Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 30749
Docket No. MW-31437
95-3-93-3-427

The Third Division consisted of the regular members and in addition Referee Martin H. Malin when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(CSX Transportation Inc. (former Louisville and
(Nashville Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The discipline (letter of reprimand) imposed upon Track Repairman J. Henson for alleged violation of CSX Transportation Company Safety Rules 1 and 92.2 in connection with an injury sustained on June 29, 1992 and failure to notify Mr. E. White that he was not returning to work after being released by the doctor was unwarranted, on the basis of unproven charges and in violation of the Agreement. [System File 4(15)(92)/12(92-977) LNR].

(2) As a consequence of the violation referred to in Part (1) above, the Claimant shall receive the benefit of the remedy prescribed by the parties in Rule 27(f)."

FINDINGS:

The Third 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 waived right of appearance at hearing thereon.

On June 29, 1992, Claimant injured his back while lifting a railroad tie. Claimant lifted the tie to separate it from others to enable it to be grabbed for lifting by a Burro Crane. On July 8, 1992, Claimant was notified of an Investigation, to be held July 17, 1992. The notice charged Claimant with "responsibility in connection with the personal injury to your back . . . which occurred on the EX Subdivision, MP VB 242.4, at or about 1100 hours on June 29, 1992." Following a postponement, the Investigation was held on July 31, 1992. On August 24, 1992, Claimant was advised that he had been found to have violated Rules 1 and 922, when he lifted a tie that was too heavy. The letter referenced testimony establishing that Claimant was not wearing his back brace at the time of injury and that he scooted ties instead of lifting them. It also referenced Claimant's failure to notify the Roadmaster on June 30, 1992, and on July 13, 1992, that he was not returning to work after being released by his doctor. Claimant was assessed a letter of reprimand.

The Organization contends that Carrier failed to comply with Rule 27 because the notice failed to apprise Claimant of the charges against him. The Organization contends that Claimant was found guilty of failing to notify the Roadmaster that he was not returning to work, but that the notice was limited to determining Claimant's responsibility in connection with his injury on June 29, 1992. The Organization further contends that the notice failed to mention Rules 1 and 922 and, thereby, failed to inform Claimant completely of the charges against him.

The Organization also argues that Carrier did not carry its burden of proving the alleged violation. The Organization observes that Claimant was the only person who saw his injury. The Organization contends that Carrier's assessment of responsibility for the injury is based on speculation and conjecture rather than evidence. The Organization objects to Carrier's reliance on Claimant's failure to wear his back brace because Carrier does not require employees to wear back braces.

Carrier contends that it proved the alleged violation. Carrier argues that Claimant admitted that the tie appeared to be extraordinarily heavy and that he did not ask for help in lifting it. Carrier further argues that help was available from the Crane Operator, who had helped Claimant lift other ties earlier in the day. Carrier further argues that the absence of a Rule requiring wearing a back brace does not relieve Claimant of responsibility for making the common sense determination that use of the brace could have prevented injury in this situation.

Carrier maintains that Claimant was given a fair Hearing. Carrier further contends that the penalty was not arbitrary or excessive.

The Board reviewed the Notice of Investigation and Rules 1 and 922. Rule 1 directs employees to use personal judgment and exercise care to avoid injury. It specifies that safety is of the first importance and advises that in case of doubt or uncertainty, the safe course of action should always be taken. Rule 922 instructs employees before lifting a load to analyze the load, determine its weight and, if too heavy to lift, get help. The notice listed the date and location of the injury and charged Claimant with responsibility for his injury. Rules 1 and 922 clearly were within the scope of the notice.

The notice, however, mentioned nothing concerning Claimant's failure to notify the Roadmaster on June 30, 1992, and on July 13, 1992, that he was not returning to work after being released by his doctor. No reasonable person reading the notice could be aware that such action would be a subject of the Investigation. Indeed, the notice itself was issued on July 8, 1992, and could not possibly advise Claimant to defend regarding his actions on July 13. See, e.g., Third Division Award 20686.

The Board is at a total loss to understand why Carrier referred to Claimant's failure to return to work in its August 24, 1992 letter. Carrier found that Claimant violated Rules 1 and 922. The reference to the failure to return to work comes in the following paragraph which appears to specify the evidence which Carrier believed supported the Rules 1 and 922 violations. The failure to return to work, however, in no way relates to a failure to exercise personal judgment and care or to a failure to analyze the load or get help for a load that was too heavy to lift. It is those Rule violations which form the basis for the discipline imposed.

The Board reviewed the record developed on the property. This is not a case where Carrier contends that because Claimant got hurt, he must have done something wrong (See, e.g., Second Division Award 9583). Claimant estimated that the tie in question weighed 270 pounds. He based this estimate on the size of the tie and the fact that it was very wet. He indicated that the tie was much larger than the other ties. Claimant further admitted that had he sought help in lifting the tie, he would not have been injured. Although Claimant stated that no one was around to help, the evidence is clear that the Crane Operator had helped Claimant lift other ties, and there is no explanation as to why the Crane Operator could not have helped Claimant again, or why, if the Crane Operator was not immediately available, Claimant could not have waited for him. We find that Carrier's determination that Claimant

violated Rules 1 and 922 is supported by substantial evidence.

The penalty imposed was a written reprimand. We are unable to say that this penalty was arbitrary, capricious or excessive.

AWARD

Claim denied.

O R D E R

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 24th day of February 1995.