

NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION

Award No. 37747  
Docket No. MW-38404  
06-3-04-3-308

The Third Division consisted of the regular members and in addition Referee Steven M. Bierig when award was rendered.

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

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (Level 3 Upgrade assessment) entered upon Mr. J. Villalobos' record on November 16, 2002 was arbitrary, capricious, unjust and in violation of the Agreement (Carrier's File 1370899-D).
- (2) The discipline [Level 4 with thirty (30) days off work without pay and requirement to pass rules examination in order to return to work and develop a corrective action plan] imposed upon Mr. J. Villalobos on March 6, 2003 for alleged violation of Union Pacific Rules 1.1.2 and 70.1 in connection with a personal injury report on February 8, 2003 while working as a system rubber tire backhoe operator in the vicinity of Corona, New Mexico was arbitrary, capricious on the basis of unproven charges and in violation of the Agreement (Carrier's File 1368289 D).
- (3) As a consequence of the violation referred to in Part (1) above, the Level 3 Upgrade assessment shall now be removed from Mr. J. Villalobos' record and he shall receive any compensation or benefits lost that may have been incurred as a result of said discipline.
- (4) As a consequence of the violation referred to in Part (2) above, all reference to the Level 4 discipline shall be removed from

Mr. Villalobos' record and he shall be compensated for  
"\*\*\*any lost wages including overtime, travel expenses from  
Troutdale, Oregon to his home residence and from his home  
residence to Morengo, Washington including per diem from  
March 9, 2003 to April 8, 2003 and benefits connected thereto  
that Claimant may suffer be reimbursed because of the  
Carrier's wrong doing. \*\*\*"

**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 has service dating from April 1, 1986 and System Rubber Tire Backhoe seniority dating from February 17, 1988. The Claimant was regularly assigned and working on Production Gang 9001 under the supervision of J. Swore and under the direct supervision of Assistant Foreman J. Sandoval in the vicinity of Corona, New Mexico.

On February 8, 2003, the Claimant was instructed to "throw plates." While there is some controversy about what actually occurred, it does appear that the Claimant used a hook as an aid in throwing the plates. However, the hook that the Claimant used was too short and he injured himself. The Claimant reported his injury to his Foreman who instructed him to sit on the bus and wait for Supervisor Swore. The Claimant prepared an injury report and was taken to Santa Rosa Hospital in Santa Rosa, New Mexico.

By letter dated February 15, 2003, the Claimant was given notice that a formal Investigation would be held on February 28, 2003 "... to develop the facts and place responsibility, if any, in connection with the charge that: While working as a System Rubber Tire Backhoe Operator on System Gang 9001 you allegedly sustained a personal injury on February 8, 2003 in the vicinity of Corona, New Mexico which may be in violation of Union Pacific Rules 1.1.2 and 70.1...."

The Hearing convened on February 28, 2003. By letter dated March 6, 2003, the Claimant was advised that there was sufficient evidence adduced at the Hearing to sustain the charges in connection with his violation of Rules 1.1.2 and 70.1. The Claimant was advised that because his record reflected that he had been reinstated in 1997 with a Level 3 Upgrade and the current violations merited a Level 1 Discipline, he was assessed a Level 4 Discipline that resulted in a 30-day suspension from service without pay. He was also advised to develop a Corrective Action Plan upon his return to work after his suspension. Pursuant to an earlier discipline, the Claimant was reinstated to service on November 17, 1997 on a leniency basis with his seniority and vacation rights unimpaired. In addition, the Board notes that at the time of the incident, the Claimant had recently returned from an eight-year leave of absence as an elected official of the Organization.

Two matters are at issue here. First, was the Claimant guilty of violating Rules 1.1.2 and 70.1, and thereby deserving of discipline? Second, assuming that the Claimant had violated the relevant Rules, did the Carrier appropriately impose a Level 4 Discipline when ordinarily such a safety violation results in a Level 1 Discipline? It is uncontested that a Level 1 Discipline consists of a one-day suspension.

The Organization claims that the discipline was unwarranted. It asserts that the burden of proof in a discipline matter such as this is on the Carrier and that burden has not been met. The Organization stresses that the Claimant stated at the Investigation that he had requested and was denied a longer hook, leading to his injury. The Claimant should not be punished for an error on the Carrier's part. Further, even if the Claimant engaged in the relevant offense, he should not have received a Level 4 Discipline. When the Leniency Agreement was reached, the Claimant was not notified of an automatic Level 3 Upgrade. The Organization contends that the claim must be sustained and the Claimant made whole.

Conversely, the Carrier takes the position that it met its burden of proof. The Claimant was afforded a fair and impartial Investigation in accordance with the requirements of the Agreement. The Carrier considers the Claimant guilty as charged. According to the Carrier, a review of the transcript as developed during the Investigation reveals that the Claimant did not request a longer hook and was therefore responsible for his violation of the Safety Rules. Further, the Carrier asserts that a Level 4 Discipline was appropriate because at the time the Claimant was reinstated in November 1997, under the then-existing Carrier Upgrade Policy, the Claimant was reinstated with Level 3 status. Therefore, because the Claimant's instant discipline was a Level 1 and his record indicated an existing Level 3 Discipline, a Level 4 Discipline was appropriate in this case.

In discipline cases, the Board sits as an appellate forum. We do not weigh the evidence de novo. As such, our function is not to substitute our judgment for the Carrier's, nor to decide the matter in accord with what we might or might not have done had it been ours to determine, but to pass upon the question of whether there is substantial evidence to sustain a finding of guilty. If the question is decided in the affirmative, we are not warranted in disturbing the penalty unless we can say it appears from the record that the Carrier's actions were unjust, unreasonable or arbitrary, so as to constitute an abuse of the Carrier's discretion. (See Second Division Award 7325; Third Division Award 16166.)

The Board finds substantial evidence in the record to sustain the Carrier's position that the Claimant violated the relevant Safety Rules. There was a credibility dispute between the Claimant and Supervisor Swore as to whether the Claimant had requested a longer hook. As noted above, the Board is not in a position to re-litigate the Investigation. Therefore, we affirm that the Claimant violated Rules 1.1.2 and 70.1.

However, as to the penalty assessed, we must agree with the Organization. A review of the Reinstatement Agreement dated November 17, 1997 does not indicate that the Claimant was reinstated with a Level 3 Upgrade and, therefore, the Claimant was not on notice of such Upgrade. Because no such notice was provided, the Level 4 Discipline imposed will be reduced to a Level 1 Upgrade.

**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 21st day of March 2006.