

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 32486  
Docket No. MW-32907  
98-3-96-3-273**

The Third Division consisted of the regular members and in addition Referee Robert Perkovich when award was rendered.

**(Brotherhood of Maintenance of Way Employees  
PARTIES TO DISPUTE: (  
(Burlington Northern Railroad**

**STATEMENT OF CLAIM:**

**“Claim of the System Committee of the Brotherhood that:**

- (1) The thirty (30) day suspension assessed B&B Truck Driver G. C. Schulties for his alleged failure to work in a safe manner which resulted in his alleged injury on January 4, 1995 was without just and sufficient cause, based on an unproven charge, arbitrary, capricious and in violation of the Agreement (System File T-D-894-B/MWB 95-06-15AA).**
- (2) As a consequence of the aforesaid violation, Truck Driver G. C. Schulties shall be compensated for all wage loss suffered, including overtime, he shall be made whole for any and all benefits lost and his record shall be cleared of the charge leveled against him.”**

**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 were given due notice of hearing thereon.

At all material times herein the Claimant was a B&B Truck Driver with approximately 19 years of seniority.

On January 4, 1995 the Claimant was working as part of a crew that was removing rail ties. While performing those tasks the Claimant did not use tie tongs, but rather removed the ties by hand and without the assistance of other crew members. Moreover, he did so despite the urging of his crew members that he should refrain from moving the ties by hand. Ultimately, the Claimant hurt his neck and right arm, but worked the remainder of the day.

The following day the pain worsened and the Claimant informed his Supervisor that he had hurt himself the previous day while moving ties. When asked by his Supervisor, the Claimant affirmed that he was removing the ties by hand and without assistance.

The next day the Claimant visited a physician and the Supervisor investigated the matter. In doing so the Supervisor learned from other crew members that the Claimant did in fact remove the ties by hand, instead of using tie tongs, and that he did so without assistance from other crew members and despite their urging that he refrain from doing so.

The Carrier subsequently charged the Claimant with violating rules relating to the reporting of injuries and the obligation of employees to work safely. Upon investigation on the property the Claimant was assessed a 30 day suspension.

The Organization contests the discipline on both procedural grounds and with respect to the merits of the charges leveled against the Claimant. The procedural attack consists of assertions that the charges were not adequately specific and that the Carrier's appeal officer was predisposed as to the merits. We disagree. The record shows that the charges in this matter informed the Claimant that he was charged with a "failure to work in a safe manner which resulted in . . . injury . . . on January 4, 1995." Since the record shows that there is no doubt that the injury took place on that day and that there was no other incident on that day or in near proximity to that day that might otherwise confuse the Claimant. Finally, the record also shows that the neither the Claimant nor the Organization were encumbered in defending against the charge. With

regard to the other alleged procedural defect, the predisposition of the Carrier's Appeal Officer, we note that although the Organization is correct that he was also the Carrier representative that instructed the Claimant's Supervisor to investigate the matter, he did nothing more than that until called upon to review the appeal. Moreover, the Organization's claim that the Appeal Officer's "... involvement at the earliest stages of these proceedings..." is not supported by any facts other than those just described. Thus, a claim of any additional conduct on his part that might have tainted the proceedings is a mere assertion without basis in the record.

On the merits the Organization argues that the Claimant did not violate the rules cited by the Carrier or that there is no rule prohibiting the conduct engaged in by the Claimant. In the alternative, it contends that the record is insufficiently clear to meet the Carrier's burden of proof that the Claimant refused a direct order or failed to move with the use of tie tongs. Finally, the Organization asserts that even if these arguments are rejected, the Carrier is guilty of disparate treatment in that other crew members also failed to use tie tongs and were not disciplined.

On the first point, the Organization is correct that although the Claimant was charged with failing to report the accident he did in fact do so and that the Carrier has no rule requiring the use of tie tongs when moving ties. However, the record is equally clear that there is a rule obligating the Claimant to work safely and attentively and that, moreover, other crew members cautioned him against moving ties by hand. Under these circumstances we conclude that the Claimant was sufficiently notified that he was about to do something improper. In addition, the record is clear that the Claimant admitted to his Supervisor that he did in fact move ties by hand and without using tie tongs. Thus, there is a sufficient basis to conclude that the Claimant consciously acted in an improper fashion. Although it might be true that the Supervisor's instructions lacked the force of a clear and direct order to "remove the ties using tie tongs," it is clear that the Supervisor's stated desire was that the Claimant do so, that the Claimant had many years of service that would form the basis for a conclusion that failing to use tie tongs was improper, and that again his own crew members advised him in the same fashion. Finally, we note that any evidence of other crew members also failing to use tie tongs was raised after the Supervisor's investigation of the Claimant's misconduct. In order to conclude that the Carrier acted disparately it must be evident that it was aware of the fact that other employees were similarly situated as the Claimant and that despite that knowledge it treated the Claimant differently. The record does not support such a conclusion and we therefore reject the Organization's argument in this regard.

**AWARD**

Claim denied.

**ORDER**

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 23rd day of February 1998.