

**PUBLIC LAW BOARD 6302**

**NMB NO. 175**  
**AWARD NO. 161**

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**PARTIES TO DISPUTE** |

**CARRIER** |

Union Pacific Railroad |

AND |

**ORGANIZATION** |

Brotherhood of Maintenance of Way Employees |  
Division of International Brotherhood of Teamsters |  
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**Carrier's File**  
1510301

**System File**  
J-0848U-265

**STATEMENT OF CLAIM**

1. In violation of Rule 48 of the July 1, 2001 Collective Bargaining Agreement, Carrier assessed System Laborer, Richard C. Nunez , herein Claimant, an eighty (80) hour suspension as a result of imposing a Level 3 discipline measure but administered at a discipline measure of Level 4 to be served between July 9, 2008 and July 16, 2008 for violation of General Code of Operating Rules (GCOR), Rule 1.15 in connection with reporting for duty at North Platte, Nebraska instead of Kearney, Nebraska on May 25, 2008.<sup>1</sup>
2. As a consequence of Carrier's violation as set forth in Point 1 above, the Organization requests that all charges against Claimant be dropped, that the incident that resulted in his suspension be removed from his personnel record and, that he be compensated at the straight time rate including any overtime for all hours he would have worked had he not been suspended.

**STATEMENT OF BACKGROUND**

In May of 2008, Claimant was assigned and working as a Laborer on System Gang No. 9453. In the first half of May, 2008, Claimant's System Gang 9453 and System Gang 9951 had been working together at Kearney, Nebraska. For the second half of May, 2008, which included the incident date here, of May 25<sup>th</sup>, System Gang 9951 was

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<sup>1</sup> The Board takes judicial notice of the fact that subsequent to the imposition of this disciplinary action, effective January 14, 2009 by Decree of the District Court of Lincoln County, Nebraska (Case No. CI08-760), Claimant legally changed his name from Richard Charles Nunez to Richard Charles Hemmerling. However, since Claimant's name change took effect after-the-fact of his being disciplined, for the purpose of this proceeding, the Board reference to Claimant shall be a reference to him when his name was Richard Charles Nunez.

relocated to work at North Platte, Nebraska. Specifically, the scheduled work days for both System Gangs in the second half of May, 2008 were May 24, 25, 26, 27, 28, 29, 30 and 31, but noting that Saturday, May 24<sup>th</sup> was observed as the Memorial Day Holiday and therefore was not a day that was worked by either gang. As both System Gangs 9453 and 9951 are "on-line" gangs, their assembly point to commence work each workday is governed by the provisions of Rule 30, the Designated Assembly Point clause of the Agreement which, as applicable to the circumstances surrounding this case, reads in pertinent part as follows:

**The assembly point for employees headquartered on-line will be the designated work site where the day's work is scheduled to begin. If the assembly point for on-line employees is changed from one workday to another, the Carrier must designate the new assembly point no later than the close of shift on the previous workday. Unless so designated, the assembly point will remain unchanged.**

The Organization asserts that in contravention of the contractual obligation as set forth in the cited provision of Rule 30 above, Track Supervisor Todd Gayman required the members of both gangs which included the Claimant to telephone him prior to the start of the second half of May to be informed of the designated assembly point when work resumed on Sunday, May 25, 2008. The Organization maintains that on Friday, May 23, 2008, Claimant telephoned Supervisor Gayman to resolve an error on his paycheck and, in this same conversation Gayman instructed Claimant he was to report at North Platte, Nebraska on May 25<sup>th</sup> and to work at North Platte for the remainder of that work period which was May 25 through May 31, 2008. When Claimant arrived at North Platte prior to 6:00am, the start time of the shift he discovered he was the only member of Gang 9453 present and, as such, he informed System Gang 9951 Foreman, Mark Cunningham he had been instructed by Supervisor Gayman to work at North Platte and Foreman Cunningham assented as he was short-handed, permitting Claimant to work with System Gang 9951 for the entire day.

