

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD  
FIRST DIVISION**

Award No. 25007

Docket No. 44716

99-1-98-1-U-2011

The First Division consisted of the regular members and in addition Referee Barry E. Simon when award was rendered.

**PARTIES TO DISPUTE:** ( (Brotherhood of Locomotive Engineers  
(Union Pacific Railroad Company (former  
( Chicago & North Western)

**STATEMENT OF CLAIM:**

“The Brotherhood of Locomotive Engineers requests the Division to order the removal of a Letter of Counsel dated December 8, 1997 and addressed to Engineer G. K. Long from claimant’s personal record.

Claim premised upon BLE/UP System Discipline Agreement, attached as Employee’s Exhibit A.”

**FINDINGS:**

The First 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.

On December 8, 1997, W. B. Rowe, Manager Operating Practices, Commuter Operations, issued the following letter to Claimant:

On December 2, 1997, your engine was inspected at Harding Avenue to determine if you were in compliance with Transportation Bulletin No. 102, dated September 30, 1997. Transportation Bulletin No. 102, a copy of which is attached, requires that the train communication circuit breaker be turned off prior to coupling or uncoupling the engine from the train. When your engine was inspected en route from uncoupling your train at California Avenue Coach Yard, the train communication circuit breaker was found to be in the ON position.

Everyone's cooperation is required to properly maintain our equipment to improve the service reliability of the PA System. Your compliance with Transportation Bulletin No. 102 is needed.

The letter, which Carrier characterizes as a "Letter of Counsel," indicated that a copy was being placed in Claimant's personal file.

The Organization asserts the Carrier's UPGRADE Discipline System does not provide for Letters of Counsel as a means of documenting discipline. Because this letter was placed in Claimant's personal file, and because it is a method of documenting discipline problems and modifying behavior, the Organization argues it must be consistent with the stated UPGRADE policy. As discipline, the Organization concludes the above quoted letter cannot be issued without Claimant first being given a fair and impartial Investigation, in accordance with the BLE-UP System Discipline Agreement, Section 2, General.

The Carrier denies that discipline was rendered in this case. It says Mr. Rowe handled the matter with Claimant "on the ground," informing him as to what was expected of engineers concerning the Circuit Breaker Switch, and confirmed his discussion in the letter. The Carrier argues it is privileged to issue Letters of Counsel without resorting to the discipline process. It says it continually communicates with its employees, as an exercise of its managerial prerogative, on matters of safety, work practices, operating rules and regulations, job performance, etc. These communications, says the Carrier, may be oral or written, and are not part of the discipline chain, nor do they become a part of the employee's discipline record.

Many Awards have been rendered in this industry addressing the question of whether memoranda of this nature constitute discipline, thereby requiring adherence

to the Agreement provisions requiring an investigation prior to its issuance. The general principle followed in most of these Awards is that the letter must not indicate that the employee is guilty of misconduct that would practically assure that he would be considered a second offender if brought up on charges for a similar offense in the future.

Ideally, a letter of counseling would follow a meeting between the employee and the supervisor at which the employee's conduct is discussed in detail, as well as suggestions for improvement. The counseling letter would then confirm that such a conference took place to discuss the employee's performance in a particular area. The letter would go on to describe the conduct or performance expected from the employee in the future. It might cite rules and regulations that govern the employee's conduct. It should not, however, indicate that the employee was in violation of Carrier rules or regulations. At that point, the letter would become disciplinary in nature.

The Organization has cited Award No. 650 of Public Law Board No. 5383, between these parties. That Award stated:

"A case similar to the instant dispute was decided on this Carrier recently. In its Award No. 6, Public Law Board No. 6149 (Cook) concluded that a Letter of Counsel sent to an employee 'can be construed as discipline which was not assessed in accordance with the discipline rule.'"

We agree that such letters "can be construed as discipline," but that does not mean they must be so construed. It is only when they cross the threshold to become accusatory that we will find them to be disciplinary in nature, thereby requiring an investigation prior to issuance. When they have not crossed that threshold, they will be considered legitimate Letters of Counsel. The parties are reminded, however, that a Letter of Counsel must not be considered as evidence that the employee has engaged in prohibited conduct. At most, it merely serves as evidence that the employee has been made aware of the conduct expected by the Carrier.

It is not necessary that the letter specifically refer to a rule as having been violated for it to be considered discipline. If the employee's conduct is described in such a way that it is obvious that it was in violation of Carrier's rules, it will be considered discipline. For instance, if the Carrier mentions that the employee was absent from work on a specific date, such a comment would be the objective reporting of a fact that,

in and of itself, might not subject the employee to discipline. If, however, the letter went on to say that the employee did not obtain authority for his absence, it would effectively accuse the employee of a rule violation, although no specific rule was cited.

The Board, after reviewing the particular letter in this case, concludes it crossed that threshold and became disciplinary. The letter begins with the statement that Claimant's engine was inspected to determine if he was in compliance with Transportation Bulletin No. 102. It then explains that Transportation Bulletin No. 102 requires the train communication circuit breaker to be turned off. Finally, it states the circuit breaker on Claimant's engine was in the on position. While it does not specifically state as much, the only logical conclusion from the letter is that the Carrier had determined that Claimant was not in compliance with the Bulletin. The letter, then, is accusatory in nature, making it a disciplinary action, because it was issued without first affording Claimant an investigation pursuant to Section 2 the BLE-UP System Discipline Agreement.

#### AWARD

Claim sustained.

#### 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 First Division

Dated at Chicago, Illinois, this 2nd day of June 1999.