE

CARRIER

Union Pacific Railroad

Carrier's File

1520814

AND

ORGANIZATION

Brotherhood of Maintenance of Way Employees
Division of International Brotherhood of Teamsters

System File

R-0948U-303

STATEMENT OF CLAIM

1. The Level 2 Discipline imposed upon Track Inspector Tedd A. Gilkerson in connection with a derailment that occurred on April 8, 2009 is based on unproven charges, unjust, unwarranted and in violation of the Agreement.
2. As a consequence of the violation referred to in Part 1 above, we request that all charges against Claimant Gilkerson be dropped and any mention of this incident be removed from his personal record.

STATEMENT OF BACKGROUND

At the time the incident occurred giving rise to the filing of the subject claim, Claimant had over eleven (11) years of service with the Carrier having commenced his employment on March 10, 1998. Additionally, during the period in question, Claimant held the position of Track Inspector.

Subsequent to Claimant going on vacation, a train derailment occurred on April 8, 2009 at the ConAgra facility in Omaha, Nebraska. It was determined from an investigation that the derailment was due to track defects in the area that had not been found by the Claimant and that Carrier concluded the derailment was Claimant's fault. Upon his return to work from his vacation on April 13, 2009, Manager Track Maintenance, Chris Rewczuk charged Claimant with a Level 2 violation for his failure to detect the track

defects in question and as an alternative to issuing Claimant discipline for said failure, he instead subjected Claimant to a Formal Coaching Session relative to training him on Rules 8.7.3, 8.7.5, 8.7.17, and 8.8.3 as set forth in the Track Manager Field Handbook (TMFH). Pursuant to Carrier's Policy and Procedures For Ensuring Rules Compliance effective October 15, 1998 and revised April 1, 2009, the provision on Formal Coaching reads as follows:

FORMAL COACHING (Level 1 and 2 Violations)

Employees charged with Level 1 or Level 2 infractions will be coached without being formally charged with a rule violation. The formal coaching session(s) will be documented and entered into the employee's electronic discipline record. No new discipline level is established. Excessive violations of Level 1 or Level 2 rules may result in a violation of Rule 1.13.

In accord with the Formal Coaching provision, Claimant's coaching session was documented on the pre-printed form, "Coaching Session Form". Among other information recorded on this form was the notation in the Comments section that reads as follows:

Tedd will find defects to prevent derailments and he understands the effect of having multiple coaching sessions.

With regard to the above commentary, it was noted on the form that Claimant had previously been given two (2) other coaching sessions within a six (6) month period, to wit, on January 6, 2009 and March 30, 2009. The record evidence was devoid of any information regarding the details of these two (2) coaching sessions. The record evidence reflects that both Claimant and MTM Rewczuk signed the Coaching Session Form which was dated April 13, 2009.

By letter dated April 21, 2009, the Organization made a formal request of the Carrier to hold an unfair treatment conference concerning the formal coaching session given Claimant in accordance with the provisions set forth in Rule 48 (n) of the controlling July 1, 2001 Agreement. Rule 48 – Discipline and Grievances, paragraph (n) reads as follows:

An employee in service who feels he has been unjustly treated may request a conference through the General Chairman or other officer of the Organization. If the matter cannot be resolved in the interim, the representative may make written request for a conference to the appropriate Company manager involved and such request will contain the precise nature or cause of the complaint. Such request for conference must, however, be made within twenty (20) calendar days of the cause of complaint. If the asserted unjust treatment is left

unresolved, it may be handled as a claim or grievance under the provisions of Rule 49.

In accord with the requirement of Rule 48 (n) that a request for an unfair treatment conference contain the precise nature or cause of the complaint, the Organization set forth the following rationale:

Claimant was charged with violation of a rule for an incident that happened on April 8, 2009 while he was on vacation, and the Carrier unilaterally imposed a Level 2 discipline assessment, which resulted in a Formal Coaching session on April 13, 2009. A conference must be held to determine the facts that led to the discipline.

In finding no basis proffered by the Organization to prove Claimant had been unjustly treated in having been given a Formal Coaching session, Carrier denied the Organization's request for an Unfair Treatment conference. In response, by letter dated June 18, 2009, the Organization informed Carrier it was its position that since Carrier had failed to afford Claimant the opportunity to resolve the matter of having been charged with an alleged Level 2 violation of certain cited TMFH rules (see elsewhere above) it was notifying Carrier that the matter in question be addressed by filing the subject claim.

