

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 33921
Docket No. MW-34540
00-3-98-3-187**

The Third Division consisted of the regular members and in addition Referee Sandra Gilbert Pike when award was rendered.

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(Consolidated Rail Corporation**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (letter of reprimand) imposed upon Mr. G. Migliorisi for alleged,’ “violation of Rule 60.2 of Conrail's S7C, Safety Rules and Procedures, when you failed to protect your own safety while walking around your assigned machine at Esplen Interlocking at approximately 7:00 am on Tuesday, August 13, 1996 resulting in you sustaining an on-duty personal injury to your lower back. ***” was unwarranted, without just and sufficient cause and on the basis on unproven charges (System Docket MW-4569-D).**
- (2) As a consequence of the violation referred to in Part (1) above, the letter of reprimand and all references to the charges leveled against Mr. G. Migliorisi shall be removed from his record.”**

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 August 13, 1996, the Claimant was assigned and working on a Mark IV Tamper with Gang SI-402 at the Esplen Interlocking. The Claimant was warned by Foreman Adorante that an excessive amount of ballast had been unloaded in the area causing dangerous conditions. While performing the required pre-start up inspection of the machine, shortly after 7:00 A.M., the Claimant fell in the loose ballast, injuring his back. The injury required the Claimant to be off five to six weeks.

By letter dated September 9, 1996, The Claimant was instructed to attend a Hearing in connection with violation of Rule 60.2 of Conrail's S7-C, Safety Rules and Procedures. After mutually agreed to postponements, the Hearing was eventually held on January 9, 1997. The Claimant was notified by Notice of Discipline dated January 28, 1997 that he had been found guilty as charged and disciplined with a reprimand.

The Organization properly appealed the discipline. The parties being unable to resolve the issue, this matter comes before the Board.

The Organization argues convincingly that the Carrier offered no evidence to prove that the Claimant was at fault in the accident. The Organization contends that The Claimant was charged and disciplined because an accident occurred.

Foreman Adorante described the conditions of the track in his testimony.

"Well the stone was piled high, way high, ahead of the rail. You could not see if it was compacted or if there was hollow spots underneath. You couldn't tell if it was loose, it was a good foot ahead of the rail. You could not see the outside edge of the ties at all meaning that if you stepped up you wouldn't know if you stepped on ties or if you stepped between the ties, you just could not tell."

The record shows that the Foreman was aware of the accident and injury at the time the accident occurred. The records shows that The Claimant refused immediate medical attention. The Claimant completed his work that day and the next, finally calling in sick and seeking medical attention on August 15, 1996. The record shows that The Claimant suffered a back injury resulting in the Claimant being out of service for a substantial amount of time.

The Board reviewed the entire record and transcript in this case and we find that the Carrier has not met its burden of proof that the Claimant acted improperly or in violation of any Rules when he was injured on the date in question. The Carrier did not provide any evidence to show that the accident was avoidable or how the Claimant could have acted differently to prevent the accident.

An accident did occur, but that does not necessarily justify discipline. The Board has held on numerous occasions in the past that an injury in and of itself does not represent evidence that an employee injured on duty was acting in a careless or unsafe manner or in violation of the Rules. See Third Division Awards 32487, 26594, 16600, 12535. The Carrier must come forward with specific proof to show that the Claimant acted in violation of Rules or negligently in order to justify discipline. In this case, the Carrier has not met that burden.

We find no basis for the discipline assessed against the Claimant in this dispute. The 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 January, 2000.