

**NATIONAL MEDIATION BOARD**

**PUBLIC LAW BOARD NO. 7258**

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES	)	
	)	Case No. 18
and	)	
	)	Award No. 18
UNION PACIFIC RAILROAD COMPANY	)	
	)	

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

Hearing Date: May 1, 2009

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

1. The thirty (30) day suspension imposed upon Crane Operator P. Munoz, Work Equipment Helper D. Perez, and Bridgeman B. Brown for violation of GCOR Rule 78.7 (Boom Near Power Lines) in connection with a July 24, 2007 incident is based on unproven charges, unjust, unwarranted, and in violation of the Agreement (Carrier's File 1493527 SPW).
2. As a consequence of Part 1 above, we request that the Level 4 be expunged from Claimants Munoz, Perez and Brown's personal record and that they be compensated at their respective rate for their assigned positions, all wages and benefits lost for each serving a thirty (30) day suspension including reimbursement for their attendance at the formal investigation and all expenses related to travel, meals and lodging."

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.

The record reveals that Claimant Munoz, at the time of this incident was assigned as an diesel electric crane pal ("crane") operator and had about one year's experience operating the machine. Claimant Munoz's began the day July 24, 2007 at Tucumcari Yard with a job briefing. Claimant testified that he was then transported by a track inspector twenty-four (24) miles distant to the location of the crane. The record shows that Claimant then traveled back toward Tucumcari with the crane and one gondola car to a bridge about three- fourths of a mile west of the Tucumcari Yard. Claimant's assigned assistant, Claimant Perez, testified that he was waiting for the crane at the bridge. Claimant Munoz testified that upon reaching the bridge, he disengaged the crane from the gondola car. Both Claimants Munoz and Perez worked the crane

at the bridge lifting and placing parts to the side of the track for welders to work on. Upon completion of the required work at the bridge, Claimants Munoz and Perez re-attached the gondola car and were instructed by the assistant foreman to gather ballast cars about three-quarters of a mile East of the bridge, near the yard, and to separate them. Claimant testified that upon reaching the clearing that he was sent to, he called the assistant foreman and told him that he couldn't get into the clearing because a train crew had set cars on the set out track for him to clear. The assistant foreman, Claimant Munoz related, brought a third employee, Claimant Brown, to assist Claimants Munoz and Perez by pulling switches. Claimant Munoz testified that he had to move three cars in order to get to the ballast cars; moved five ballast cars back and forth out to the siding; and, then moved back in to the set out track. At that point, Claimant Munoz recalled, a dispatcher called the track inspector wanting the track warrant back and Claimants were ordered to get in the clear. At that time, Claimant Munoz related, he had a job briefing with Claimants Perez and Brown, and they agreed that he, Munoz, would bump the remaining cars on to the set out track so he could clear into Track #1 for the night, rather than moving the remaining cars out to the siding.

Claimant Munoz explained that there were 19 cars remaining on the set out track. Claimants were intending to bump or shove those cars 300-400 feet downhill to get them out of the way so the crane could clear for the night. Claimant Munoz explained that Claimant Perez was sent to the far East end of the string of cars to signal when Claimant Munoz should stop shoving the string of cars and Claimant Brown was posted mid-way down the string of cars to relay Perez's signal to Munoz. Claimant Munoz explained that the crane necessarily had to be facing the direction of the shove so that he could see Claimant Brown relaying Claimant Perez's signal to stop. As a result of having to face the shove, the crane's boom was extended over the gondola car at an angle that left the tip of the boom approximately 35 feet in the air. As Claimant Munoz shoved the drag of cars forward, it is undisputed that the tip of the boom impacted with three overhead power lines, severing the wires, causing a power outage and putting the crane out of commission.

All three Claimants were removed from service the day following the occurrence by T. R. Martindale, the Director of Bridge Construction, after an investigation of the incident by R. Chavez, the Manager of Bridge Construction. Claimants were advised to report for investigation and hearing concerning their violation of Rule 78.7 on August 24, 2007. Claimants Perez and Brown were returned to service during the interim and compensated for lost wages suffered. Claimant Munoz was not returned to work until twenty (20) days later and according to the Organization's submission, has not been compensated for lost time.

The August 24, 2007 formal investigation was postponed by mutual consent and subsequently held on September 26, 2007. The General Director of Maintenance of Way rendered a decision dated October 16, 2007 finding that a substantial degree of evidence was adduced at hearing to find Claimants guilty of violation of Rule 78.7 and they were assessed a Level 4, 30-day suspension. That finding was appealed on November 19, 2007 and this claim was filed. The Claim was denied on January 10, 2008 and that denial was appealed on March 4, 2008. That appeal was denied on May 5, 2008 and this dispute was discussed in conference on July 9, 2008.

The Organization initially objects to the fact that the Director of Bridge Maintenance, T. R. Martindale, who was the Carrier Official who removed Claimants from service, was the conducting official at the investigation and hearing. The Organization opines that Mr. Martindale's prior involvement in removing the Claimants from service gave him a biased or pre-judged mental disposition that prevented Claimants from receiving a fair and impartial hearing. In essence, the Organization argues, the cop who issued the ticket was also sitting as the judge.

