

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 6402
AWARD NO. 173, (Case No. 194)**

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
DIVISION - IBT RAIL CONFERENCE**

vs

**UNION PACIFIC RAILROAD COMPANY (Former Missouri Pacific
Railroad Company)**

William R. Miller, Chairman & Neutral Member
T. W. Kreke, Employee Member
K. N. Novak, Carrier Member

Hearing Date: January 18, 2012

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

- 1. The Carrier violated Rule 21 of the Agreement when it imposed discipline (Level 1) upon Mr. J. Thomas by letter dated November 8, 2010 for alleged violation of Rule 70.1 Safety Responsibilities (System File UP-226-WF10/154 5622).**
- 2. As a consequence of the violation referenced in Part 1 above, we request that Mr. Thomas be granted an investigation in accordance with Rule 21 of the Agreement."**

FINDINGS:

Public Law Board No. 6402, 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.

At the time of the incident giving rise to the instant dispute the Claimant was assigned to and working with Gang 9849. It was alleged that on November 7, 2010, at approximately 9:10 a.m. the Claimant was working on a railroad crossing during which time he struck a snake with a shovel and then allegedly picked up the snake and tossed it in the general direction of a co-worker. Because of those actions the Carrier coached him on the safety responsibilities that he has towards himself and his fellow employees. The Carrier documented the coaching and counseling event on a "Level 1 and 2 Coaching Session Form".

The Organization filed a claim on behalf of the Claimant where it stated the Claimant had been disciplined without the benefit of a "fair and impartial" Investigation and it requested a Hearing in accordance with Rule 21.

It is the position of the Organization that the Carrier imposed a Level 1 disciplinary notation on the Claimant's personal record which is a form of discipline without benefit of a formal Investigation. It argued that on November 8, 2010, the Carrier spoke with Claimant in regards to an alleged violation of Carrier Rule 70.1 Safety Responsibilities and that same day, it mailed Claimant a notice confirming the discussion and subsequently placed the supporting documentation into his disciplinary record which according to the Organization could be used in subsequent discipline matters even though they were not proven. The Organization also responded to the Carrier's procedural argument that stated that if this was a disciplinary matter it should have been directly appealed to the highest level as discipline is handled on a one step basis. It concluded by requesting that the Claim be sustained as presented.

It is the Carrier's position that Claimant was not disciplined, but instead was coached and counseled for engaging in potentially unsafe behavior. According to it, there was no discipline level initiated against the Claimant, and Claimant's record is clear of any disciplinary event and indicates a starting level of zero, additionally, there is a clear notation in his record of a "formal coaching in *lieu*". It argued that the formal coaching was in lieu of discipline, therefore, it was not required to hold a Hearing in accordance with Rule 21 of the Agreement. The Carrier closed by asking that the claim remain denied.

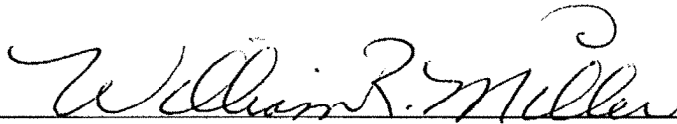
The Board has thoroughly reviewed the facts of the case. It is generally well accepted by arbitral precedence that the Carrier may issue and maintain a written record of a coaching/counseling session to help an employee in improving their behavior with the caveat that it should not be used for the purpose of preferring charges nor should it be considered as part of an employee's disciplinary record (See Third Division Award No. 32927 and P.L.B. No. 7104, Award No. 14). In the latter of the aforementioned Awards it was stated in pertinent part the following:

"...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.

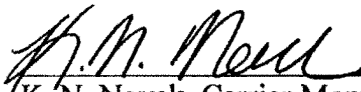
The Board is in agreement with the rationale and logic set forth above. Review of the Coaching Session Form reveals that it is a recounting of the November 7, 2010, event. The letter does not make a definitive conclusion of guilt nor does it assert that it will be used against the Claimant in the future. Therefore, the Board finds and holds that the Claimant's meeting with the Carrier on November 8, 2010, was a coaching/counseling session that was non-disciplinary in nature and cannot be used against Claimant in the future and because of that the Organization's request for a formal Investigation remains denied.

AWARD

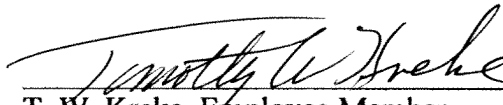
Claim denied.



William R. Miller, Chairman



K. N. Novak, Carrier Member



T. W. Kreke, Employee Member

Award Date: 4-5-2012