

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 22727  
Docket Number MW-22686

George S. Roukis, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees  
(  
(The Denver and Rio Grande Western Railroad Company

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood  
that:

(1) The reprimand imposed on the personal record of Section  
Truck Driver Eli Romero was improper and without just cause (System File  
D-39-77/MW-21-77).

(2) The claimant's personal record shall be cleared of said  
reprimand."

OPINION OF BOARD: An investigative hearing was held on October 12, 1977  
to determine the facts and responsibility, if any,  
in connection with a personal injury sustained by claimant on September 6,  
1977, while transferring cross ties in the Colorado Springs Yard.

Claimant was subsequently informed on October 20, 1977 that a  
reprimand was placed on his personal record and this disposition was  
appealed on the property and is presently before us for adjudicative  
review.

In reviewing this case, this Board is mindful of Carrier's  
concern for safe workplace practices and thus we have carefully recon-  
structured from the investigative transcript the developments that led to  
the accident. Based upon this analysis we find that the single most  
important question posed before this Board is whether or not Claimant  
pulled his glove out in a careless, unsafe fashion when it unexpectedly  
got caught on the tie that he was lifting. The investigative transcript  
shows that both the assistant foreman and the other section laborer, who  
were with him at the time, testified that he was working in a safe and  
acceptable manner just prior to the incident. There were no eyewitnesses  
who actually saw what occurred and the only comment assessing the  
accident was the Roadmaster, who was not present at the injury situs,  
but who opined that Claimant was probably not fully attentive to what  
he was doing at that time.

There was no evidentiary showing that he was moving this tie in  
a palpably unsafe manner or in such a way that his glove would inevitably  
get caught.

Similarly there is no evidence that the tie would not have fallen had he not tried to pull his hand free or that the other ties would not have dislodged had he remained still and sought assistance.

It was an unpredictable situation, not precipitated by the way that he or his colleagues were actually working, which required a prompt response. Whether it was the best response can not be determined, given the exigencies of the moment.

We agree with Carrier that unsafe work practices cannot be tolerated in this industry and our case law supports this point, but we do not believe that the investigative record provides sufficient evidence of probative value to substantiate the imposed penalty. Claimant was not working in an unsafe manner, nor did he have time to weigh objectively at the time of the crisis his available options. By all accounts he was a safe and diligent worker and we do not think that he acted carelessly under the precise circumstances of this incident. In Third Division Award 17228, we held in pertinent part that,

"While this Board is reluctant to interfere with the administration of discipline by a Carrier, we do adhere to the principle that it is incumbent upon the Carrier to substantiate by positive evidence the charge or charges upon which the discipline is based."

We believe this rule applies to this case. We will sustain the claim.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employees involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was violated.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

ATTEST:

  
Executive Secretary

Dated at Chicago, Illinois, this 31st day of January 1980.