

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No.38954
Docket No. MW-38893
08-3-NRAB-00003-050331
(05-3-331)

The Third Division consisted of the regular members and in addition Referee Sinclair Kossoff when award was rendered.

(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
(PARTIES TO DISPUTE: (
(BNSF Railway Company (formerly The Atchison,
(Topeka and Santa Fe Railway Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline [ten (10) day record suspension with a one (1) year probation period] imposed upon Mr. T. J. McCann for his alleged violation of Rule 1.13 of BNSF Maintenance of Way Operating Rules in connection with a personal injury while working at Grant Avenue Crossover on the Kansas City Terminal Railway on November 25, 2003 was without just and sufficient cause, based on unproven charges and in violation of the Agreement [System File C-04-S090-1/10-04-0174(MW) ATS].
- (2) As a consequence of the violation referred to in Part (1) above, Mr. T. J. McCann shall now have all reference of this discipline removed from his record.”

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 November 25, 2003, the Claimant, a Welder B, and J. Turney, his coworker, a Welder A, were grinding welds with an MC3 Grinder at Mile Post 6.55 at the Kansas City terminal in Kansas City, Missouri. As the Welder A, the coworker was considered to be the employee in charge of the crew. The MC3 Grinder weighs approximately 235 pounds. After finishing their work on one side of the track, the Claimant and the coworker manually lifted and turned the MC3 Grinder so that they could work on the opposite side of the track. In the process the Claimant injured his back.

The MC3 Grinder is designed to be turned with a turntable that is built into the machine. K. Davis, Welding Supervisor, System Engineering, testified that on October 14, 2003, before they began working with the MC3 Grinder, he had the Claimant and his Welder A coworker place the unit on the Main 3 crossover, and the three of them did a walk-around of that piece of equipment. According to the Supervisor's testimony, he showed them what each crank did, the mechanisms, and the brake. In addition, he testified, he cranked down the turntable unit and showed them how to turn the unit with the turntable. It takes about 20 pounds of downward pressure, he stated, and one individual very easily can turn the unit from rail to rail. He also gave them the option, he testified, to use the boom on the truck, but not physically to try to handle the machine with two people because it was too heavy and too awkward. According to the Supervisor, he asked both men if they had any questions about the unit, and they said that they understood the operation of it. The Supervisor then fired up the unit, marked out the switch locations, and proceeded to grind some switches with the unit to show them how the operation worked. The Supervisor testified that you can turn the machine with the turntable in less than a minute and 30 seconds.

The Supervisor testified that the Welder A was in charge of the crew and that he told the Welder A that he expected the crew to do four switches a day and that system-wide the Carrier was meeting that goal. The grinding cannot be done when there is train traffic on the tracks, and, because of heavy traffic volume, the Supervisor had to work closely with the Dispatcher and the Signal Supervisor to provide track and time for the crew to work while maintaining protection for them.

A. Richardson, Terminal Engineer, who oversees the track maintenance on the Kansas City Terminal Railroad, testified that around 3:00 P.M. on November 25, 2003, the Claimant came into the office and reported that he had hurt his back while he and his partner were attempting to lift the MC3 Switch Grinder to turn it around. The Claimant provided the Terminal Engineer a written statement describing how he felt a sharp pain in the upper part of his back around 12:30 P.M. when he and his coworker lifted the machine and started to turn it around. According to the statement, the Claimant thought it would go away and tried to stick it out, but the pain persisted until the time that he finally reported it several hours later that afternoon. The Claimant added the following postscript to his statement:

“P.S. Told Jason [the Welder A] this grinder is too heavy to be walking around with and he agrees but Kent Davis [the Supervisor] is more [or] less forcing us to this stage, more switches, more switches, grinding without track & time on look out. That’s Mr. Davis, running a grinding machine no track & time on lookout and carrying around a 350 pound machine should have used my own judgment before this happened.”

The Supervisor testified that the November 25 incident was the first indication he had that the crew was turning the MC3 Grinder manually. The Claimant’s statement, the Supervisor stated, was the first indication he had that the Welder A was using a lookout to watch while the crew was grinding the switches. “Now, what I did instruct Jason Turney to do,” the Supervisor testified, “was not to put the MC3 on to do it under lookout rule, but if the time permitted, . . . that if we could do some of the hand grinding with the slotting wheel or some of the minor radius of a frog with a one-inch by eight-inch grinder under lookout rule, and

everything was in the correct parameters, that we could utilize a little bit of time like that, but never to put the MC3 on under those conditions.”

