

**NATIONAL MEDIATION BOARD**

**PUBLIC LAW BOARD NO. 7258**

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES	)	
	)	Case No. 9
and	)	
	)	Award No. 9
UNION PACIFIC RAILROAD COMPANY	)	
<hr/>		

Richard K. Hanft, Chairman & Neutral Member  
T. W. Kreke, Employee Member  
D. A. Ring, Carrier Member

Hearing Date: November 12, 2008

STATEMENT OF THE CLAIM:

1. The thirty (30) day suspension imposed upon Machine Operator Alfonso I. Partida for violation of GCOR Rules 42.4.2 (Using Track Time and Authority) and 70.3 (Job Briefing) in connection with failing to have a complete job briefing and failing to secure track and time authorization on May 11, 2007 is unjust, unwarranted, based on unproven charges and in violation of the Agreement (Carrier's File 1485319 SPW).
2. As a consequence of Part 1 above, the Organization requests that Mr. Partida's record be expunged of any and all reference to the Level 4 and that his personal record reflect that he has been exonerated of all charges. The Organization further requests that Mr. Partida be reimbursed for all loss of wages, straight time and overtime, for the period of time that he has been instructed to observe thirty (30) days off.

FINDINGS:

Public Law Board No. 7258 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 May 16, 2007 Claimant was notified to report for an investigation and hearing concerning allegations that he failed to have a complete job briefing in violation of General Code of Operating Rule No. 70.3 and failed to secure main track authorization at CPAL 503 in violation of GCOR 42.4.2. Following a mutually agreed postponement, an investigation was conducted on June 5. On June 27 a Level 4, thirty-day suspension was imposed on Claimant. The Organization presented a Claim on Claimant's behalf on August 20 that was denied on October 12, 2007.

Carrier contends that it presented substantial evidence in support of its finding that Claimant violated GCOR Rules 42.4.2 and 70.3 during the investigation on the property and there were no procedural errors during the handling of the claim on the property. Moreover, Carrier asserts, the seriousness of Claimant's offenses fully supports the level of discipline imposed. Hence, the Carrier contends that the instant claim should be dismissed in its entirety.

The Organization first contends in regard to the allegation that Claimant failed to have a complete job briefing that the Carrier's sole witness, who was not present when the job briefing took place, can only speculate as to how complete the job briefing was and that it is a well-established principle that the Carrier may not rely on mere speculation, assumption or conjecture as a basis upon which to impose discipline. Moreover, the Organization argues that it presented two witnesses with direct knowledge of the job briefing who corroborated the Claimant's testimony that a complete job briefing was held.

The Organization next, and in regard to the alleged violation of track and time authorization, refers to the rule that was allegedly violated and points out that Rule 42.4 unambiguously states that 'In CTC territory, track cars and machines may occupy a main track or controlled siding within the specified limits and time periods *verbally authorized by the train dispatcher or control operator...*' (*Emphasis added*) and argues that the record supports the fact that Claimant's foreman had received verbal authorization from the train dispatcher and that Claimant was merely acting upon information provided by the dispatcher to his foreman and cannot be found at fault for doing so.

The record reflects that on May 11, 2007 Claimant was part of a crew that was in the process of moving a Tamper Machine and a Ballast Regulator from Marne to the City of Industry Yard to work on a recent derailment. Claimant was unfamiliar with the territory. The Organization contends that the record supports the fact and it was not disputed that the crew conducted the move with proper 'track and time' authorization from milepost 506 to milepost 504.

Directly after the move to milepost 504, the record reflects, Claimant and another machine operator were called by the crew's foreman to the surfacing crew's truck where the foreman was sitting to receive further instruction. Record testimony indicates that a conversation was had between the dispatcher and the foreman via a cell phone with the speaker activated. The Claimant related that the dispatcher told the foreman that they needed no authority from him to make their next move into the yard and that they should contact the yard master.

The record evidence reflects that the foreman did contact the Crest Conductor who informed him that he would run the machines in through track 13 or 14 and that he, the Crest Conductor, would direct the crew through the yard as they were unfamiliar with that yard's layout.

The Claimant's testimony as well as that of the corroborating witnesses indicates that the communication between the foreman and the dispatcher and between the foreman and the Crest Conductor took place in the truck with all three crewmen present over a cell phone with the

speaker activated.

Claimant relates that upon completion of the job briefing, the crew returned to their equipment and began making their advancement toward the City of Industry Yard. Claimant stated that he noticed one of the upcoming switches was lined up against him and he so informed his foreman who pulled up to the switch, got out of his truck and observed the switch, lined it properly for their usage and signaled Claimant forward. As Claimant was moving forward, he related, he received a cell phone call from the other equipment operator behind him on the ballast regulator informing him that something was wrong. At that time, Claimant testified, he reversed direction and backed up to where he started from. At that point, the foreman had another conversation with the dispatcher who told him that it was assumed that the crew was on the tail track when in reality they were on the siding.

The Charging Officer in this matter, who was also the Carrier's sole witness, testified that on the day of the incident that he had not asked Claimant if the crew had a job briefing but did testify that Claimant's foreman indicated to him that the crew had a briefing. The charging Officer also testified that he had not spoken to either the dispatcher or the Crest Conductor at the time that he was looking into the incident.

We find that the Carrier failed to carry its burden of proving the guilt of the Claimant on either charge by substantial evidence. It is clear from the testimony of the Claimant and two corroborating witnesses that after making the move to milepost 504, Claimant and the other machine operator were summoned to the crew foreman's truck where a thorough job briefing took place with the full crew hearing the conversation with the dispatcher, as well as a second conversation with the Crest Conductor. It is undisputed that the crew foreman conducted a pre-task assignment of activities to take place and that there was a confirmation of understanding by all participants in full compliance with Rule 70.3.

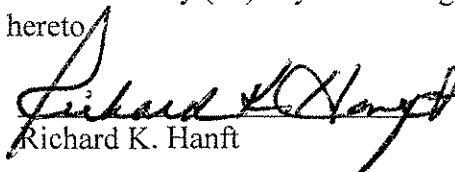
Moreover, in regard to the allegations that Claimant violated Rule 42.4.2, we find that the machine operator was merely following instructions given him by his foreman and is not culpable for the misdirection of the foreman based on misinformation from the dispatcher.

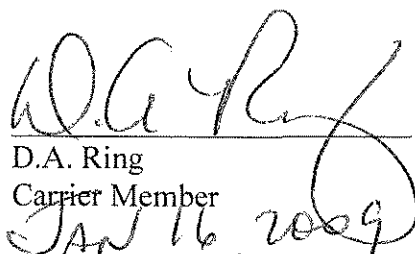
## **AWARD**

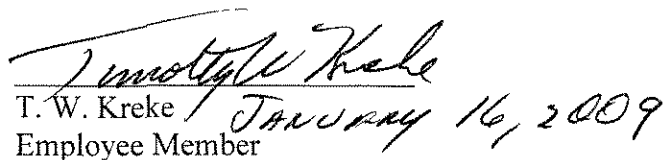
Claim Sustained in accordance with the findings.

**ORDER**

The Board, having determined that an award favorable to the Claimant be made, hereby orders the Carrier to make the award effective within thirty (30) days following the date two members of the Board affix their signatures hereto

  
Richard K. Hanft

  
D.A. Ring  
Carrier Member  
Jan 16, 2009

  
T. W. Kreke / January 16, 2009  
Employee Member

Dated at Chicago, Illinois, December 8, 2008