

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 35725  
Docket No. MW-34870  
01-3-98-3-587**

**The Third Division consisted of the regular members and in addition Referee Robert L. Douglas 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 ten (10) day suspension assessed Welding Foreman R. M. Burkindine for his alleged responsibility in the personal injury he sustained on August 12, 1996 was without just and sufficient cause, based on an unproven charge and in violation of the Agreement (Carrier’s File MW-4705-D).**
- (2) As a consequence of the aforestated violation, Welder Foreman R. M. Burkindine shall now be returned to service, compensated for all wage loss suffered and have his record cleared of the 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.**

The record indicates that the Carrier issued to the Claimant a Notice of Discipline, dated June 12, 1997, that outlined the offense as follows:

**“Violation of Safety Rules (60.9) #3 and #4, of Conrail Safety Rules and Procedures, effective May 1, 1995, Book S7C, which states: Follow these precautions to walk from one place to another safely: #3 Do not jump over excavations, holes, or open pits. Walk around them. #4 Be alert for tripping and slipping hazards. On August 26, 1996 you reported that you sustained an injury on August 12, 1996 by stepping in a hole which caused you to lose your balance and injuring your right leg. This occurred on the Sparrows Pt Track at MP 3.5 at approximately 10:00 AM in Baltimore, MD.”**

**The Carrier imposed a ten-day suspension of the Claimant.**

**The record includes uncontroverted testimony by the Claimant as follows:**

- “Q. Mr. Burkindine, how did you injure yourself that day?**  
**A. I went to take a step to move to the next location. And when I went to turn, my right foot stayed in place; and I lost my balance and fell over top. It just would not twist.**  
**Q. What caused you to fall?**  
**A. My foot not being able to move.**  
**Q. Why couldn't your foot move?**  
**A. It was in a tie crib.”**

**The record omits any credible evidence that the Claimant had jumped over an excavation, hole, or an open pit within the meaning of Safety Rule 60.9, No. 3 referenced in the Notice of Discipline. As a result, the record omits any basis to sustain the Carrier's action for a violation of that provision.**

**The record, however, contains sufficient evidence to find that the Claimant failed to be alert for tripping or slipping hazards within the meaning of item No. 4 of the Safety Rule. Specifically, the Claimant acknowledged that he had injured himself while he had attempted to move to the next location and had attempted to move his foot. In essence, the Claimant failed to pay sufficient attention while he was moving in his work area. The Carrier has a right to expect that employees, such as the Claimant, will remain alert**

and vigilant while at work. The record does not contain any basis to conclude that the work area created an unusual or unacceptable hazard that in some fashion excused, justified, or relieved the Claimant from the obligation to be alert for tripping or slipping hazards. Although other employees had removed certain ties from the area, such actions increased the importance for the Claimant to remain vigilant and alert while he performed his assigned tasks. The record contains sufficient evidence to support the conclusion of the Carrier that the Claimant had failed to meet this requirement. In addition, the record contains examples of certain prior discipline that the Claimant had received and therefore this aspect of the Claimant's prior work record furnished the Carrier with sufficient cause to impose the ten-day suspension of the Claimant.

The record does not contain any credible proof that the Carrier failed to follow the procedural requirements concerning the imposition of discipline. In particular, the record substantiates that the Carrier first learned that the Claimant had suffered a cognizable injury on August 26, 1996. The Carrier therefore scheduled the Hearing of this matter in a timely manner within the meaning of Rule 27, which requires a Hearing within 30 days of the date that the Division Engineer or his representative had knowledge about the offense. Until the Claimant reported that an actual injury had occurred, no basis existed for the Carrier to find that the Claimant had committed an offense. The initial scheduling of the Hearing for September 24, 1996 therefore constituted a timely scheduling of the Hearing.

In addition, the record fails to prove that the Carrier improperly rescheduled the September 24, 1996 Hearing to October 10, 1996. Although the record lacks a clear explanation for the rescheduling by the Carrier, the undisputed fact that the Organization subsequently postponed the Hearing until June 3, 1997 so that the Claimant could participate in the Hearing constitutes credible and probative evidence that the rescheduling met the mutual needs of the parties at the time. The subsequent challenge first advanced by the Organization in July 1997 regarding this point therefore lacks persuasiveness.

To the extent that the record contains any additional arguments by the parties, such arguments lack persuasiveness in the context of the present specific record developed by the parties.

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**AWARD**

**Claim denied.**

**ORDER**

**This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.**

**NATIONAL RAILROAD ADJUSTMENT BOARD**  
**By Order of Third Division**

**Dated at Chicago, Illinois, this 24th day of October, 2001.**