ORGANIZATION'S POSITION

The Organization's basis for filing the subject claim is predicated on the following written statement proffered by the Claimant:

I was forced in signing the level 2 that they assised (sic) me with. Mtm chris rewczuk said that if I didn't sign they were going to disquify (sic) me since I have had multiple coaching sessions. When this derailment occured (sic) I was on vacation and the track was due for inspection when I was gone on vacation of april the 8th. . . . When I got back to work I was informed of derailment that they said it was my fault that I didn't inspect the track prior the derailment and track was over 30 days of inspection. . . How can I be at fault when im (sic) on vacation. . . . When I returned from vacation I was going to have to catch-up with playbook and do other things that the mtm's always find for us to do other than inspect track and we get blamed for not doing are (sic) jobs properly.

In addition to the underlying basis for the claim that Carrier denied its request for an unfair treatment conference, the Organization submits that Carrier violated Rule 48 (i) by unilaterally invoking a Level 2 Formal Coaching session without first consulting with Claimant's representative. Rule 48 (i) reads in whole as follows:

Except as otherwise provided herein, when the occurrence with which the employee is charged with responsibility does not, in the judgement of the appropriate Company manager, warrant the assessment of demerits in excess of ninety (90), the employee may waive, in writing, the right to a hearing and accept a specified number of demerits, not to exceed ninety (90), which will then be levied against the individual's discipline record. It is understood, however, that an employee cannot waive the right to a formal hearing if the assessment would result in an accumulation of more than ninety (90) demerits which would subject the employee to dismissal. Demerits will be assessed in blocks of fifteen (15), and fifteen demerit marks will be cleared by six consecutive months of service during which no demerit assessment is received.

In other circumstances, an employee may waive, in writing, the right to a hearing and accept a suspension from service for an agreed to number of days provided, however, such employee will be afforded a reasonable opportunity to consult with his duly accredited representative before signing said waiver.

The Organization asserts that Claimant was coerced into signing the Formal Coaching form explaining that Claimant signed the form because he understood the well established practice in the railroad industry of "obey now, grieve later" and was fully ready to utilize the grievance procedure when he realized that not signing the coaching session form would result in further disciplinary action against him. The Organization further asserts Carrier violated its own developed and established procedures for utilizing coaching sessions on the property by refusing to grant Claimant's request for Union representation at the coaching session.

Based on the foregoing argument asserted, the Organization respectfully requests the Board to sustain the claim in its entirety.

CARRIER'S POSITION

Carrier maintains it possesses the right to instruct and train its employees via the holding of formal coaching sessions pursuant to its Policy and Procedures for Ensuring Rules Compliance as part of its UPGRADE Discipline policy, and that this was the circumstance that existed in Claimant's situation, to wit, that he was instructed on those rules pertaining to undocumented track defects that led to the April 8, 2009 derailment. Said UPGRADE policy reads in relevant part as follows:

Conferencing, counseling, *coaching* and education are effective tools for rules compliance. Informal [and Formal] Coaching or Formal Conferencing may be used at the discretion of the manager. Managers

will be accountable for the fair and consistent application of the Discipline Policy. (Emphasis added)

Carrier asserts that a careful review of the on-property handling of the subject claim establishes that Claimant freely and voluntarily participated in the April 13, 2009 coaching session with MTM Chris Rewczuk as evidenced by his signing the coaching session form and that he was paid for his participation in the coaching session. Additionally, MTM Rewczuk submitted a written statement attesting that Claimant was not forced to sign his formal coaching session form, that he signed the form under his own free will. Carrier maintains that had Claimant been coerced in any way to sign the coaching session form he simply could have registered his concern by refusing to sign the form. The fact that he signed the form serves as proof that he was not coerced into signing the form and that he signed the form voluntarily.

Carrier asserts that at the root of this claim is the Organization's continued position, characterized by Carrier as "misguided" that Claimant's April 13, 2009 coaching session constituted discipline. Carrier maintains that from a clear and straightforward reading of the Formal Coaching provision of its Policy and Procedures for Ensuring Rules Compliance, that a coaching session is an alternative to assessing an employee discipline for having violated one or more of its rules. Thus, Carrier submits, no discipline was issued to the Claimant under all the prevailing circumstances of his situation. Finally, Carrier argues, there is absolutely no substantive proof and only the self-serving statement by Claimant that he had requested and was denied Union representation to be present when he was given the Formal Coaching session. Carrier denies that Claimant asked for and was refused Union representation by MTM Rewczuk.

