

BEFORE PUBLIC LAW BOARD NO. 6621

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

And

UNION PACIFIC RAILROAD COMPANY

Case No. 41

Statement of Claim: "Claim of the System Committee of the Brotherhood that:

1. The Level 4 and thirty (30) day suspension assessed Ballast Regulator Operator Delfino B. Casarez for his alleged violation of Union Pacific Chief Engineers Bulletin Instruction 136.7.3 on August 20, 2003 was without just and sufficient cause and based on an unproven charge. (Carrier's File 1384764-D).
2. Ballast Regulator Operator Delfino B. Casarez shall now have his record cleared of the incident and be compensated for all wage loss suffered."

Background:

Claimant Delfino B. Casarez, a Ballast Regulator Operator with about thirty-nine years' seniority, was operating a regulator in a hole on August 20, 2003. While Claimant was in the hole, Mike Anzo, his foreman, gave Claimant the following instruction: "We have the time, let's go to crossing from Bakery Spur, switch 790." (Tr. at 11). Anzo also told Claimant that they were ready to go surface the crossing and that Claimant would have to come out of the hole. Claimant proceeded to move the regulator out of the hole onto the main line, approaching a crane on an adjacent track. While the crane was stationary, Claimant, without radioing the crane operator, proceeded slowly past. The crane then swiveled, knocking into the regulator, which was within fifteen feet of the crane.

By letter dated August 29, 2003, the Carrier notified Claimant of an investigation and hearing on charges that Claimant had collided with a crane on August 20, in possible violation of

Union Pacific Chief Engineers Bulletin Instruction 136.7.3, effective June 4, 2000, which provided in pertinent part:

136.7.3 Work Zone Around Machines

A. Roadway Workers

Roadway workers must not enter a machine's work zone without first communicating with the operator to establish safe work procedures.

Unless a different work zone is established in the job briefing, the work zone extends from a point 15 feet in front of the machine to a point 15 feet behind the machine.

Note: Some machines, such as cranes and ballast regulators, also require lateral or side clearance to ensure the safety of all roadway workers.

(Tr. at 35.)

Following the investigation and hearing, the Carrier sent Claimant a letter dated September 29, 2003 notifying him that he was to be suspended without pay for thirty days, a discipline assessment of Level 4, because he had been found to have violated Union Pacific Chief Engineers Bulletin Instruction 136.7.3, effective June 4, 2000. In a November 18, 2003 letter, the Organization submitted a claim challenging the discipline. The Carrier denied the claim, and, after the parties were unable to resolve the dispute amicably on the property, it was submitted to the Board for final and binding resolution.

Carrier's Position:

In response to the Organization's claim that the Carrier erred procedurally by failing to present the crane operator, L. Blevins, at the hearing for questioning by Claimant, the Carrier contends that the Hearing Officer recessed the hearing to afford the Organization an opportunity to produce Blevins, and the Organization declined to do so. In addition, the Carrier notes that

Blevins's written statement, which supported the Carrier's case, was entered into evidence.

On the merits, the Carrier argues that it presented substantial evidence that Claimant violated Chief Engineer Instruction Bulletin 136.7.3, which requires "roadway workers," not supervisors, to avoid entering a machine's work zone. Because the crane already was working when Claimant's regulator approached, the Carrier submits that it was Claimant's obligation to communicate with the crane operator before entering the crane's work zone.

In response to the Organization's attempt to pass on to Claimant's foreman the responsibility for communicating with the crane operator, the Carrier states that the foreman's responsibility was merely to inform Claimant that he should move the regulator. According to the Carrier, the foreman's instruction to Claimant to move the regulator did not relieve Claimant of his obligation to communicate with the crane operator before entering his work zone.

With respect to the discipline issued, the Carrier contends, citing arbitral precedent, that the thirty-day suspension should not be reduced because it was not arbitrary or capricious.

Organization's Position:

The Organization claims that Claimant was not afforded a fair hearing because the Carrier did not produce the crane operator as a witness who would be subject to cross examination by Claimant. For that reason alone, the Organization submits that the claim should be granted.

On the merits, the Organization contends that the Carrier failed to meet its burden of proving the charge leveled against Claimant. The Organization also submits that the foreman should have had a job briefing with the crane operator to notify him that his gang, including Claimant, was going to the main line and would pass the crane to get to the crossing. According

to the Organization, it was the foreman's role to coordinate all the gangs working in his territory, and that responsibility should not be passed down to each employee.

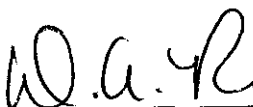
Findings:


The Carrier has a legitimate interest in enforcing Union Pacific Chief Engineer Instruction Bulletin 136.7.3, which places responsibility on each roadway worker to communicate with other roadway workers before entering their work zones. The record, however, is somewhat unclear, in part because neither the foreman, who directed Claimant to proceed out of the hole, nor the crane operator, was present at the investigation to testify. Based on the record, the Carrier did not sustain its burden of proving that Claimant was at fault.

Award:

The claim is granted. The Carrier shall make Claimant whole for the thirty-day suspension imposed upon him, and shall clear Claimant's record of the charges leveled against him in connection with the above-described events on August 20, 2003.


JOAN PARKER, Neutral Member


CARRIER MEMBER
DATED: 10-18-04


ORGANIZATION MEMBER
DATED: 10-18-04