

**NATIONAL MEDIATION BOARD**

**PUBLIC LAW BOARD NO. 6302**

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES**

and

**UNION PACIFIC RAILROAD COMPANY**

)  
) Case No. 83  
)  
) Award No. 84  
)

Martin H. Malin, Chairman & Neutral Member  
D. D. Bartholomay, Employee Member  
D. A. Ring, Carrier Member

Hearing Date: September 15, 2005

**STATEMENT OF CLAIM:**

1. The discipline, UPGRADE Level 3, imposed on Mr. Jamie Hernandez for his alleged violation of Rules 1, 48, 48(a) and 48(c) for failing to give a stop signal to a machine following when he brought his machine to a stop was without just and sufficient cause, in violation of the Agreement and excessive and undue punishment.
2. Mr. Jamie Hernandez shall now be compensated for wage loss suffered and the discipline shall be removed from his personal record.

**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.

On August 10, 2004, Carrier notified Claimant to report for an investigation on August 16, 2004. The notice charged Claimant with allegedly violating Rules 42.9, 1.1.2, 70.1 and 70.4 by failing to give a stop signal to the machine following the machine he was operating on July 20, 2004, at 3:15 p.m. at MP 409.40 on the Black Butte Subdivision. Following two postponements, the hearing was held on September 14, 2004. On October 3, 2004, Carrier notified Claimant that he had been found guilty of the charges and assessed discipline at UPGRADE Level 3, which amounted to a five-day suspension.

The Organization contends that Carrier violated Rule 48 by failing to provide Claimant

with notice of the precise charges against him. The Organization observes that the notice alleged that the violations occurred on July 20, 2004, but all of the evidence focused on an incident that occurred on July 19, 2004. It is apparent that the notice contained an error as to the date of the alleged incident. However, it is also apparent, that the only incident in which Claimant stopped the machine he was operating and was struck from behind by the machine that was following occurred on July 19, 2004. No similar incident occurred on July 20. Claimant and the Organization clearly understood which incident the notice referred to and were clearly prepared to present a defense. We cannot find that the clerical error in listing the date of the incident under investigation as July 20 instead of July 19 provides any basis for upsetting the discipline.

The critical question is whether Carrier proved the charges by substantial evidence. The record reflects that on the date in question, Claimant was operating TKO machine TRIP 8904. He was following a spike puller and he was followed by THC 176154 tie crane. They were headed to MP 409.40 to continue installing ties, having been granted an extension of track time. Claimant stopped his machine at MP 409.40 but did not give a stop signal to the tie crane following behind him. The tie crane struck Claimant's machine.

There is no question that Claimant failed to give a stop signal. The determinative issue is whether Claimant was required to give a stop signal. Claimant testified that the spike puller gave a stop signal at MP 409 and Claimant also gave a stop signal. The spike puller slowed but did not stop until MP 409.40, where it began work. Claimant maintained that he did not have to give a stop signal at MP 409.40 because the gang was in work mode.

Rule 42.9 provides:

When two or more track cars are moving on the same track, the operators of all cars must agree upon and use a predetermined signal to stop that is easily seen and understood.

The operator of a track car that follows must watch for signals and must acknowledge a signal with the same signal.

Carrier maintains that Rule 42.9 does not contain an exception for when the gang is operating in work mode. However, the ARASA Supervisor, who investigated the accident and was the principal witness against Claimant testified:

No. When he's in work mode, when a machine is in work mode and they're working doing whatever job that they have with that machine, they are not – they are not – they do not have to give a signal every time the machine stops.

The Supervisor went on to explain that this exception did not apply to Claimant when he stopped at MP 409.40:

This is not the case. Mr. Hernandez was traveling to the beginning of the work zone at 409.40. He stopped his machine behind the spike pullers. That means he stops. He


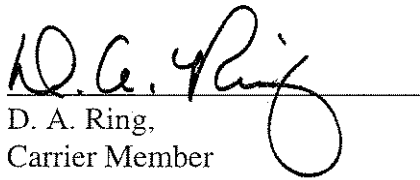
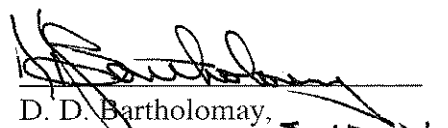
stopped his machine. He put the work head on the ground. He did not give the machine behind a stop signal that he was stopped.

In another words, Claimant had stopped to begin work and was therefore required to give a stop signal. He had not stopped in the course of work.

In light of the Supervisor's testimony, we find that Carrier proved by substantial evidence that Claimant was required to give a stop signal to the machine traveling behind him at MP 409.40. There is no question that Claimant did not give such a stop signal. Although the evidence established that the operator of the tie crane was also at fault in the accident, his fault does not absolve Claimant of Claimant's responsibility for failing to give the stop signal. Accordingly, we hold that Carrier proved the charges by substantial evidence. The penalty assessed was in keeping with Carrier's UPGRADE and was not arbitrary, capricious or excessive.

#### AWARD

Claim denied

  
Martin H. Malin, Chairman  
D. A. Ring,  
Carrier Member  
3-10-06  
D. D. Bartholomay,  
Employee Member 3-10-06

Dated at Chicago, Illinois, February 27, 2006