The Claimant testified that on October 14, 2003, the Supervisor demonstrated to him and the Welder A how to load, unload, and grind with the MC3 Grinder, but nothing with the turntable. He is aware, he stated, of how to use the turntable on the machine. Asked at the Investigation whether while turning the machine on November 25 he mentioned to the Welder A that they ought to be using the turntable on the machine, the Claimant stated, “No, sir. I just mentioned many a times that we ought to use the truck boom.” According to the Claimant, he also mentioned this on November 25 at the time of the incident in question, but they could not use the boom because they could not get the truck in position. “[T]here wasn’t a road . . . close enough that we could use the boom,” the Claimant testified, “so we just manually turned it.” There was no problem with the turntable on the machine, the Claimant stated. Asked if he thought that it was safe for two people to lift the machine and turn it, the Claimant stated, “Yes, I did, because that’s the only way I’ve ever seen it turned. I mean, I, I haven’t been around it too awful much, but I’ve been around it enough that I’ve seen people operate it, and that’s the way I’ve always seen it being turned.”

The Claimant testified that there were many times that the crew did not have track and time and therefore could not set the truck in position to use the boom to turn the M3 Grinder and that his coworker, the Welder A, was basically getting “instructions from the supervisor to do this on lookout.” In the incident when he hurt his back, according to the Claimant, the crew did have track and time authority. The Supervisor, he stated, never instructed him to work the MC3 Grinder without track and time. He acknowledged that he never told the Supervisor, the Terminal Engineer, or any of the Roadmasters that he was turning the machine by hand and did not think that he should be. He only confronted his coworker, the Welder A, about it, he stated. Questioned whether he understood that all employees are empowered for their safety, the Claimant testified, “Yes, I do, but I, I guess my fear was being insubordinate.” His coworker, the Claimant stated, talked to the Supervisor every morning either by conference call or by means of voice mail.

The Claimant was asked by his Representative at the Investigation, "So you were put in a position of making a choice of a possible insubordination charge, or picking up the grinder because Mr. Turney, who was your supervisor, told you to pick it up. Is that right?" The Claimant answered, "That's right." The Claimant testified that from the day he started working with the MC3 Grinder on October 13, 2003, until he was injured on November 25, 2003, he and his coworker, on a daily basis, turned the unit by hand. The only time the boom was used, according to the Claimant, was to take the MC3 Grinder out of the truck and to put it back in the truck. Every day, the Claimant testified, his coworker, the Welder A in charge of the crew, would tell him that the Supervisor was on him to get more welds ground.

On the day that the Supervisor demonstrated for them how the MC3 Grinder worked, the Claimant stated, they used the boom to unload the unit from the truck and place it on the track. After they set the machine on the track, the Claimant testified, they manually turned it while the Supervisor was standing there. Asked whether he has "manually turned this grinder in the past while other Carrier officers have watched you," the Claimant answered that he has. None of them ever took exception to his turning the machine manually, the Claimant testified. Questioned whether he had ever run the machine before his October 13 start date, the Claimant stated that he had not. The Claimant testified that neither the Welder A nor the Supervisor had ever threatened him with insubordination.

Recalled to testify, the Supervisor stated that he provided orientation to the Claimant and the Welder A in the operation of the MC3 Grinder on October 14, and 16, 2003. He stated that they did a walk-around of the entire machine, and he showed them the complete process. "I physically cranked the turntable down at that point," the Supervisor stated, "showed them how the machine rotated. I did not rotate the entire machine. I brought it out of position, partially rotated it, put it back, and once . . . everybody understood the operation of the machine, I proceeded to grind that switch up." At no time on October 14, or 16, the Supervisor testified, did he see the Claimant or his coworker lift the MC3 without the turntable or the boom. Had he seen it, the Supervisor stated, he would have immediately stopped it.

Recalled to testify, the Claimant testified that on October 14 and 16 the Supervisor demonstrated how to grind with the machine but not how to use the

turntable. They did not use or crank down the turntable at that time, the Claimant testified. The only supervisors that have seen him turn the machine without using the turntable or a boom, the Claimant stated, were Track Inspectors in the Augusta area. None of the Roadmasters has seen him turn the machine manually, he stated.

