

**NATIONAL MEDIATION BOARD**

**PUBLIC LAW BOARD NO. 6302**

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES )  
and ) Case No. 144  
UNION PACIFIC RAILROAD COMPANY ) Award No. 140  
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Martin H. Malin, Chairman & Neutral Member  
T. W. Kreke, Employee Member  
D. A. Ring, Carrier Member

Hearing Date: June 18, 2008

STATEMENT OF CLAIM:

- (1) The dismissal of Truck Driver R. J. Ellson for alleged violation of Rule 1.6 Parts 1, 2, 3 and 4 (Conduct), Rule 70.3 (Job Briefing), SSI-Item 17 (Job Briefing), Rule 74.12 (Railroad Grade Crossing) and Rule 70.1 (Safety Responsibility) in connection with: while employed as a Truck Driver, at Las Vegas, Nevada, near Milepost 321.3, at approximately 7:30 a.m., on April 19, 2007, it is alleged that while driving your personal vehicle unauthorized at Arden Yard, you entered local train red zone at occupied crossing and your personal vehicle was struck by the train. In addition, you allegedly willfully disregarded specific instructions from your manager by driving your personal vehicle. (System File C-0748U-152/1477294).
- (2) As a consequence of the violation outlined in Part (1) above, we request that Mr. Ellson be immediately reinstated to service with the Union Pacific Railroad Company with all seniority, vacation and Agreement rights unimpaired. Furthermore, Claimant must be compensated for all time lost from the date of his Carrier forced removal from service until he is returned to service and the violation of our Collective Bargaining Agreement ceases. This compensation is to include all straight time and overtime hours Claimant would have worked and been compensated for absent the violation of our Collective Bargaining Agreement.

FINDINGS:

Public Law Board No. 6302 upon the whole record and all of 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.

On April 23, 2007, Carrier notified Claimant to report for an investigation on May 3, 2007. The notice charged that Claimant, while driving his personal vehicle unauthorized, entered a local train red zone in Arden Yard and was struck by a train. The notice alleged violations of Rules 1.6(1), (2), (3), and (4), 70.3, 74.12, and 70.1 and SSI-Item 17. The hearing was held as scheduled. On May 22, 2007, Carrier notified Claimant that he had been found guilty of the charges and dismissed from service.

The record reflects that on April 19, 2007, Claimant was a Truck Driver assigned to assist a contractor's crew that was cleaning out material between the tracks. Claimant testified that he had a job briefing with the contractor's pump foreman and told her he would check the road next to the lead to ensure that her large vacuum truck could make it down the road to the lead. He drove his personal vehicle toward the west end of the yard, crossed over the east leg of the wye and approached the west leg of the wye. At that point, he observed a train occupying the crossing. Claimant testified that he stopped, honked his horn twice, saw no crew members in the train and proceeded into the crossing. The train began moving and struck Claimant's vehicle.

We consider each of the rules that Claimant was found to have violated. Initially, we note that there is absolutely no evidence in the record that Claimant failed to conduct a proper job briefing with anyone. Indeed, there is no testimony from any witness, including the Manager Track Maintenance, that Claimant should have conducted a job briefing with anyone and failed to do so. Accordingly, we must find that Carrier failed to prove the alleged violations of Rule 70.3 and SSI-Item 17 by substantial evidence. We further observe that there is no evidence of any dishonesty on Claimant's part. Here too, we see no testimony to any effect that Claimant was dishonest in any way. Therefore, we must find that Carrier failed to prove the alleged violation of Rule 1.6(4) by substantial evidence.

The MTM testified that he did not authorize Claimant to drive his personal vehicle. Instead, Claimant was to ride with the contractor. The MTM further testified that he had not authorized Claimant to use his personal vehicle in the past. He acknowledged that, to his knowledge, there was no Carrier policy that would have prohibited an employee from using his personal vehicle. It is clear that Claimant used his personal vehicle without authorization. However, because the MTM's testimony is not sufficiently specific, it is not clear whether Claimant was given a direct order not to use his personal vehicle, which would support a finding of insubordination, or whether Claimant was guilty of the less serious violation of failing to comply with instructions.

The record is clear, however, that Claimant drove his vehicle into the red zone, observed the train occupying the crossing and failed to verify that there would be no movement on the track prior to crossing. Although Claimant testified that he honked his horn, the Engineer testified that he heard no horn and, in any event, honking his horn would not substitute for verifying that there would be no movement of the train prior to crossing the track. We conclude

that Carrier proved the alleged violation of Rule 74.12 by substantial evidence. The alleged violations of Rules 1.6(1) and (2) and Rule 70.1 are derivative of the violation of Rule 74.12, and accordingly were also established by substantial evidence.

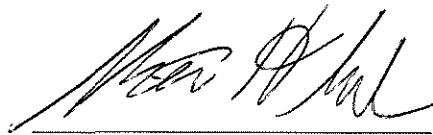
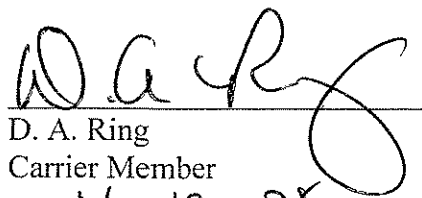
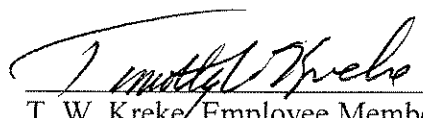
We turn to the penalty assessed. Our role is not to decide whether we would have imposed the same penalty. Rather, we may only disturb the penalty if we find that it is arbitrary, capricious or excessive. In the instant case, we have concluded that the penalty of dismissal was excessive. We base this conclusion on the following. At the time of the incident, Claimant had almost 27 years of service and there is no record of any prior discipline. The penalty of dismissal was assessed on a finding of numerous rule violations, some of which were not established at all and one of which, the alleged insubordination, is unclear and may only have been a failure to comply with instructions. Furthermore, although Claimant was clearly culpable, it also appears that the Engineer never sounded a horn or bell prior to initiating the movement and this too may have contributed to the collision. Considering all of the surrounding circumstances, we award that Carrier reinstate Claimant to service with seniority unimpaired but without compensation for time out of service.

### AWARD

Claim sustained in accordance with the Findings.

### ORDER

The Board having determined that an award favorable to Claimant be issued, Carrier is ordered to implement the award within thirty days from the date two members affix their signatures hereto

  
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Martin H. Malin, Chairman  
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D. A. Ring  
Carrier Member  
11-12-08  
\_\_\_\_\_  
T. W. Kreke, Employee Member  
Employee Member NOV. 12, 2008

Dated at Chicago, Illinois, October 30, 2008