

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 35406

Docket No. MW-34993

01-3-98-3-755

The Third Division consisted of the regular members and in addition Referee Ann S. Kenis when award was rendered.

(Brotherhood of Maintenance of Way Employes

PARTIES TO DISPUTE:

**(Burlington Northern Santa Fe Railway (former Burlington
(Northern Railroad Company)**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The five (5) day suspensions assessed Assistant Foreman A.D. Fortier and Track Laborer V.R. Moen for their alleged responsibility in connection with the injury sustained by Mr. Moen on August 30, 1995 at East Grand Forks, Minnesota was without just and sufficient cause, based on unproven charges and in violation of the Agreement (System Files T-D-1070-HMWB 96-02-12AK and T-D-1071-H/MWB 96-02-12AL).**
- (2) Assistant Foreman A.D. Fortier and Track Laborer V. R. Moen shall now be compensated for all wage loss suffered and each shall have his respective personal file cleared of this incident.”**

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 30, 1995, Claimant Moen was working under the supervision of Claimant Fortier, the Assistant Foreman. That day, it was necessary to remove bolts from several track joints within a road crossing to prepare for rail replacement. Claimant Fortier instructed Claimant Moen to remove the track bolts and he did so by using a rail saw. In so doing, he was injured when the cut nut and bolt hit his leg.

On September 1, 1995, the Claimants were advised to attend an Investigation to determine facts and place responsibility, if any, in connection with Claimant's Moen's injury incurred while cutting bolts off a joint. After the September 11, 1995 Investigation, the Claimants were advised that their actions had not been performed in a safe manner and that they were in violation of the Carrier's Safety Rules. Each was assessed a five-day suspension.

At the Hearing, Roadmaster Heille testified that a rail saw is designed to cut rails, not bolts. He stated that a rail saw is specially designed with an attachment that mounts the saw on the rail to prevent it from kicking back and slipping. Thus, in order for Claimant Moen to even use the rail saw to cut bolts, he had to remove the rail saw from the attachment. The Claimant knew or reasonably should have known when he removed the rail saw from the attachment that he was not taking the safest or most prudent course of action. Roadmaster Heille testified that a wrench or torch are the appropriate tools to use when cutting bolts and that the incident at issue could have been prevented through the proper use of such tools.

The Carrier argues that neither employee exercised necessary care in the performance of their duties on August 30, 1995. It points out that Claimant Fortier was charged with the responsibility of ensuring the safety of the gang members under his charge. Having not lived up to that responsibility, he was appropriately disciplined. Similarly, Claimant Moen failed to act in a responsible manner and therefore discipline was justified. The Carrier maintains that employees are required to use common sense. Taking apart a rail saw in order to cut bolts defies common sense, the Carrier submits. The Claimants should have opted for one of the other methods of bolt removal that were readily available.

The Organization defends by arguing that there is no Rule specifically prohibiting an employee from using a rail saw from cutting bolts, nor is there any evidence that

employees have been informed that such action is impermissible. On the contrary, the Organization points to the unrefuted testimony of the Claimants which indicates that employees often use a rail saw to remove bolts and that this commonly accepted practice precludes the application of discipline in this instance.

The Organization cited Third Division Award 32608 as precedent and, after careful review, the Board is compelled to conclude that the logic and reasoning in that Award has similar application herein. In that case, an employee sustained a personal injury while attempting to bend a bolt by hitting it with a sledge hammer. The Carrier contended that the better and safer course of action would have been to use a jack rather than a sledgehammer to bend the bolt. Finding that the employee had simply acted in conformance with practice, the Board stated, “A review of the alternative methods which could have been used by the Claimant to bend the bolt suggests that he used a common method in the industry to perform his job that day.”

So, too, in this case do we find that the Claimants were acting in accordance with a common practice. Both Moen and Fortier testified that the use of the rail saw to cut bolts was quite common; they had seen it used in that manner openly, on many occasions, over a period of years, without injury or incident. Significantly, the Carrier never rebutted that pivotal testimony.

The Board recognizes that it is not possible for the Carrier to specifically anticipate and prohibit all unacceptable or unsafe conduct. But when no specific written Rules exist, the importance of applying safety practices consistently becomes even more important. Here, the Carrier never communicated to employees that the use of a rail saw to remove bolts was improper or would result in discipline, despite the fact that it was a commonly used method of accomplishing that task. The Carrier cannot lull employees into thinking over a long period of time that they can use a particular method of cutting bolts and then suddenly begin disciplining with impunity. Sound industrial policy dictates that changes in the way of doing things should be accompanied by notice or an educational process.

Thus, on the basis of the record in its entirety, the Board cannot find that there was substantial evidence of the Claimants’ guilt. The evidence in the record demonstrates that the Claimants chose an accepted method for removing the bolt. While it is unfortunate that Claimant Moen had an accident, we must conclude that neither Claimant can fairly be the subject of discipline under these particular facts.

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 26th day of April, 2001.