

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 35320
Docket No. MW-34202
01-3-97-3-719**

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

PARTIES TO DISPUTE: (
(Brotherhood of Maintenance of Way Employees
(Southern Pacific Transportation Company (Eastern Lines)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (suspension pending formal investigation and subsequent dismissal from service) imposed upon Mr. A. M. Garcia, Jr. for alleged violation of Rule 1.1 of the Safety and General Rules For All Employees in connection with his alleged ‘ . . . responsibility in being careless and an unsafe worker as evidenced by your record of personal injuries and most recently by the personal injury you sustained April 30, 1996.’ was without just and sufficient cause, on the basis of unproven charges and in violation of the Agreement (System File MW-96-151/MW D96-49 SPE).**
- (2) As a consequence of the violation referred to in Part (1) above, the Claimant shall be reinstated to service with seniority, vacation and all other rights unimpaired, his record shall be cleared of the charges leveled against him and he shall be compensated for all wage loss suffered beginning May 10, 1996 and continuing until he is returned to service.”**

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.

The record indicates that the Claimant experienced a disproportionately high number of accidents over an extended period of time during the performance of his assigned tasks. The Carrier essentially found that the work history of the Claimant necessarily proved that the Claimant had failed to work in a safe manner. The Organization disputed that the Claimant had violated any work Rule of the Carrier at any time and merely had reported all of the injuries that he had incurred during the course of his employment.

A careful review of the record fails to explain how the Claimant could have had so many injuries unless he had neglected his job. In particular, the Claimant had reported approximately 12 personal injuries during the period from 1972 to 1996, which included five injuries from 1989 to 1992. In fact, the Claimant accounted for one half of all of the injuries in his District during 1993. These statistics provided by the Carrier created a presumption that the Claimant had a tendency to disregard his obligation to work in a safe manner and that such a tendency contributed to the occurrence of the injury on April 30, 1996, which triggered the instant dispute. The burden then shifted to the Claimant to provide a logical explanation to rebut this presumption. The record omits any credible reasons to explain how the Claimant became injured on April 30, 1996 other than by acting in a careless manner. The suggestion by the Organization that the substantial disparity in the number of injuries suffered by the Claimant merely occurred because of the Claimant's commitment to be meticulous in reporting every single injury fails to rebut the presumption under the unusual circumstances of the present case.

The injury that triggered the present case is instructive and illustrative of the Claimant's deficiencies. In particular, the record reveals that the Claimant injured his right shoulder while he participated in laying tie plates because a boom hit a rail being unloaded from a truck and the rail struck the Claimant. The Claimant failed to provide

any credible explanation for this event. The Carrier had a right to conclude that the Claimant had failed to exercise proper attentiveness and therefore had become vulnerable to sustaining such an injury. Although some persons might characterize the Claimant's work history as accident proneness, such a conclusion deflects, minimizes, and obscures the responsibility of an employee to exercise appropriate care to avoid accidents, injuries, and mishaps. Such a responsibility is of paramount importance because of the serious implications of such neglect on the health and safety of all of the members of the workforce and on any members of the public who may be near the locations where members of the bargaining unit perform their work assignments.

In reaching these findings, the record fails to prove that any procedural matters precluded the Carrier from disciplining the Claimant. Specifically, the Carrier charged the Claimant in a sufficiently prompt manner in the context of the present sequence of events. The record also fails to prove that the processing of the present matter violated the relevant time requirements in a material and cognizable way.

As a consequence, the Carrier had a right to discipline the Claimant as a method to correct the Claimant's deficiencies and to impress on the Claimant that he must make a greater effort and a greater commitment to work in a safe manner. The Carrier had a right to address the Claimant's apparent lack of understanding and lack of appreciation of the potential for serious injuries to himself and to other employees. The Carrier had a right to underscore to the Claimant that a critical need exists for him to exercise much better judgment and concentration at work to avoid contributing to any future injuries to himself or to others.

The present case, which did not warrant the termination of the Claimant, therefore requires a determination of a proper remedy. The record omits any suggestion that the Claimant intentionally sought to harm himself or anyone else. Instead, the record substantiates that the Claimant failed to recognize the serious impact of his periodic lapses. Although the Award shall provide that the Carrier lacked a right to terminate the Claimant, the Carrier did have a right to hold the Claimant out of service. Under these precise circumstances, the Carrier shall return the Claimant to work without any backpay. The period between May 10, 1996 and the date of reinstatement shall be converted into a disciplinary suspension. The Claimant shall retain his accumulated seniority.

The Carrier and the Claimant may consider the need for any additional training or instruction to increase the likelihood that the Claimant's return to work will succeed. Any recurrence of the Claimant's pattern of injuries may provide the Carrier with legitimate grounds to impose future severe disciplinary action on the Claimant up to and including termination.

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 16th day of February, 2001.