Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 13540
Docket No. 13425
00-2-99-2-18

The Second Division consisted of the regular members and in addition Referee James E. Conway when award was rendered.

(Sheet Metal Workers' International Association
PARTIES TO DISPUTE: (
(Consolidated Rail Corporation

STATEMENT OF CLAIM:

"Claim of the Employees:

1. The Carrier violated the provisions of he current and controlling agreement, in particular Rule No. 60.2 of the Conrail Safety Rules and Procedures Engineering, for an investigation for sheet Metal Work J. Camp, which was held on May 22, 1998.

2. That the Carrier failed to proved the charges placed against him at an investigation for an injury he had on May 5, 1998, therefore violating Rule 6 of the controlling Agreement, Discipline.

3. Additionally, the Restoration to Service Letter, dated February 23, 198, has been violated.

4. That accordingly, the Carrier be required to make the Claimant whole for all compensation for time lost and that he be made whole for all benefits, such as, but not limited to, vacation, holidays, seniority, medical and dental benefits and any other fringe benefit he may have been deprived of due to the Carrier's improper dismissal of Sheet Metal Worker J. Camp."

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.

The Claimant was dismissed from his position as a Sheet Metal Worker by notice dated June 12, 1998 following an injury incurred while removing a leaking pipe on May 5, 1998 at the Carrier's B & B Shop in Toledo, Ohio. The Carrier's action was based upon its determination that the Claimant was negligent in failing to perceive the safety hazard involved with first cutting the pipe at a point near the ceiling before making a lower cut, causing the top piece to break off and hit him. It further maintains that the Claimant's disregard of its Safety Rules was inconsistent with the terms of the return to service agreement he executed in connection with his reinstatement following a prior termination.

The Organization argues that extenuating circumstances dictate a sustaining award. First, the Carrier was delinquent in not assessing the nature of the job before assigning the Claimant to do it without assistance. The leaking pipe the Claimant was asked to remove was a cast iron pipe weighing 150 pounds, rising 10 feet from floor to ceiling, 4 inches in diameter and running vertically up along the side of a chain link fence. At a point approximately one foot from the ceiling an elbow turned the pipe 90 degrees to the right for an additional two feet, cantilevered out with no supporting strap, and another elbow then turned it vertical again at a 90-degree angle, whence it ran its final one foot up through the roof. The Carrier should have seen to it that the Claimant had help in removing this pipe. Further, the terms of the return letter it insisted upon in relation to the earlier termination were so extreme as to be unreasonable, and the Claimant's very fear of running afoul of them by even asking for help contributed to the problem at issue. Lastly, the Carrier has wrongly relied upon those terms here, as it produced no evidence to support its charges of "gross negligence."

The record reveals that after being directed to remove a section of the above described roof drainpipe, the Claimant made a saw cut in the top vertical section with a four-inch grinder, and then proceeded to make a second cut with the grinder near the

bottom of the pipe some 18 inches from the floor. When his progress on the second cut was blocked by the position of the chain link fence, he attempted to finish it with a hacksaw. As he did so, the threads at the elbow above him where the pipe turned vertical for its final one-foot length to the roof broke as a result of corrosion, causing the other end of the horizontal piece to also break. The entire two-foot section of pipe, weighing 48 pounds, fell onto the Claimant, striking him on the head as he knelt making his lower cut. The Claimant was wearing a hard hat, but was nonetheless injured and taken to the hospital for examination and treatment.

In the Carrier's judgment, the Claimant could and should have protected against the hazard by securing the pipe at the top after making the first cut, tying it to the chain fence and an adjoining beam. In the opinion of the Carrier's Assistant Division Engineer of Structures, D. E. Williams, the very existence of a leak in the pipe suggested the possibility of problems at the joint, and the Claimant's failure to recognize that fact itself constituted negligence on his part.

The Board first examines the argument that the Carrier's action in previously returning the Claimant to service was under unduly restrictive terms. Following a derailment at Stanley Yard in Toledo on July 30, 1997, he was dismissed for falsifying information in connection with the Carrier's Investigation of the incident, but conditionally restored to service by a Letter of Agreement he signed on March 13, 1998. The fourth condition of that understanding reads as follows:

> "4. Mr. Camp agrees to satisfactorily perform his assigned duties in a manner consistent with the applicable safety Rules, and that any additional occurrence of a similar nature, or any equally serious safety infraction, or any other proven major offense will result in the automatic reinstatement of the dismissal;"

The Board cannot accept the Organization's contention. While the above conditions are strict, they are representative of those typically found in such understandings, reflecting the relative imbalance of the employee's bargaining leverage under the circumstances. It is not the Board's role to either scrutinize for fairness or rewrite the Agreement the parties themselves thought suitable at the time they entered into it. Whether the Carrier was justified in discharging the Claimant for violation of this understanding, however, is a closer question. Based upon our study of the record,

we conclude that extreme negligence has not been proved, and accordingly, for the reasons stated below, the Board partially sustains the claim.

