

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD 6302

NMB NO. 167
AWARD NO. 164

PARTIES TO DISPUTE

CARRIER

Union Pacific Railroad

AND

ORGANIZATION

Brotherhood of Maintenance of Way Employees
Division of International Brotherhood of Teamsters

Carrier's File
1501881

System File
J-0848U-256

STATEMENT OF CLAIM

1. The Carrier violated Rule 48 of the Collective Bargaining Agreement effective July 1, 2001 when on March 14, 2008, Claimant, Arc Welder Helper Richard C. Nunez was found to have been in violation of Rule Chief Engineer (C.E.) Instruction Bulletin 136.4.4 (Train Approach Warning) as updated in the C.E. Bulletins of October 16, 2007, in connection with his failure to notify a track welder in time to clear the tracks fifteen (15) seconds before an approaching train and, as a result, a Level 4 thirty (30) day actual suspension that had already been served by Claimant between January 31, 2008 and February 29, 2008 was affirmed.¹

2. As a consequence of the violation set forth in Part 1, the Organization requests that all charges against Claimant be dropped, that any reference of the incident be expunged from his personal record, and that Claimant be compensated for all straight-time and overtime hours for the period of time he was unjustly held from service.

¹ 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. C108-760**), 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 assessed the subject disciplinary actual thirty (30) day suspension, for the purpose of this proceeding, the Board reference to Claimant shall be a reference to him when his name was Richard Charles Nunez.

STATEMENT OF BACKGROUND

On January 29, 2008, Claimant was working as an Arc Welder Helper assisting Arc Welder D.B. Georgius on Track #2 near Mile Post (MP) 291.93 near North Platte, Nebraska. In his position as Helper, Claimant was responsible pursuant to Chief Engineer (C.E.) Bulletin 136.4.4 for performing the lookout duty of notifying Georgius in sufficient time to move to a place of safety prior to the passing of an approaching train. Rule 136.4.4 reads as follows:

A lookout can give a train approach warning in time to allow each roadway worker to occupy a previously arranged place of safety at least 15 seconds before the arrival of the train.

At approximately 10:00am, Claimant tapped Georgius to warn him of an approaching train. According to the Organization's account of the ensuing events, after being warned of the approaching train, Georgius looked up then turned back and continued to weld for a brief moment before removing his welding jig from the frog. While in the process of removing his welding jig from the frog the train approached within approximately three hundred and seventy feet (370 feet) of Georgius' work location. As Georgius cleared the work location and moved to a place of safety, the approaching train came to a stop approximately one hundred and eighty feet (180 feet) away. The Organization submits that at the time this event occurred, Georgius expressed no concern over the proximity of the train vis-à-vis his work location and that after the train cleared the work location Georgius completed work on the frog with Claimant still acting as lookout. Upon completion of the work at Mile Post 291.93, Georgius and Claimant traveled to another work location and completed the same task at that location without incident. The following morning, January 30, 2008, Georgius apprised Manager Track Maintenance (MTM), M. Briley of his belief the incident of the approaching train that had transpired the previous morning was a close call. As a result, a discussion ensued among Claimant, Georgius, Briley, and Manager Track Projects, G. A. Peterson (Gary) regarding the incident after which Claimant was removed from service. Following Claimant's removal from service, Briley and Georgius proceeded to Mile Post 291.93 and measured the distances the train was at both when Georgius maintained he received the warning from Claimant and when he cleared the work location.

By letter dated February 1, 2008, Carrier charged Claimant with a violation of Rule C.E. Bulletin 136.4.4 and was instructed to attend a formal investigation pertaining to the charge which hearing was held on February 25, 2008. Subsequent to the hearing, on March 14, 2008, in determining that Claimant violated Rule C.E. Instruction Bulletin 136.4.4 as charged Carrier found that with the train moving at the speed limit of 40 miles per hour (MPH), Claimant was obligated to give Georgius the warning when the train was at the minimum distance of 880 feet away from the work location. Instead, the evidence adduced at the investigation revealed that Claimant did not give Georgius the

warning notification until the train was approximately 375 feet away from the work location and additionally, that the train stopped 180 feet away from where Georgius was working. According to the testimony proffered by Georgius, upon being given the warning by Claimant, he stepped back and as he did so, the train came to a stop. Georgius asserted he did not occupy his safe location for fifteen (15) seconds as required.

The Organization notes that notwithstanding the fact Claimant was precluded from the re-enactment of the incident performed by Briley and Georgius since the re-enactment took place immediately after Claimant was removed from service, nevertheless, the Organization maintains that based on its review of maps introduced at the investigation coupled with Claimant's testimony, the train was twelve hundred and twenty feet (1220 feet) away, well beyond the minimum distance away of 880 feet when Claimant gave his warning notification to Georgius. At this distance, it would take the approaching train traveling at 40mph (at this speed covering 58.6 feet per second), twenty (20) seconds to arrive at Georgius' work location, thus complying with the fifteen (15) seconds required under Rule 136.4.4 to allow Georgius to occupy a previously arranged place of safety. The Organization argues that Claimant was disciplined solely because Georgius, Carrier's only witness assumed that he was not given sufficient advanced warning of the approaching train but that the record evidence does not support this assumption. As a result, the Organization submits Carrier failed in its burden to prove the charge that Claimant violated Rule 136.4.4. Accordingly, the Organization asserts Claimant is entitled to the full remedy requested.

Carrier states that the role of an arbitral panel, here the Board, is to verify that substantial evidence was adduced at the investigative hearing to support a finding of guilt relative to the charge or charges leveled against the subject employee, here the Claimant. Once the Board ascertains the presence of substantial evidence adduced at the investigative hearing, it lacks authority to overturn the level of discipline assessed, notwithstanding that the discipline imposed may seem harsh unless it can be sufficiently demonstrated to be arbitrary, capricious, discriminatory, or an abuse of Carrier discretion. In the case at bar, the record evidence adduced at the investigative hearing which met the clear and convincing standard of proof, proved that Claimant committed a serious violation of safety in not complying with the Train Approach Warning rule, Rule 136.4.4 and that the quantum of discipline assessed of a thirty (30) day actual suspension was not arbitrary, capricious, discriminatory, or an abuse of Carrier discretion but rather was commensurate with the commission by Claimant of having violated Rule 136.4.4.

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FINDINGS

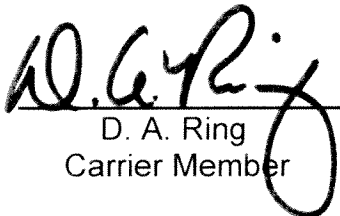
Public Law Board No. 6302, upon the whole record and all the evidence, finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and that the Board has jurisdiction over the dispute herein; and, that the parties to the dispute were given due notice of the hearing thereon and did participate therein.

The Board concurs in all aspects of the argument advanced by Carrier in support of its action of imposing the discipline of a thirty (30) day actual suspension against Claimant for commission of having violated Rule 136.4.4, a very serious offense of safety requirements. We find Carrier met its burden of proof in establishing by substantial evidence that Claimant, in fact, failed to give Welder Georgius the required advanced warning of the approaching train in order to provide Georgius sufficient time to move to a place of safety for fifteen (15) seconds, an allowance of time for the train to clear his work location. Accordingly, we find to deny the subject claim in its entirety.

AWARD

Claim Denied


George Edward Larney
Neutral Member & Chairman


D. A. Ring
Carrier Member


T. W. Kreke
Employee Member

Chicago, Illinois

Date: April 26, 2010