

**NATIONAL MEDIATION BOARD**

**PUBLIC LAW BOARD NO. 7258**

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES	)	
	)	Case No. 21
and	)	
	)	Award No. 21
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 one hundred twenty (120) day suspension imposed upon Machine Operator Rick D. Burger for alleged violation of GCOR Rule 42.2.2 in connection with a minor machine collision on October 24, 2007 is excessive, unduly harsh and an abuse of Carrier discretion (Carrier's File 1496706).
2. As a consequence of Part 1 above, we respectfully request that Mr. Burger now be compensated for all benefits and wage loss suffered by him (straight time and overtime) and that the alleged charge(s) be expunged from his personal record."

**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 October 24, 2007 Claimant drove a ballast regulator into a tamper resulting in a collision with minor machine damage. Claimant was withheld from service starting October 25, 2007 and instructed to appear for an investigation and hearing November 1, 2007 for possible violation of GCOR Rule 42.2.2. By letter dated November 30, 2007 the reviewing officer found a substantial degree of evidence was produced to sustain the charge and assessed a Level 4C 180-day suspension. On December 5, 2007 it was determined that the discipline assessed was incorrect and it was reduced to a 120-day suspension. The Organization filed a claim asserting that the discipline imposed was excessive, unduly harsh and an abuse of Carrier's discretion. The Claim was denied March 3, 2008 and appealed April 21, 2008. That appeal was denied on

June 24, 2008 and the claim was discussed in conference without resolution on February 3, 2009.

On October 24, 2007, Claimant's crew was working at a private crossing. Claimant testified that he moved the ballast regulator to the south side of the crossing and disembarked the machine to help the rest of the crew at the crossing. At the time he got off of his machine, the crew's tamper was located 300-400 feet away from the ballast regulator further south on the same track. After assisting the other members of the crew at the crossing, Claimant mounted the ballast regulator and began traveling south. Unbeknownst to Claimant, the tamper operator had moved the machine North on the track to within 20-25 feet of the ballast regulator. Claimant testified that he looked to the South and saw the tamper, but was already traveling at a speed that prevented him from stopping before hitting the tamper.

Neither the Organization nor the Claimant denies that the accident occurred or that Claimant was partially at fault. Claimant admitted that by the time he saw the tamper, he could not stop the machine in time to avoid the collision. The Organization argues that the tamper operator was partially at fault and admitted to rule violations involving failure to have a job briefing and failing to warn Claimant that he had moved the tamper so close to the regulator. The Organization contends that the tamper operator's admission of partial responsibility mitigates Claimant's responsibility for colliding with the tamper. Hence, the Organization urges this Board to reduce the level of discipline assessed because, given all of the circumstances, the discipline is excessive.

The Carrier contends that Claimant admitted the offense and as such the charge was proven with substantial evidence. Once this Board substantiates that the charge was proven, the Carrier maintains, we lack the authority to overturn the level of discipline assessed unless it can be shown to be arbitrary, capricious or an abuse of Carrier discretion. Here, due to the very serious nature of the infraction, where a fellow employee could have been put into jeopardy of life or limb, the Carrier asserts that the quantum of discipline is indeed commensurate with the offense proven.

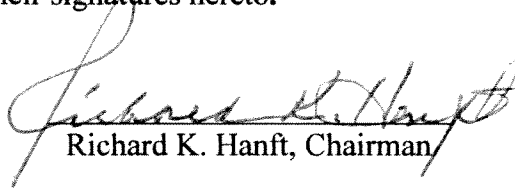
While we are cognizant of the numerous awards that have upheld the reasonableness of the Carrier's Discipline Policy and also that here, the Claimant admitted to the offense, the Board finds that here it is appropriate to mitigate the discipline to a 60-calendar day suspension based on Claimant's overall discipline record. This Claimant has a 37- year career with only one apparent blemish on his record more than a dozen years ago. We also reach this conclusion because four (4) months into the suspension period the Carrier reduced the discipline for a Level 4C violation in its Policy to 60 days rather than 120 days. This Award is unique to the circumstances of this case and is not to be considered citable or to set precedent for other cases.

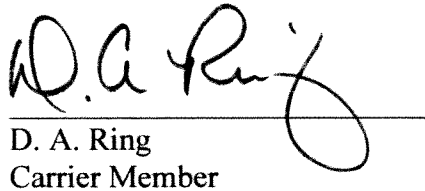
## **AWARD**

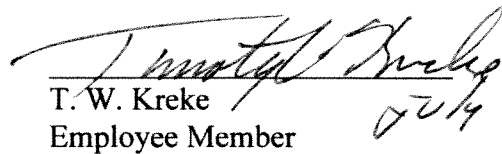
Claim sustained in accordance with the findings.

**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

July 29, 2009

Dated at Chicago, Illinois, June 28, 2009

7-29-09