

PUBLIC LAW BOARD NO. 7660
CASE NO. 5

BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYES

PARTIES

TO DISPUTE:

and

UNION PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

1. The discipline [letter of reprimand (Level 1-2 Coaching)] imposed on Mr. G. Purkey by letter dated June 27, 2011 was without just and sufficient cause, unwarranted and in violation of the Agreement (System File D-124U-207/1580535).
2. As a consequence of the violation referred to in Part 1 above, the Carrier must remove this discipline from Mr. Purkey’s record and compensate him for all losses, including wages, benefits, seniority rights and any other losses suffered as a result of the Carrier’s improper discipline.”

FINDINGS:

Upon the whole record, after hearing, this Board finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted under Public Law 89-456 and has jurisdiction of the parties and the subject matter.

Claimant admits participating in a coaching event with Supervisor Bates concerning his failure to properly secure a web grinder on June 27, 2011. During a one-on-one discussion with another supervisor on November 7, 2012 Claimant was given a

copy of his personal record and saw that the June 27, 2011 incident was noted as a Level 1-2 Coaching Discipline Event on his Discipline History. Claimant submitted a signed statement indicating that before this time he was under the impression that the June 27, 2011 incident was an informal coaching session and that he was never told otherwise or given a copy of anything to sign. An unsigned email from Supervisor Bates states that it was made clear to Claimant that the event was a formal coaching session. It appears from the record that no written Level 1 and 2 Coaching Session Form was completed concerning this event. The instant claim was filed on November 13, 2012 protesting the issuance of that discipline without due process.

The appropriate sections of Carrier's UPGRADE Discipline Policy appear below:

DISCIPLINE ALTERNATIVES

Conferencing, counseling, coaching and education are effective tools for rules compliance. Informal 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.

INFORMAL COACHING

Employees may be provided informal coaching without being formally charged with a rule violation. The intent of informal coaching is to assist an employee in changing behaviors that are not in compliance with company rules and/or policies. Informal coaching is not documented in the employee's electronic discipline record.

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.

Carrier initially contends that this claim is time barred under the 60 day time limit for initiating claims contained in Rule 49(a)(1), as it was not filed until over 15 months after "the date of occurrence on which the claim ... is based," and must be dismissed

without reaching the merits, citing Third Division Awards 38646 and 39705. With respect to the merits, Carrier argues that it has been consistently held that coaching and counseling sessions are not discipline under its UPGRADE policy, and that although it was documented in Claimant's record, his discipline level remained at zero (0), and the provisions for a hearing set forth in Rule 48 do not apply, relying on Public Law Board 6302, Award 199; Public Law Board 5959, Award 90; Public Law Board 7341, Award 2; Public Law Board 7660, Award 3. Carrier asserts that, since the Organization has failed to sustain its burden of proving that discipline was issued without due process in violation of the Agreement in this case, the claim must be denied.

The Organization argues that the claim was timely filed from the date when Claimant first learned that a formal coaching session was included in his discipline record - November 7, 2012 - which is the appropriate commencement of the Rule 49 filing period, and is not procedurally barred, citing Third Division Awards 25919, 19225, 22310. With respect to the merits, the Organization contends that the Level 1-2 formal counseling session is in Claimant's record under his discipline history, has been assessed a level which is consistent with the issuance of discipline under Carrier's UPGRADE policy, and can be relied upon to progress discipline by its very terms, thereby constituting discipline which would fall under the due process procedures of Rule 48, relying on Public Law Board 6149, Awards 6 and 7. Since Claimant was never given the opportunity to protest or disagree with the subject matter of that coaching session, and was denied the due process right to a hearing prior to the issuance of discipline, the Organization maintains that the claim should be sustained and the discipline entry removed from Claimant's record.

Initially the Board notes that, although over 15 months passed between the time of the formal counseling session on June 27, 2011 and the initiating of the claim on November 13, 2012, we are unable to find that the matter is procedurally barred from

proceeding under the time limits of Rule 49(a) in this case. In light of Claimant's written statement denying knowledge that the June 27, 2011 coaching session was formal and would be placed in his personal record, and in the absence of any evidence that the Level 1 and 2 Coaching Session Form (20064) was utilized in this case, as is required under the UPGRADE policy (assuring employee notice by way of his signature and that of the manager), the Board is unable to conclude that the unsigned email from the supervisor indicating that "it was made clear" to Claimant that it was a formal coaching session is sufficient to adequately rebut Claimant's contention that he had no knowledge of the incident giving rise to his claim until November 7, 2012. See, Third Division Awards 39935, 40871. Under these circumstances, we do not hold that the claim is untimely. See, e.g. Third Division Award 25919.

On the merits, a careful review of the record convinces the Board that the Organization has failed to meet its burden of proving a violation of Rule 48 in this case. This claim asserts that Claimant was denied due process by not being provided an opportunity to respond to the underlying charge. There is no evidence that Claimant or the Organization asked for an unjust treatment hearing in this case when it discovered the entry of the Level 1-2 coaching session in Claimant's record, as is had in Public Law Board 6302, Award 199 or Public Law Board 7660, Case 3. Both of those cases, as well as Public Law Board 7341, Case 2, held that the issuance of a Level 1-2 coaching/conferencing session under Carrier's UPGRADE policy is not the issuance of discipline, but is an alternative to discipline, as is noted on the policy itself. Public Law Board 6149, Awards 6 & 7 deal with the issue of a Letter of Counsel, not a formal counseling session, and base its findings on the fact that there is no specific provision for such a letter within the UPGRADE policy. Regardless of how and where the counseling session involved in this case is noted on Claimant's record, it did not progress him beyond a Level 0, and cannot be relied upon by Carrier to advance him up the progressive discipline ladder.

Since no discipline was issued to Claimant on June 27, 2011, he was not denied due process by his supervisor's failure to follow the procedures set forth in Rule 48.

AWARD:

The claim is denied.

Margo R. Newman

Margo R. Newman
Neutral Chairperson

K. N. Novak

K. N. Novak
Carrier Member

Andrew Mulford

Andrew Mulford
Employee Member

Dated: 10/3/14

Dated: 10/3/14