Turning to the merits of the dispute, the Organization contends that none of the Claimants here charged were guilty of violation of the Rule they were charged with violating because none of the Claimants were operating the crane's boom under or over power lines as the Rule contemplates. Thus, the Organization maintains, that the Carrier failed to prove the charges by substantial evidence and therefore, the discipline assessed to all Claimants here was excessive, capricious, improper, unwarranted and cannot stand.

The Carrier first asserts that the Organization's claim that Claimants' removal from service and associated wage loss has previously been addressed and resolved prior to the Investigation and that Claimants have been compensated accordingly. In regard to Mr. Martindale's conduct while acting as hearing officer, the Carrier avers that the Organization has failed to provide any specific examples of any pre-judgment or bias on the hearing officer's part and argues that the Organization cannot point to any error in the Carrier's handling of this case so egregious as would warrant voiding the discipline imposed. Hence, the Carrier steadfastly maintains that Claimants were all afforded substantial procedural due process

Carrier avers that Claimants' guilt was proven by substantial evidence because it is clear from the record that all three Claimants were responsible for operation of the crane and it is undisputed that the crane severed power lines while under the operation of all three Claimants.

Moreover, the Carrier maintains that safety is a paramount consideration and where, as here, employees fail to take proper precautions, the outcome could be catastrophic if not fatal. Thus, Carrier argues, its imposition of discipline, in light of the violation, was not arbitrary, capricious or an abuse of discretion, but was instead appropriately assessed in accordance with its UPGRADE Policy, which has been consistently upheld as reasonable.

The majority of the Board in this matter finds merit to the Organization's argument that Claimants were not afforded a fair and unbiased hearing. Procedurally, there was no error in Mr. Matindale serving as hearing officer. Mr. Martindale removed Claimants from service based on the findings of an investigation conducted by Mr. Chavez. Moreover, the final decision whether a substantial degree of responsibility was shown was determined by another Carrier officer. However, a careful examination of the record reveals that the hearing officer was more concerned with arguing with witnesses about their answers, cutting off answers that the witnesses were trying to explain and making every attempt to exonerate management from any responsibility in this incident, than in finding facts, thus denying claimants an objective and fair hearing. That, in and of itself, would be sufficient to overturn the discipline imposed, but turning to the merits of the case, the Carrier failed to prove violation of the Rule that the Claimants were charged with.

It is evident from the record that the Claimants were charged with violating the wrong rule. Perhaps, had the Carrier charged Claimant Munoz with failing to maintain proper clearance, that may have been proven. The same cannot be said of Claimants Perez and Brown. Despite the Carrier's assertion that they were acting as ground men, they were merely acting as look-outs.

However, Carrier charged all three Claimants here with improperly operating the boom of the crane above or below power lines. Clearly, no one here charged was operating the boom of the crane. They were instead using the crane as a switch engine, and Claimant Munoz failed, while making a 700 foot push to get clearance for the night, to notice overhead power lines that he had repeatedly requested be marked. Claimants Perez and Brown were hundreds of feet away from the power lines and cannot be reasonably held accountable for Claimant Munoz's failure to see the power lines. Carrier has failed to prove by substantial evidence that Claimants violated the rule that they were charged with.

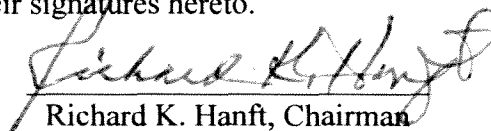
In regard to the requested relief sought, all Claimants will be compensated for all wages and benefits lost. However, this claim seeks, among other relief, that Claimants be compensated for expenses incurred in attending the investigation. There is no support for such relief in the Agreement. It has long been established on this property that, absent an express Agreement provision for payment of expenses incurred in attending an investigation, such payment is not required even where the claim has been sustained. Accordingly, we sustain the claim except for the request that Claimants be reimbursed for expenses incurred in connection with their attendance at the investigation.

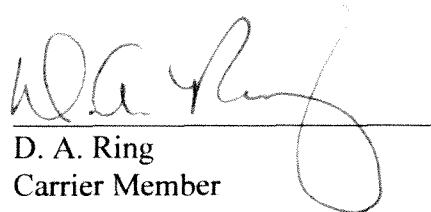
#### **AWARD**

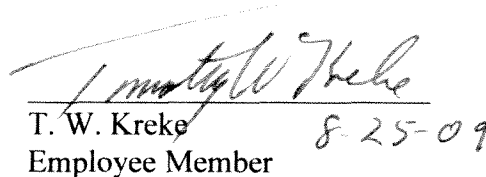
Claim sustained in accordance with the findings.

#### **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, Chairman

  
D. A. Ring  
Carrier Member

  
T. W. Kreke  
Employee Member 8-25-09

Dated at Chicago, Illinois, July 10, 2009

8/25/2009

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