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NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION

Award No. 37400  
Docket No. MW-37952  
05-3-03-3-362

The Third Division consisted of the regular members and in addition Referee Gerald E. Wallin when award was rendered.

PARTIES TO DISPUTE: ( Brotherhood of Maintenance of Way Employes  
( Union Pacific Railroad Company (former Missouri  
( Pacific Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline [Level 2 including up to one (1) day or one (1) round trip alternate assignment to develop Corrective Action Plan] imposed under date of June 12, 2002 upon Mr. C. E. Nuells for allegedly violating Rule 81.4.1 of the Union Pacific Safety Rules in connection with a personal injury and alleged failure to take proper precautions when getting off standing equipment on January 18, 2002 while assigned as a track foreman at Bloomington, Texas, was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File MW-02-84/1328368 MPR).
- (2) As a consequence of the violation referred to in Part (1) above, the Carrier shall remove all references of this discipline from Mr. C. E. Nuells' personal record and he shall now be compensated for eight (8) hours' pay at his respective rate of pay for attending the investigation on May 29, 2002 and for any and all expenses incurred in connection therewith.”

**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 was the Foreman of a rail replacement gang on January 18, 2002. Impending train traffic required his gang to vacate the section of track on which they were working. After loading tools onto the gang's hy-rail truck, the Claimant began to dismount from the truck bed. His left foot slipped while doing so causing him to fall to the ground and injure his back. It had been raining that day. He lost time from work for several months after the injury.

In addition to challenging the sufficiency of the Carrier's evidence to support the disciplinary action, the Organization raised several procedural objections as threshold matters. Our review of the record does not show them to be reversible errors.

Regarding the timeliness of the Investigation, the parties' Agreement is not absolute. It only conditions the applicable time limit upon "best efforts" and does not explicitly establish any sanctions for when Investigations are noticed and/or held outside the time limit. Thus, the Agreement appears to establish a goal instead of a requirement. On this record, it is clear that the Claimant was disabled for several months after his fall. The Carrier waited until he was fit for duty before noticing and holding the Investigation. Given the underlying circumstances, we do not find the Carrier's action to have been untimely. This finding is not altered by the number of other Awards cited by the Organization. All of them involved other

parties and significantly different contract language. None of them involve a similar "best efforts" provision like the instant Agreement.

The Organization's objection to the sufficiency of the notice must also be rejected. The notice contained the following charge:

"... your alleged failure to take proper precautions when getting off standing equipment on January 18, 2002, resulting in a personal injury to yourself..."

Our review of the applicable Agreement language does not reveal a requirement for any more specific information.

The Organization also objected to the absence of a Carrier witness. However, the record does not establish what, if any, material information the witness could have provided. Accordingly, we have no proper basis for concluding that the absence of the witness deprived the Claimant of a fair and impartial Investigation in any manner whatsoever.

On the merits, the Claimant was charged with violating certain provisions of Rule 81.4.1, which governs getting on or off standing equipment. It reads, in pertinent part, as follows:

"The following precautions must be taken when getting on or off standing equipment:

Always use the provided appliances (steps, ladders and hand holds) for getting on and off equipment. Be aware of and take necessary precautions to prevent injury from the build up of snow, ice, water, mud, grease and oil on footwear, sill steps and side ladders.

\* \* \*

Face the equipment and use the side ladder or steps, maintaining a three-point contact (two feet and one hand or two hands and one foot). Feet must be securely placed.

When getting off, retain a grip on the hand hold until one foot is firmly placed on the ground or other support.

\* \* \*

Use extreme care during wet, muddy, snowy or icy conditions. . . .”

It is undisputed that the only actual hand hold provided for climbing down from the bed of the truck was on the passenger’s side. The Claimant used it when he climbed up onto the bed. When he dismounted, however, he chose to alight from the driver’s side. For a hand hold, the Claimant’s testimony described how he gripped the support for a hydraulic oil cooler with both hands. While stepping down with his left foot, his left foot slipped off of a step and he fell to the ground. The Claimant asserted that he was facing the truck as he attempted to climb down.

According to the Claimant’s supervisor, however, who participated in a re-enactment talked through by the Claimant the following day, the Claimant described how he was facing away from the truck as he dismounted.

Other than the Claimant, there were no eye-witnesses to his fall. Nonetheless, the Carrier discounted the credibility of the Claimant’s explanation and, instead, credited the testimony of the supervisor. After careful review of the record, we find the circumstances shown by that record to constitute substantial evidence in support of the Carrier’s determination.

The Claimant contends that he maintained a secure three-point contact while reaching for a secure fourth point of contact with his left foot and took the other precautions required by the Rule. If this were true, it is extremely unlikely that he could have fallen as he did. If he truly maintained three-point contact securely until his left foot was securely placed as a fourth point of contact, he should have remained stable regardless of what happened with his left foot. Accordingly, the Carrier was entitled to conclude that the Claimant did not attempt to dismount the truck as he claimed at the Investigation. It is also undisputed that the Claimant did not use the hand hold provided on the passenger’s side when attempting his dismount.

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Given the overall circumstances, we do not find the discipline imposed, which was corrective action with pay, to have been unreasonable. Thus, we will not disturb it.

**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 February 2005.**