

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

Award No. 33566  
Docket No. MW-34231  
99-3-97-3-725

The Third Division consisted of the regular members and in addition Referee Steven M. Bierig when award was rendered.

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

**STATEMENT OF CLAIM:**

“Claim on behalf of the System Committee of the Brotherhood that:

- (1) The discipline [suspension from service pending hearing and subsequent fifteen (15) day suspension] imposed upon Mr. R. A. Herrman for alleged violation of Rules 1.1, 1.1.1, 1.12 and 1.6 which allegedly contributed to the personal injury sustained by Mr. R. F. Conrad on June 5, 1996 was arbitrary, capricious, on the basis of unproven charges and disparate treatment (System File D-96-15/MW D 96-42).
- (2) As a consequence of the violation referred to in Part (1) above, the Claimant's record shall be cleared of the charges leveled against him and he shall be compensated for all wage loss suffered from June 6 through 20, 1996 with interest at 18%.”

**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.

As of June 26, 1996, the date of Claimant's discipline, the Carrier had employed Claimant since February 21, 1974, a period of over 22 years. Prior to the discipline imposed in this case, Claimant had not received any previous discipline. The incident in question occurred on June 5, 1996. At that time, Claimant had established seniority as a Trackman.

On June 5, Claimant was assigned to work on Gang 4124 in a gang of three including Foreman F. Conrad and Truck Operator T.G. Peters. Gang 4124 was assigned to install trackties at Milepost 627 at Ransom, Kansas. The three men were replacing switchties with trackties. After a job briefing, they began in the morning and performed their duties without incident. At approximately 1:15 P.M., Foreman Conrad had completed cleaning ballast out of a hole to install another tie. He instructed the Claimant to pull a tracktie into the hole under the rail. The Claimant's first attempt to insert the tie was unsuccessful. Pursuant to instructions, Claimant then removed the tie and Foreman Conrad again attempted to clean out the ballast. Foreman Conrad then asked Claimant to pull the tracktie into the hole under the rail. The Claimant, who had his back to Foreman Conrad, completed these instructions. However, for some reason, Foreman Conrad's foot was in the hole and when Claimant placed the tie back in the hole, the Foreman's foot became pinned between the tracktie and the rail which caused a compound fracture to his ankle. The Claimant then transported Foreman Conrad in Claimant's vehicle to the hospital in Ransom, Kansas, for medical treatment. Claimant then reported the incident to Track Inspector B. Herrman (Claimant's Brother) who in turn reported the incident to Roadmaster C.J. Vallejo. Roadmaster Vallejo conducted a preliminary investigation of the incident. At the conclusion of the preliminary investigation, he removed Claimant from service pending formal Investigation.

By letter dated June 6, 1996, Claimant was instructed to attend an Investigation on June 11, 1996 in Scott City, Kansas, in connection with the accident suffered by Foreman Conrad on June 5, 1996. Specifically, Claimant was charged with violations of Rules 1.1, Safety Rule 1.1.1, Maintaining a Safe

Course, Rule 1.12, Alert and Attentive, and Rule 1.6, Conduct from the Safety Rules and Rules of Instructions. On June 10, the General Chairman requested a postponement of the Investigation until June 18, 1996, which was granted. The Investigation took place on June 18, 1996 and on June 26, 1996, Claimant was found guilty of violating the above-mentioned Rules on June 5, 1996 and that Claimant's actions contributed to the personal injury sustained by Foreman Conrad. As a disciplinary action, Claimant was suspended for 15 days, to be served from June 6 through June 20. He was returned to work effective June 24, 1996 and he was to be paid for June 21, 1996.

The Organization contends that the Carrier violated the Agreement because it failed to prove that the Claimant had violated the relevant Safety Rules. Claimant had his back to Conrad when he pulled the tie in and could not possibly see that Foreman Conrad's foot was in the hole when Claimant was inserting the tracktie. Claimant was following Foreman Conrad's oral instructions. The Organization contends that the burden of proof is on the Carrier and in this case, the Carrier has not met that burden. Additionally, the Organization contends that even if the Claimant was somehow at fault, his penalty should be commensurate with Foreman Conrad's, who was also at fault. Because Conrad received no penalty, Claimant's 15-day suspension constitutes disparate treatment and must be rejected.