No one disputes that it is the responsibility of the employee to take a safe course of action in performance of his duties, or to bring problems encountered to his supervisor for resolution. In this instance, Foreman R. E. Smith, who assigned the Claimant to remove and replace the leaking pipe, acknowledged that he and the Claimant shared the responsibility of planning a safe job. The Claimant told him at the outset as he was making his first cut at the top of the pipe that the job would be difficult. Smith offered help if the Claimant needed it, but the Claimant declined the offer.[1] Smith, an electrician, made no effort to recommend a plan of attack for having the pipe removed by one person but watched the Claimant make his first cut at the top of the pipe and neither expressed any concern nor suggested a different methodology. The Board concludes that in later deciding that the Claimant's approach was unsafe, Smith is looking through the prism of hindsight. He cannot have it both ways. If the top cut was unsafe, he himself could have held the pipe; or summoned additional help; or suggested cutting the pipe in sections; or urged the Claimant to tie the pipe to the fence and beam; or stood by to assist him if the need arose.

The Board takes a similar view of the testimony of Supervisor Hernandez, who opined that the Claimant should have made multiple cuts - perhaps as many as 12 - tied them each off, and removed the pipe in sections. This labor-intensive formula seems to the Board to reflect unrealistic afterthought. Additionally, although Hernandez opined that the job was a one-man job, Smith's testimony is less certain, and he concedes the task "could have been a two-man job." Lastly, the Board finds persuasive the Organization's argument that for the Claimant to accomplish the work alone would have been difficult at best. If the job were to be done safely by one person, according to Smith and Hernandez it would have required the sheet metal man to use a grinder while standing on a ten-foot ladder cutting pipe with goggles on, no ground man, one hand on the power tool and one hand holding the ladder. Whether that approach is entirely safe, or safer than the Claimant's method, appears to the Board to be arguable. Further,

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[1] Claimant testified that he was apprehensive about asking for help, having been disciplined previously for refusing an assignment. "I'm afraid to ask him for help, cause he blows up and gets all red and mad, cause he says you're just refusing to do the job, or you don't want to do the job, what's a matter. I've been through that before . . . he gets real irritated real quick if you say anything contrary to what he has to say. You know, so I'm afraid t ask for help. You just do what he . . . says to do . . . ."

even if the pipe had not broken free at the joint, the Claimant would have had to manhandle a vertical length of pipe estimated to weigh 100 pounds in addition to the 50-pound vertical section.

The Board's conclusion that the Organization has the stronger argument on the question of whether it was entirely appropriate to use a single man on this job is bolstered by the testimony of Sheet Metal worker Schroeder, who testified that the elbows in the pipe the Claimant was asked to remove were made of extra heavy steel, and that a year earlier he had cut down a similar pipe and it took two men to do so. Indeed, following the Claimant's accident, Shroeder and another sheet metal man were sent out the next day to cut down and remove the remainder of the pipe the Claimant had worked on and install a new one. Shroeder unequivocally deemed the job to require two men. Witness Silvas, a Sheet Metal Worker, testified that the pipe in question was both heavy and awkward; that he would not have anticipated it breaking at the point it did; and that based upon his knowledge of the work at issue he believed removal of the pipe required two men.

The record indicates that the Claimant established seniority with Conrail on August 24, 1976. The charges assessed against the Claimant are as follows:

> "Your extremely negligent, grossly improper and dangerous conduct on May 5, 1998, at approximately 10:00 A.M. while removing a drainage pipe in the B&B Shop in Toledo, Ohio, which resulted in your personal injury."

While this record easily supports a finding of simple negligence, in the face of the Claimant's very long service and a close question concerning the advisability of sending two men; a genuine difference of opinion about the forseeability of the broken joint; the Board's concern about whether Smith was fully conversant with the technical aspects of the job he ordered; our sense that he had a responsibility to forewarn the Claimant of the dangers he now says were obvious; and the Claimant's expressed concern for speaking up, given his past problems, we conclude that termination is too severe a penalty in the absence evidence of "extreme" or "gross negligence."

The remedy issue poses special problems. As indicated, gross negligence has not been established, but the Claimant is hardly blameless on the evidence of record. Simple negligence may be fairly imputed, for he either thought the cutting exercise was dangerous and failed to take the precautions necessary or, alternatively, failed to see any

risk in not securing the pipe before cutting. We find, however, that while it is difficult to understand how either such lapse of judgment could occur with a 20-year veteran, under the circumstances presented, the Claimant's lapse was not of the type that his return to work conditions were intended to reach.

This accident occurred approximately three weeks after the Claimant's return from a lengthy prior period out of service. In view of our finding of simple negligence on his part but with extenuating circumstances, the Board concludes that back pay is inappropriate relief. The Board, however, sustains the claim in part and directs the Carrier to restore the Claimant to his prior position with seniority unimpaired at the earliest practicable time following his successful completion of such training or retraining program as the Carrier deems necessary and appropriate.

AWARD

Claim sustained in accordance with the Findings.

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 25th day of September, 2000.