

**PUBLIC LAW BOARD NO. 5263**

**Case No. 213  
Award No. 213**

**United Transportation Union** )  
 )  
 vs ) **PARTIES TO DISPUTE**  
 )  
**Union Pacific Railroad Company** )

**STATEMENT OF CLAIM**

Claim of Conductor Brian J. McCalley, EID 0405268, for the reinstatement to the services of Union Pacific Railroad Company (former C&NW Railway Company), with vacation and seniority rights unimpaired, the payment of vacation allowance for time wrongfully discharged, and the scheduling of a vacation period consistent with seniority ranking, in addition to the payments of pay (sic) and all health and welfare benefits until reinstate, including reimbursement for any medical payments made while discharged, the payment of all Railroad Retirement taxes based on all lost and realized earnings, and reimbursement for any expenses related to the pursuit of alternative employment, the removal of this discipline from the Claimant's record and that he be compensated for any and all lost time with compounded interest at 1.5 percent monthly, including compensation for time spent attending an investigation held on June 10, 2005, when charged with an alleged responsibility "in connection with your alleged failure to stop your train for a red absolute signal at CPU 296 on the Albert Lea Subdivision at approximately 1706hrs. on June 3, 2005, while you were a crew member on the MITDM-03, ordered at South St. Paul on June 3, 2005 at 1300 hrs".

**FINDINGS**

This Board finds the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended, and that this Board has jurisdiction over the dispute involved herein. The parties to said dispute were given due and proper notice of hearing thereon.

On June 17, 2005 the Carrier dismissed the Claimant from its service. As a result of an investigation held on June 10, 2005 the Carrier found the Claimant violated Operating Rule 6.3 on June 3, 2005. This violation is a Level 4 violation of the Carrier's Behavior Modification Policy. Because the Claimant was already at level 4, this resulted in permanent dismissal.

The facts in this case are that Claimant was employed as a Conductor on the Central Seniority District at South St. Paul, MN. The Claimant was ordered for assignment MITDM-03 on June 3, 2005, at 1300 hours. The Claimant was standing next to the engineer's control stand talking on the engine radio taking a mandatory directive from the Maintenance of Way foreman and the

dispatcher. The engineer was operating the controls of the locomotive. While taking the mandatory directive the Claimant bent over to look out the front window of the engine and saw a red absolute signal. The Claimant immediately placed the train in emergency.

There is no dispute that the train ran a red stop signal. The question is the culpability of the Claimant. At the time of the incident the Claimant was standing at the engineer's console using the radio and writing down orders from the dispatcher and Maintenance of Way foreman. The Carrier's MOP testified that the Claimant was doing his job. The MOP also testified to the following:

- A. Mr. McCalley, as he is a normal - sized individual, it was a conventional unit, if you are standing, in order to see out the front window, you have to crouch a little bit. A normal - sized man cannot look directly out the front window without stooping down a little bit.
- Q. So you're saying that due to the fact there was 1 operating radio on the engineer's side of the locomotive, he was forced to stand to take the directives, and therefore, may not have a good view out the window, out the windshield.
- A. He would've had to make a voluntary intent movement in order to be able to see what was in front of him. Yes.

He further testified as to what the Engineer was doing as follows:

- Q. From the questions you got, was there any - - was the - - was Mr. Bell, as the engineer operating the locomotive, you said, you stated it was moving at the time they were taking the directives. Was Mr. Bell doing anything else besides operating the locomotives?
- A. Yes. Mr. Bell - - there was quite a bit of radio communication going on. Mr. Bell had taken his own track bulletins and was copying down the same thing that Mr. McCalley was copying down. So he was operating the train and copying mandatory directives.
- Q. And is an engineer expected to do both of those at the same time?
- A. Not under normal circumstances, no.

The Engineer took full responsibility for the incident.

The Local Chairman of the Organization appealed the decision to the Superintendent who responded as follows:

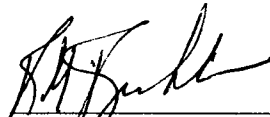
As your letter states, Conductor B. J. McCalley was taking a "mandatory directive" but I ask you to refer to Item 10A, 1.47-C (All Crew Members Responsibilities) of the System Special Instructions. Although Conductor McCalley was not charged with this rule, it does address what Conductor McCalley should have been doing prior to and at the time MITDM-03 passed the STOP signal on June 3, 2005.

Claimant was not charged with nor was the System Special Instructions presented at the hearing.

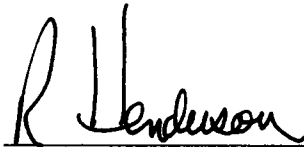
Carrier is obligated to prove the Claimant violated its Rules. It is clear from the record the Carrier did not meet this burden. Accordingly, Claimant will be reinstated with seniority unimpaired and will be paid for all time lost, without any interest.