The Carrier alleges that there was substantial evidence at the Investigation to prove that Claimant violated the Safety Rules identified. Further, the Carrier claims that the amount of discipline imposed, a 15-day suspension, was commensurate with the nature of the Rules infractions. The Organization requested interest at the rate of 18% if the claim is sustained. The Carrier responds that interest is not provided for either by contract language, or by past practice, citing Public Law Board No. 4769, Award 49, Third Division Award 24614, 23918 and other Awards.

The Board sits as an appellate forum. We do not weigh the evidence de novo. As such, our function is not to substitute our judgment for the Carrier's, nor to decide the matter in accord to what we might or might not have done had it been ours to determine, but to pass upon the question whether there is substantial evidence to sustain a finding of guilty. If the question is decided in the affirmative, we are not warranted in disturbing the penalty unless we can say it

appears from the record that the Carrier's actions were unjust, unreasonable or arbitrary, so as to constitute an abuse of the Carrier's discretion. (See Second Division Award 7325; Third Division Award 16166).

The Board reviewed the transcript and the positions of both parties. We cannot find that there is substantial evidence that Claimant was guilty of violating the Safety Rules on June 5, 1996 when Foreman Conrad was injured. At the time of the incident, Foreman Conrad was instructing Claimant on when to place the tracktie. As was the practice, Claimant was facing away from Foreman Conrad and was following his instructions when he pulled the tracktie in place injuring Conrad. It would not have been possible for him to see that Foreman Conrad's foot was in the hole as he was facing the other way. Claimant attempted to place the tracktie once, but without success. He tried again, placing the tracktie only when specifically instructed by Foreman Conrad. When Foreman Conrad told Claimant to place the tracktie, he did as instructed. This is consistent with Foreman Conrad's testimony:

**"LE Magathan:** Did you instruct Mr. Herrman to pull the tie back in?

**RF Conrad:** Well, yes, I would say I did.

**LE Magathan:** You were still in the crib cleaning the crib when you instructed him to pull it in?

**RF Conrad:** No, I wasn't in the crib.

**LE Magathan:** Where was your foot when the tie struck your leg?

**RF Conrad:** It probably was in the God dammed [sic] hole there or something, I don't know where in the hell it was at.

**LE Magathan:** ...The hole that you were digging, to insert the tie, you had that cleaned out, you instructed

Mr. Herrman to pull the tie back in, is that correct?

RF Conrad: Yes that's correct.

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LE Magathan: So you're of the opinion then that you felt that you were in the clear, you instructed them?

RF Conrad: That's correct.

LE Magathan: You instructed Mr. Herrman to pull the tie in, but yet it struck your left leg and apparently your left leg wasn't in the clear?

RF Conrad: That's correct."

Thus, it is apparent that Claimant was working within his instructions and did not violate any Safety Rules. This is how the Gang had operated at all times up to the accident. As Foreman Conrad testified, he did not know how his leg got into the hole when Claimant placed the tracktie and Claimant could not have seen it. Thus, this was one of those unfortunate "accidents" which occur through no one's fault. Thus, after a review of the entire record, we cannot find substantial evidence to uphold the Carrier's conclusion that Claimant violated the Carrier's Rules.

As we have now reached a decision in favor of the Claimant on the issue of the Rule violations, we turn to the claim by the Organization that Claimant is entitled to interest at the rate of 18% on the 15 days of backpay to which he is entitled. On this issue, we rule in favor of the Carrier. There is no authority either in the Agreement or past practice which allows for such interest payments. See Public Law Board No. 4769, Award 49, Third Division Award 28178, 24710, 24614, 23918, and Second Division Award 12385.

Because the Carrier failed to meet its burden of proof that a violation of the Rules occurred, this claim must be sustained in accordance with the findings.

**The 15-day suspension of the Claimant shall be removed from his records, and he shall be made whole, but without interest.**

**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 Third Division**

**Dated at Chicago, Illinois, this 20th day of October 1999.**