In conclusion, Carrier maintains there was no instance in which Claimant's Agreement rights were violated. Carrier states it properly exercised its rights as an employer in meeting with the Claimant to discuss rules and procedures applicable to his position. The record of the on-property handling of the claim clearly establishes that Claimant was not unjustly treated, as he was not assessed any discipline, nor did he miss any time from work or lose any compensation. Furthermore, there is no evidence to support the Organization's allegation Claimant was denied the right to have Union representation during the coaching session. Carrier emphatically argues there was no triggering event upon which to invoke the provisions of Rule 48 (n) impaneling an unfair treatment conference as the coaching session did not entail either a matter of discipline or disqualification. Carrier submits that Claimant has suffered no harm or any negative effect as a result of his having been subjected to the April 13, 2009 coaching session.

Accordingly, based on the foregoing argument asserted, Carrier respectfully requests that the Board reject the subject claim and uphold its fundamental right to train its employees.

FINDINGS

Public Law Board No. 6302, upon the whole record and all the evidence, finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and that the Board has jurisdiction over the dispute herein; and, that the parties to the dispute were given due notice of the hearing thereon and did participate therein.

Upon the record evidence in its entirety, the Board is not persuaded by any of the arguments raised by the Organization in defense of the Claimant. The argument that Carrier was obligated to accede to a request by Claimant to have Union representation present during the Formal Coaching Session is not supported by Rule 48 (i) as so contended by the Organization, as a close and careful reading of the language set forth in this provision is devoid of any reference to such right by an employee in the absence of assessment of any discipline. The only reference to a right of an employee to Union representation is in relation to waiving in writing the right to a hearing and acceptance of a suspension and even in that circumstance, the employee is only afforded a reasonable opportunity to "consult with his duly accredited representative before signing said waiver". Additionally however, the Board concurs in Carrier's position that no substantive proof exists to support Claimant's contention that he, in fact, requested of MTM Rewczuk to have Union representation present and that this request was denied. The Board further concurs in Carrier's position that Claimant could have indicated his request for Union representation had been rebuffed by MTM Rewczuk by refusing to sign the Formal Coaching Session Form which he did not.

The argument raised by the Organization that Claimant was coerced into signing the Formal Coaching Session Form by MTM Rewczuk's alleged threat to disqualify Claimant if he did not sign the form nowhere is supported by any substantive proof. The Organization's explanation that Claimant in effect signed the form under duress because he was familiar with the concept of "comply now and grieve later" is simply inapplicable to the prevailing circumstances as this principle applies only to a situation where an employee perceives that a matter of safety is involved in complying with a management directive. There is absolutely no doubt that there was no matter of safety involved in the directive by Management here to have Claimant submit to a Formal Coaching Session. The Board further concurs in Carrier's position that it has every right under its applicable policy and procedures to provide coaching and counseling of employees to ensure their compliance with its numerous operating rules.

Finally, the Board is in further concurrence with Carrier's position that there was absolutely no triggering event that would have obligated it to accede to the Organization's request for an unfair treatment conference pursuant to the provisions set forth in Rule 48 (n) of the 2001 Agreement. The record evidence establishes that the contention by the Organization that Claimant received discipline relative to Carrier's determination he was complicit in causing the derailment is incorrect. Carrier's Policy

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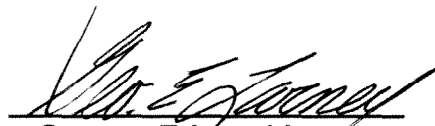
and Procedures For Ensuring Rules Compliance makes it abundantly clear that when an employee undergoes Formal Coaching as did Claimant in the case at bar, said coaching takes the place of discipline for Level 1 or Level 2 infraction(s) of the rules.

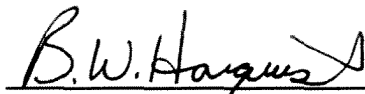
Based on the foregoing findings, the Board rules to deny the subject claim in its entirety.

This Award is to become effective within sixty (60) days from the date signed by the Parties.

AWARD

CLAIM DENIED


George Edward Larney
Neutral Member & Chairman


B. W. Hanquist


T. W. Kreke

Chicago, Illinois

Date: October 22, 2010

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