

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 36212
Docket No. MW-36386
02-3-00-3-627**

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

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(Union Pacific Railroad Company**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (Level 5 and dismissal) imposed on Mr. R. Potokar on July 19, 1999 for alleged violation of Union Pacific Rules 1.6, 1.1, 1.1.1, 1.1.2, 1.2.5, 1.2.7, 1.13, 70.1, 75.1, 75.1.1 and 75.1.2 while working as a welder helper in Roper Yard and in filing of Form 52032 on March 25, 1999 was without just and sufficient cause, on the basis of unproven charges and in violation of the Agreement (System File W-9948-159/1209028).**
- (2) As a consequence of the violation referred to in Part (1) above, Mr. R. Potokar shall now have the aforesaid discipline removed from his personal record and he shall be returned to service and compensated for all time that he was withheld from 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 Claimant entered the Carrier's service in April 1997 after passing a routine physical examination. He bid for a Welder's Helper position on Gang 6158 on January 25, 1999 under the supervision of P. Kelley. Several weeks later, the Claimant informed Kelley that he was having problems of unknown origin with his back which would likely require surgery in the near future. The Claimant further informed Kelley that his personal physician had not imposed any work limitations but had advised him to avoid strenuous physical activity.

Kelley testified, "we basically made the decision to let [the Claimant] go ahead and work, but with the understanding that he wouldn't do anything to strain or hurt his back until he had his operation." He told the Claimant to complete an incident report about the matter. The Claimant misplaced the form, requested another, and submitted it to Kelley on or about March 1, 1999. Consistent with his conversation with Kelley, the Claimant stated in the report, "I am not sure what caused my back to start hurting."

On March 24, 1999, the Claimant was assisting Welder Foreman J. Whitehead remove an 80-pound grinder machine from the rear of the gang's assigned truck. There is no dispute that he and Whitehead had performed this task together many times before without incident. This time, however, the Claimant felt a sharp pain in his back that forced him on the ground.

The Claimant filled out an accident report following this incident claiming that he had injured his back as a result of moving the grinder. The reports further states: "I informed [Kelley] that I was having problems with my back before this injury."

The Claimant was subsequently advised to report for an Investigation in connection with possible violations of the following Carrier Rules:

"Rule 1.6 Conduct

Employee must not be Dishonest.

Rule 1.1 Safety

Safety is the most important element in performing duties. Obeying the rules is essential to job safety and continued employment.

Rule 1.1.1 Maintaining a Safe Course

In case of doubt or uncertainty, take the safe course.

Rule 1.1.2 Alert and Attentive

Employees must be careful to prevent injuring themselves or others. They must be alert and attentive when performing their duties and plan their work to avoid injury.

Rule 1.2.5 Reporting

All cases of personal injury, while on duty or on company property, must be immediately reported to the proper manager and the prescribed form completed.

A personal injury that occurs while off duty that will in any way affect employees performance of duties must be reported to the proper manager as soon as possible. The injured employee must also complete the prescribed written form before returning to service.

Rule 1.2.7 Furnishing Information

Employees must not withhold information, or fail to give all the facts to those authorized to receive information regarding unusual events, accidents, personal injuries or rule violations.

Rule 1.13 Reporting and Complying with Instructions

Employees will report to and comply with instructions from supervisors who have the proper jurisdiction. Employees will comply with

instructions issued by managers of various departments when the instructions apply to their duties.

Rule 70.1 Safety Responsibilities

Employees must:

Be responsible for their personal safety and accountable for their behavior as a condition of employment.

Take every precaution to prevent injury to themselves, other employees, and the public;

Comply with all rules, policies, and outstanding instructions,

Report, correct or protect any unsafe condition or practice,

Be aware of and work within the limits of their physical capabilities and not use excessive force to accomplish tasks,

Use good judgment in fulfilling job responsibilities safely.

Past practices that do not conform to the rules are unacceptable.

Rule 75.1 Lifting and Moving material

Each person is responsible for determining their lifting limitations. Obtain additional help or mechanical assist device(s) to lift or handle heavy or awkward objects.

