

**NATIONAL MEDIATION BOARD**

**PUBLIC LAW BOARD NO. 7258**

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES	)	
	)	Case No. 2
and	)	
	)	Award No. 2
UNION PACIFIC RAILROAD COMPANY	)	
	)	

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 Mr. Raul F. Ayala for violation of GCOR Rules 42.2 (Using Track and Time Authority) and 70.3 (Job Briefing) in connection with failing to have a complete job briefing and failing to secure track time and authorization on May 11, 2007 is unjust, unwarranted, based on unproven charges and in violation of the Agreement (Carrier's File 1483219SPW).
2. As a consequence of Part 1 above, the Organization requests that Mr. Ayala'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. Ayala 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 and also failed to secure main track authorization in violation of General Code of Operating Rules Nos. 70.3 and 42.4.2 respectively. Following a mutually agreed postponement, an investigation was conducted on June 5. On June 27 a Level 4, 30- 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 Rules 70.3 and 42.4.2 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, on the other hand, refers to the rules that were 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 had received verbal authorization from the train dispatcher to be where he was at the time he was.

In regard to Claimant's alleged violation of Rule 70.3 (Job Briefing) the Organization argues that the testimony of all three crew members involved in this matter during the investigation clearly supports the fact that all three crew members were in the same truck listening to the Claimant's conversation on a speaker phone with the dispatcher and that all crew members were aware of the work and movement of other group members and equipment as the rule prescribes. Thus, the Organization contends, the allegation that the Claimant violated the rule is without merit and holds no validity.

The record reflects that on May 11, 2007 Claimant was directing the move of a Tamper Machine and a Ballast Regulator from Marne to the City of Industry Yard to work on a recent derailment. Claimant and his crew were unfamiliar with the territory. The Organization contends that the record supports the fact, and it was not disputed, that Claimant 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, the two machine operators assisting Claimant with the move were called by Claimant to the surfacing crew's truck that Claimant was in to receive further instruction. Record testimony indicates that Claimant contacted the dispatcher via a cell phone with the speaker activated and received permission to take the power off the switch at milepost 504 in order to leave the Marne siding. The record shows that the dispatcher assumed that the crew was on a tail track, when in fact, they were on a siding. Thereafter, recordings entered into the record show, Claimant asked the dispatcher if further permission was required to enter the Yard and was informed by the dispatcher that the track was out of service from milepost 504 to milepost 501, that no further permission was required from the dispatcher and that Claimant should contact the Crest Conductor for movements into the yard.

The record evidence reflects that Claimant 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 testimony of one of the eyewitnesses indicates that at that point the two machine operators mounted their machines and began to proceed to the crossovers. Claimant was ahead of

the two machines in his truck leading the way. One of the witnesses testified that as the crew proceeded forward that he noticed that one of the switches was "against them," and he so informed the Claimant. The witness testified that at that time, Claimant drove over to the switch, got out of his truck, inspected and then threw the switch and waived the machines forward. The other machine operator was still on the main line and yard channel on his radio and when Claimant threw the switch he heard the dispatcher on that radio channel sound an alarm. That operator called the machine operator that was proceeding under Claimant's direction on his cell phone and informed him that something was wrong. Immediately the operation came to a halt, the machine was backed back into the siding and the switch was reset to the correct configuration. Claimant testified that at that point he called the dispatcher on the phone and explained that he had led him to believe that no additional authority was needed for him to proceed to the yard. Claimant testified that the dispatcher then explained that he was under the assumption that the crew was on the tail track when in fact they were on the siding.

We find that the assignment of guilt in this matter was misguided. Hence, the Carrier has failed to carry its burden to prove by substantial evidence that Claimant violated the rules as charged. While it is true that a serious mistake took place and that all involved should consider themselves lucky that there was not a cataclysmic occurrence that resulted in death, injury or damage to machinery or track structure, as was indicated in the Carrier's response to the claim, we cannot find that Claimant violated the rules as charged or is responsible for the mistake that was made. The record here reflects that an erroneous assumption on the part of the dispatcher contributed significantly to the mistake that was made and that the Claimant was following proper procedure, but was wrongly instructed that he could proceed based on the dispatcher's erroneous assumption of the surfacing crew's exact location when permission was granted.

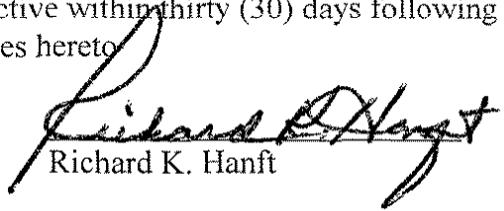
Moreover, it is clear from the testimony of the Claimant and two corroborating witnesses that after making the move to milepost 504, Claimant summoned the two machine operators to his truck where a thorough job briefing took place with the full crew hearing the conversations with both the dispatcher and the Crest Conductor, pre-task assignment of activities to take place and confirmation of understanding by all participants in full compliance with Rule 70.3.

## **AWARD**

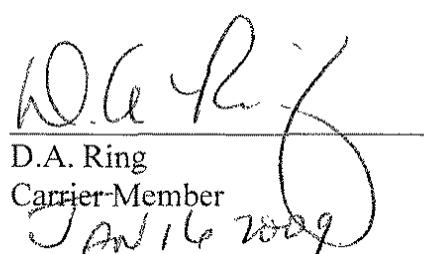
Claim sustained in accordance with the findings.

## ORDER

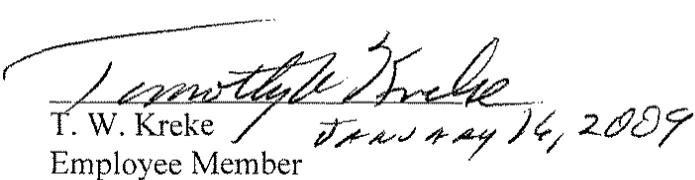
The Board, having determined that an award favorable to the Claimant be made, hereby orders the Carrier to make the award effective within thirty (30) days following the date two members of the Board affix their signatures hereto



Richard K. Hanft



D.A. Ring  
Carrier Member  
Jan 16 2009



T. W. Kreke  
Employee Member  
January 16, 2009

Dated at Chicago, Illinois, December 2, 2008