The Organization submits that based on the instruction given Claimant by Gayman to continue working at North Platte for the remainder of the work period the last half of May, Claimant reported to work at North Platte the following day, Monday, May 26, 2008. Shortly after the work day commenced on the 26<sup>th</sup>, Claimant received a call and was instructed to return to work on System Gang 9453 which was then located at Gothenburg, Nebraska. The record evidence reflects that when work commenced on Sunday, May 25<sup>th</sup>, Gang 9453 assembled at Kearney, Nebraska and then moved on to the new work location of Gothenburg, Nebraska. Everyone of the members on Gang 9453 reported to work at Kearney, Nebraska on May 25<sup>th</sup>, with the only exception being the Claimant. Upon being instructed to report to Gothenburg, Claimant immediately left North Platte to journey the 99 miles to Gothenburg but while in route, he received a call from Foreman Robert Pierson informing him he would not be permitted to work that day because he had not arrived at Gothenburg prior to the start time of the shift.

As a result of his not reporting to work at the Kearney, Nebraska assembly point on Sunday, May 25, 2008 and not reporting to work at Gothenburg at the start time of his shift on Monday, May 26, 2008, Carrier charged Claimant with having violated Rule 1.15. Rule 1.15 reads in whole as follows:

**1.15: Duty – Reporting or Absence**

**Employees must report for duty at the designated time and place with the necessary equipment to perform their duties. They must spend their time on duty working only for the railroad. Employees must not leave their assignment without proper authority. Continued failure by employees to protect their employment will be cause for dismissal.**

Carrier disputes Claimant's account he was directed by Gayman to report to work at North Platte beginning May 25<sup>th</sup>, based on Gayman's testimony rendered at the investigation hearing held June 23, 2008, wherein Gayman denied that he told Claimant in their conversation of May 23, 2008 he was to report to North Platte, Nebraska rather than to Kearney, Nebraska. In noting that the Organization's main defense is that Claimant was instructed to go to North Platte, it further notes that the Organization also proffers the argument the gangs were working together and that Claimant was either confused or misinformed with regard to reporting to North Platte. Carrier submits these two asserted defenses are contradictory and therefore, Claimant cannot have it both ways; that is, either he was confused on his location, in which case he should have called his supervisor, or he was instructed to report to North Platte, which is denied by Supervisor Gayman.

**FINDINGS**

Public Law Board No. 6302, upon the whole record and all 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.

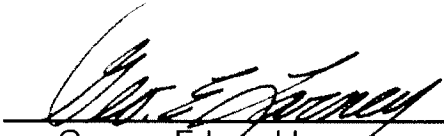
Based on the fact that Claimant's recall of his conversation with Gayman on May 23, 2008 was clearer than Gayman's recall of what was discussed, the Board is inclined to accept Claimant's account he was instructed by Gayman to report to work at North Platte on May 25, 2008, as opposed to reporting to the assembly point at Kearney, Nebraska on that date. Moreover, although he reported to work at North Platte pursuant to a spurious instruction, Claimant was allowed to remain at North Platte that day by consent of the Foreman, Mark Cunningham and, as a result, Claimant did perform work for the full time of the shift. Additionally, the record evidence is devoid of

any probative evidence that Claimant was informed on May 25<sup>th</sup> he had reported to the wrong location as he proceeded to report to North Platte for work the following day before being directed early on in the shift of May 26<sup>th</sup>, that he was to report to Gothenburg, Nebraska, a directive he immediately obeyed notwithstanding this directive was changed while in route and he was advised he would not be allowed to work that day.

Accordingly, based on the foregoing Findings, the Board rules to sustain the subject claim in its entirety.

AWARD

Claim Sustained

  
George Edward Larney  
Neutral Member & Chairman

  
D. A. Ring  
Carrier Member

  
T. W. Kreke  
Employee Member

Chicago, Illinois

Date March 3, 2010