Observe the following principles of correct and safe lifting:

**Ensure secure footing and a good grip on the materials;
Keep the object close to your body;
Keep your upper body erect;
Lift smoothly – do not use jerky motions;
Do not lift and twist at the same time.**

Rule 75.1.1 Steps to Safe Lifting

Observe the following steps when lifting any items:

1. Check the load for size, weight, stability and grip.
2. Make sure the pathway to be used is clear of obstructions, debris or other conditions which may cause loss of footing.
3. Inspect the unlift areas for a clear unlift, preferably at knuckle height, without reaching.
4. Choose the right lifting technique (e.g., squat, semi-stoop, or balanced one-hand lift).

Rule 75.1.2 Lifting with Two or More Employees

Conduct a job briefing before beginning a task and define responsibilities and techniques for the type of lift being performed. One individual will give commands for all movements (lifting, walking, lowering, or throwing). Place the individual at one end of the object being lifted. Avoid walking backwards."

Following an Investigation conducted on July 2, 1999, the Claimant was assessed a Level 5 (dismissal) discipline under the Carrier's UPGRADE policy.

The Carrier contends that it established the Claimant's guilt by the requisite standard of substantial evidence. In support thereof, it argues that the Claimant submitted contradictory injury reports, first claiming that he had a pre-existing injury and then claiming that he was injured on the job. Such misconduct falls under the category of dishonesty, a summary discharge offense. In addition, the Carrier argues that the Claimant failed to follow instructions to work in a safe manner. His actions violated numerous Carrier Rules and fully warranted the penalty of dismissal, in the Carrier's view.

After thorough review of the record, we concur with the Organization when it argues that the evidence falls far short of meeting the Carrier's evidentiary burden. The charges directed against the Claimant, while numerous, cannot form the basis for discipline in the absence of sufficient probative evidence establishing that the Claimant in fact committed the misconduct alleged.

That evidence is lacking on this record. The charge of dishonesty is apparently predicated on the idea that the Claimant submitted contradictory or false incident reports in connection with his back injury. The Board finds that conclusion to be unwarranted. The Claimant submitted the first incident report at his Supervisor's request after he reported a back problem. He did not claim that it was caused by an on-duty injury; in fact, he specifically stated that he did not know how the back problem originated. The Claimant's second incident report addressed the injury he sustained on March 24, 1999. The two reports were based on two separate incidents. We find no inconsistency in the reports and absolutely no evidence of fraudulent or dishonest intent.

The Carrier also suggests that the Claimant performed unsafe practices in lifting the grinder on March 24, particularly because he had been reminded not to perform any unsafe act in connection with his weak back. As the evidence showed, however, the Claimant was performing his regular assignment to which the Carrier took no exception at any time until after he sustained an injury. Supervisor Kelley conceded that significant point. Moreover, Welder Foreman Whiteford testified:

"It was a [unfortunate] accident and I don't think there was too much that could have been done to prevent it. We were taking the grinder off the same way we always have. We grab the grinder with one hand on the handle and the other hand on the back of the grinder and slide it off the back of the bumper."

In light of the testimony of the Carrier's own witnesses, we find no basis for a finding that the Claimant violated Carrier Safety Rules by assisting the Welder Foreman in moving the grinder from the truck.

The many Rules cited in this case, standing alone, without adequate evidentiary support, amount to bare assertions that do not meet the Carrier's burden of proving its case by substantial evidence. It is apparent that the Carrier believes there are suspicious circumstances surrounding the Claimant's alleged personal injury on that date. However, discipline may not be assessed on the basis of speculation, conjecture or assumption. The claim must be sustained on that basis.

The Claimant is ordered reinstated with seniority and benefits fully restored. Reinstatement is conditioned upon the Claimant's providing the Carrier with a written

medical release to return to work and on the Claimant's passing a return-to-work physical examination. In addition, compensation for time held out of service is to be offset for the period of time during which the Claimant's physical condition would have rendered him medically unfit for work. Accordingly backpay, if any, will run only from the date the Claimant's doctor certified that he could have returned to service until he is returned to service.

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 24th day of September 2002.