

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 33045
Docket No. MW-33455
99-3-96-3-978**

The Third Division consisted of the regular members and in addition Referee Nancy F. Murphy when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Burlington Northern Santa Fe Railroad Company
((former Burlington Northern Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (mark of censure) imposed upon Welder A. G. Lucero and Grinder Operator K. E. Roll for alleged violation of Rule 20.1 and Rule 1.1.2, respectively, in connection with an injury sustained by Grinder Operator K. E. Roll on April 18, 1995 was unwarranted, on the basis of unproven charges and in violation of the Agreement (System File B-M-405-L/MWB 95-11-03AB BNR).
- (2) The Claimants' records shall be cleared of the charges leveled against them and they shall be compensated for all wage loss suffered, if any.”

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.

On April 18, 1995, Grinder Operator K. Roll and Foreman A. Lucero (Claimants) were working on a frog at Hardin, Montana. Testimony indicates that when Claimant started his Stanley Grinder, it "kicked back" and struck his leg resulting in a laceration which required stitches. Subsequent to Claimant Roll's injury, a three person inspection team examined the grinder and determined that the handle had been "modified" and the rotation of the grinding stone had been reversed. The inspection team maintained that the "modifications" were the "root cause" of Claimant Roll's injury. Further investigation determined that Claimant Roll's Foreman, Claimant Lucero, was aware that Mr. Roll had performed the modifications to the grinder, and had failed to correct Mr. Roll's "improper" use of the tool.

As a result of the inspection team's findings, Claimants Roll and Lucero received notices to attend an Investigation on April 27, 1995 for the purpose of ascertaining the facts and determining their responsibilities, if any, in connection with Claimant Roll's April 18, 1995 injury.

The Investigation was held as scheduled, and the Conducting Officer concluded that Claimant Roll had violated Maintenance of Way Operating Rule 1.1.2 and that Claimant Lucero had violated Maintenance of Way Operating Rule 20.1.

The Organization submitted a claim on behalf of Messrs. Roll and Lucero premised upon the following assertions:

1. Carrier failed to provide the Claimants with a fair and impartial Investigation when they failed to make all employees who had knowledge of the incident available.
2. The discipline assessed is unwarranted because the Company failed to prove that Claimants violated any Safety Rules.
3. The Stanley Representative advised the Claimants that the grinder could be changed to accommodate the left-handed operation. As such, neither Claimant "modified" any equipment in violation of the Carrier Rules.

Lastly, the Local Chairman contended:

“It is well established in this industry that the mere happening of an accident does not constitute a rules violation. It is crazy to suggest that, because Grinder Roll was injured, Welder Lucero was responsible for that injury. That’s a ‘guilt trip’ that not even Burlington Northern should be allowed to lay on its employees. To suggest that, because the Grinder struck Claimant Roll in the leg, Mr. Roll must have violated a safety rule, is without foundation or basis.”

The Carrier denied the claim maintaining that a transcript of the Investigation “clearly” shows that it was held in a fair and impartial manner and within the Rules set forth in the Agreement between the Parties. The Carrier further maintained that the discipline assessed was “warranted and not excessive,” in light of Claimant Roll’s “carelessness in handling the grinder.” In that connection, the Carrier went on to note that Claimant Lucero was the Foreman of the two-man welding crew and has a responsibility to the crew and himself that all work be performed safely by the Rules and without injury.

With regard to the modifications performed on the grinder, the Carrier stated that:

“The transcript shows that both Lucero and Roll had modified the Stanley HG60 Grinder on several occasions. Although it was determined through the investigation this act did not contribute directly to Mr. Roll’s carelessness, it was modified just the same. The accounts by the principals and witnesses will stand as transcribed, but the signed letter from Mr. Coulam states that neither Mr. Coulam nor his representatives at any time authorized modification of the tool.”

Finally, the Carrier noted that through a demonstration during the Investigation it was determined that the “kick” of the grinder was away from the body “whether the grinder had been modified or not.” According to the Carrier: “This fact disproves Roll’s claim that the grinder kicked into his leg when turned on.”

The Carrier premised its decision to discipline Claimants Roll and Lucero on Agreement Rule 1.1.2 and Rule 20.1, respectively. Rule 1.1.2 provides:

“Employees must be careful to prevent injuring themselves or others. They must be alert and attentive when performing their duties and plan their work to avoid injury.”

Rule 20.1 states, in pertinent part:

“Foremen are responsible for:

- *The proper use and maintenance of the tools, materials, and equipment, used to perform their duties.**
- *The safety, supervision, and training of employees under their charge.**
- *Ensuring that work is performed safely, properly, economically, and satisfactorily.”**

The crux of the charges are allegations that “modifications” the Claimants made to the Stanley Grinder, which Claimant Roll was using the day he was injured, somehow caused his injury. There is no dispute that Claimant Roll, with Foreman Lucero’s knowledge and acquiescence, modified the Stanley Grinder. In that connection, the Claimants testified at the Investigation as follows:

“Q. What is the procedure for changing the rotation of the stone?

A. Turning the handle around.

Q. Do you feel it was safe doing that?

A. Yes, we talked to John Coulam, the Stanley representative, about doing that.

Q. Could you tell me about a conversation you had with John Coulam -- what did he tell you about changing rotation?

A. We asked him if we could change the rotation on ‘our’ grinder, and he said: ‘Yeah, that one you can change rotation on, but the newer ones you can’t.’”

The record established that the modification was made, and that sometime subsequent, Claimant Roll was injured; but no causal nexus linking the two events is proven on this record.

Although the Carrier maintained that Stanley Representative Coulam did not recollect the interchange, Head Welder Roebeling confirmed and corroborated the Claimants' testimony. He was present when the Claimants questioned Mr. Coulam, and verifies that the Representative had indeed stated that the "modifications" were acceptable and would not compromise the safety of that particular grinder. Most significantly, in correspondence on the property regarding the modifications at issue, the Carrier stated: "Although it was determined through the investigation this act did not contribute directly to Mr. Roll's carelessness, it was modified just the same." Whether or not the "modification" was properly undertaken is really a moot point in light of the fact that the Carrier admitted the "modification" did not contribute directly to the accident. Therefore, we are left only with the question of whether the Carrier proved, through a preponderance of record evidence, that Mr. Roll's own "carelessness" contributed to the accident on April 18, 1995 resulting in injury to himself. Absent speculation, there is no probative evidence that the Claimant's actions were contributorily negligent in the accident.

From a review the evidence presented, we conclude that Carrier failed to sustain its burden of proving that either Claimant was inattentive or neglectful of their duties on the date in dispute. Therefore, this claim is sustained.

AWARD

Claim sustained.

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 Third Division

Dated at Chicago, Illinois, this 24th day of February 1999.