

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

Award No. 13439

Docket No. 13364

99-2-98-2-53

The Second Division consisted of the regular members and in addition Referee Robert L. Hicks when award was rendered.

**(International Association of Machinists and
(Aerospace Workers (District 19)**

PARTIES TO DISPUTE: (

(Consolidated Rail Corporation (Conrail)

STATEMENT OF CLAIM:

- 1. Consolidated Rail Corporation arbitrarily and capriciously dismissed Machinist G. A. Solinas, following trial held on October 10, 1997.**
- 2. Accordingly, Machinist G. A. Solinas, should have his record cleared of any reference to the charges, as if the unjust discipline had not been imposed, be credited for any and all fringe benefits that would have accrued and be paid all time lost, including overtime, commencing from January 21, 1998 up to and including April 3, 1998.**

FINDINGS:

The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

On May 23, 1997, the Carrier wrote Claimant advising of a trial to be held on June 6, 1997, in connection with:

“Charge No. 1 - Violation of Safety Rules 4089D, E and F of the Conrail Safety Rules, S7D Maintenance of Equipment Employees on May 11, 1997 at approximately 7:45 A.M. which resulted in a personal injury to yourself while working as Machinist, Enola Diesel Terminal, Enola, PA, tour of duty 7:00 A.M. to 3:00 P.M.

Charge No. 2 - Being an unsafe and accident prone employee as evidenced by your five personal injuries since being hired on Conrail on April 1, 1976.”

The trial, originally scheduled for June 6, was postponed to June 20, again postponed to July 18, then to September 5, and finally to October 10, 1997, when it was held without Claimant in attendance, over the objections of his representative who had requested a fifth extension based upon Claimant being off on a disability.

The fact that an employee is off on a disability because he is not physically able to work his job does not relate to his physical disability precluding him from attending the hearing.

No reason was given as to the disability.

Carrier stated later in the on-property handling that Claimant's disability was treatment for a carpal tunnel syndrome type injury. This could preclude his working, but not his attendance at the hearing.

If the Organization wished to pursue the denied extension, they should have presented some evidence as to why Claimant was precluded physically from attending the hearing.

In the Board's view, Carrier's actions in denying the last extension under the circumstances evident in this dispute was not in violation of the Rule, nor did Carrier violate the Disciplinary Rule by holding the hearing in Claimant's absence. In most instances, the right to be in attendance at a hearing is the Claimant's choice. If he does not attend, it is done at his peril.

One charge was the alleged violation of specific Safety Rules when he injured his ring finger when the wrench slipped while he was “renewing slack adjuster safety cable.”

The Carrier witness testified as to his conversation with Claimant. He did not ask Claimant if he braced himself before “renewing” the slack adjuster cable, nor did Carrier witness ask Claimant if he was pushing or pulling on the wrench.

Rule 4089 reads as follows:

“4089. When using a wrench, follow this procedure:

- (a) Select the proper size and type of wrench to fit the object. Adjust the wrench to fit the object tightly. Do not use a shim to make the wrench fit.
- (b) If the wrench is an adjustable one, place it so that the turn will be in the same direction as the open end of the jaws.
- (c) Do not lengthen the wrench handle.
- (d) Take a braced position to avoid losing your balance if the wrench disengages or if the bolt or nut fails or suddenly loosens.
- (e) Do not immediately apply full force. Rather, make sure the wrench has a proper grip, and make sure the stroke of the wrench will not harm you. Then gradually increase the force, pulling the wrench toward you if possible.
- (f) Never push a wrench. Pull it.”

From the Board’s viewpoint, it was not known when the Carrier witness was testifying whether “renewing” meant loosening or tightening the bolt. It was not until the testimony of Claimant’s witness that the Board was informed that Claimant was tightening the bolt.

The only evidence by Carrier amounts to no evidence, but rather an assumption that since he sustained the injury, he must have been doing something wrong. Assumptions are not evidence. There exists five parts to the applicable Rule. The Carrier never established which part or parts of the Rule were violated by the Claimant.

Regarding charge two of being accident prone, based upon Claimant sustaining five injuries since 1976, which exceeded the average of 1.97 per all Machinists on the roster, does nothing to persuade the Board that Claimant was injury prone. First of all, to arrive at the average, a total of injuries divided by the number of employees determines an average. To achieve the 1.97 average, means some were higher and some were lower. In fact, Claimant's representative noted two other Machinists on the roster were listed with six injuries each, and when the representative inquired as to what action Carrier took in regards to either of the two, Carrier declined to respond.

Furthermore, there is not one scintilla of negligence in any of the previous four injuries. In fact, his first injury was a ringing in the ears caused by an air horn set off very close to Claimant. Other than being in the wrong place at the wrong time, the Board wonders how this incident was an indication of negligence.

The Carrier has failed to sustain its obligation of furnishing sufficient evidence of Claimant's culpability for the charges assessed.

It is noted that Claimant was reinstated to service without pay for time lost as of Carrier's letter of March 18, 1998. It is also noted that Claimant, on January 21, 1998, furnished the Carrier a note from his doctor that he was certified fit to return to duty. Claimant has lost about two months service.

The claim will be sustained in accordance with the foregoing. Claimant is to be paid for all time lost as provided for in the Schedule Agreement, and all traces of this hearing are to be removed from his record.

AWARD

Claim sustained in accordance with the Findings.

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ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division**

Dated at Chicago, Illinois, this 16th day of June 1999.