**AWARD**

Claim sustained. Carrier is ordered to comply with this Award within 30 days from its date.

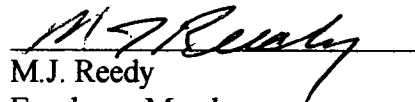


R.G. Richter, Chairman  
Neutral Member



R.A. Henderson  
Carrier Member

DISSENT ATTACHED



M.J. Reedy  
Employee Member

Concurrence attached.

Dated January 22 2007

## **PLB 5263 Award 213 Labor Member Concurrence**

Once more, the carrier must point the finger of blame to shirk responsibility for the misapplication of discipline. The dissent of the carrier member is rife with near-facts and fragments of the record, diverting attention from the substance of the case.

The notice of charges stated that the purpose of the hearing was "...to develop the facts and place individual responsibility, if any..." for the incident. The Claimant was properly performing his duties; the other employee, who was operating the locomotive, was not, and willingly accepted "individual responsibility" for causing the incident. The Claimant initiated the application of the train brakes, and did travel "685 feet" after the emergency application. Left unsaid is that the locomotive stopped "just past" the signal, not 685 feet past the signal. The determination of individual responsibility differs not subtly from the imposition of indiscriminate discipline, a distinction that this carrier is unwilling to make. To proceed with charges against the conductor after the engineer had accepted full responsibility reveals a troubling mind-set that transcends mere bad temper. Such industrial malice is properly overturned:

"When the unfortunate incident occurred, he was in the proper place at the proper time to discharge the other duties of a Switch Foreman. The crew member responsible for the derailment was honest and courageous enough to accept responsibility; the investigation should have ended, there." (PLB 6583, Award No. 14; UTU vs UP; Nash, 2003)

"When the discipline penalty, imposed by the Carrier for alleged rule infractions, is deemed harsh and excessive, this Board has the authority to remedy the onerous results and order Carrier to restore Claimant to active service. The Board is compelled to do so in this case in that justice demands such action." (SBA 235, Award 3230; UTU vs UP; Lynch, 1999)

The carrier member, after citing an award to which the labor members dissented, arrogantly decrees that this award is "erroneous and without precedent". To the contrary, this award is reasoned, rational, and correct; and to be sure, this award shall be cited as valid precedent.

Organization Member

  
Michael J. Reedy  
General Chairman

# UNION PACIFIC RAILROAD COMPANY

Robert A. Henderson  
Assistant Director  
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## PUBLIC LAW BOARD 5263 AWARD 213

### CARRIER'S DISSENT

**In this case the Claimant was working as a conductor. As a conductor he is charged with the safe and efficient operation of his train. He failed to properly perform his duties when he allowed his train to pass a signal displaying a stop indication at CPU 296 on the Albert Lee Subdivision.**

**Claimant had an approach signal at MP 298.5, which required his train to operate at restricted speed prepared to stop short of among others a signal displaying a stop indication. The fact that he may have been distracted by other duties is not mitigating. As the Board is aware numerous tribunals have held that a conductor leaving the cab of an engine to use the toilet is not mitigating. (see PLB 4561, Award 50, Seidenberg) In this case the Claimant was in the cab and was or should have been aware of his location and the approaching signal.**

**The Board held that the Carrier failed to meet its burden of proof in this case. To make its point the Board pointed to the Superintendent's response to the local level appeal. In his response the Superintendent referenced Item 10A, 1.47 C of the Carrier's System Special Instructions (All Crew Members Responsibilities). Though the Superintendent did not state that the Claimant had been charged with or found guilty of violating either Rule 1.47 or the System Special Instructions the Board incorrectly found that the Claimant had not been charged with a violation of the Carrier's System Special Instruction.**

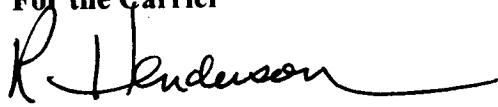
**The Board, looking for an excuse found one in some, debatably ill chosen words by the Superintendent and substituted its judgment for that of the Carrier. In overturning the discipline the Board exceeded its authority. What the Board missed is that the Claimant was charged with and found culpable of passing an absolute signal without authority, traveling 685 feet beyond the point of the emergency application of the brakes. A point to which the Claimant readily admits. The Board simply ignored the Notice of Discipline, which stated in part:**

**"...for violation of the Union Pacific General Code of Operating Rule 6.3 on June 3, 2005, the following discipline has been applied:..."**

**Also ignored is the long standing axiom that an admission against interest is sufficient for the Carrier to meet its burden of proof. (see Second Division Award 2787, BRC vs. UPRR, Ferguson)**

**The Carrier finds the Award to be erroneous and without precedent.**

**For the Carrier**

A handwritten signature in black ink, appearing to read "R. Henderson", with a long horizontal flourish extending to the right.