The Claimant testified that he has never had discipline assessed against him in the past. He had one prior personal injury, he stated, a wrist injury for which he did not lose time from work.

The Organization contends that the Claimant was denied a fair and impartial Hearing, that the Carrier failed to meet its burden of proof, and that the discipline issued was unwarranted, arbitrary, and capricious. The Organization argues that the fact that the discipline assessed against the Claimant was identical to what was offered him on the condition that he sign a waiver shows that the discipline had already been decided upon prior to the Hearing.

The Organization contends that the Claimant manually turned the MC3 Grinder because he was instructed to do so by the Welder A, who was the crew leader or employee in charge and the equivalent of the Claimant's Foreman on the job. The Organization maintains that the Claimant was required to turn the grinder machine manually because he was so instructed by his superior, who made the decision to manually lift and turn the machine, and that such compliance to a superior's instructions cannot properly be a basis for disciplining the Claimant.

The Organization notes that at the outset it requested that this case be handled under the Carrier's SIAP and Alternative Discipline policy and that this request was repeated at the Investigation. It contends that the Carrier's failure to grant its request violated the Carrier's own Policy for Employee Performance Accountability, which states in the General Guidelines section under the heading Non-Serious Rule Violations that "An employee involved in a first non-serious incident may choose alternative handling." The quoted language, the Organization maintains, allows the employee to choose whether to have a Hearing or to have his case handled under the Safety Incident Analysis Process. The policy has been applied in dozens of cases for employees involved in a first non-serious incident, the

Organization asserts, and the failure to apply it in the Claimant's case constituted disparate treatment.

The Organization further argues that in finding the Claimant guilty of the Rules violation the Carrier "totally disregarded the fact that Rank 'A' Welder Turney, who as previously noted was also charged by the Carrier with regard to the incident, signed a discipline waiver in lieu of attending a formal Hearing, thereby accepting responsibility for the accident."

The Carrier contends that the evidence presented clearly proves that the Claimant did not follow instructions for turning the MC3 Grinder given him by Supervisor Davis and thereby violated Maintenance of Way Operating Rule 1.13. The Claimant's defense that he feared a charge of insubordination has no substance, the Carrier argues, because he acknowledged that he was never threatened with insubordination. In addition, the Carrier asserts, in his written statement the Claimant said that Welder A Turney agreed that they should not be moving the machine manually. "If Mr. Turney agreed with the Claimant," the Carrier asks, "how could he then charge the Claimant with insubordination?"

The Carrier asserts that it has consistently published and enforced the policy of an employee's personal empowerment to work safely without fear of retribution and that the Claimant presented no evidence to back up his claim that he did not believe that the Carrier would stand by its policy.

The Carrier rejects the Organization's claim that it prejudged this case as shown by the fact that the discipline assessed against the Claimant was the same discipline as offered him should he accept a waiver of the Investigation. First, the Carrier argues, the waiver was an offer of settlement, and Board authority has ruled that it is not proper to bring an offer of settlement before the Board for consideration. Nor, the Board asserts, does the fact that the discipline ultimately assessed matched the discipline initially offered prove prejudgment.

The fact that supervision may have put pressure on the Claimant's crew to get more work done, the Carrier contends, has no bearing on this case because all employees working in today's business environment are under similar pressure to

get more work done in less time. This, the Carrier maintains, is not a justification for working unsafely.

With regard to the fact that it did not handle this case through its Safety Incident Analysis Process, the Carrier contends that "it has always been the Carrier's election concerning which incidents will be handled under the SIAP policy, not the Organization's or the employee's" It cites language in Appendix A of the Policy for Employee Performance Accountability that it contends shows that the Carrier has discretion as to which incidents will be handled through SIAP.

The Carrier notes the Claimant's testimony that Carrier Officers observed him and his coworker manually turning the MC3 Grinder and took no exception to their doing so. It argues that the Claimant's testimony was not supported by corroborative evidence and that the coworker did not back up the Claimant's allegations. It notes that the two Carrier Officers it called as witnesses at the Investigation testified that they never saw the Claimant or the coworker manually turn the unit. What we have here is a dispute of facts, the Carrier argues, and "[n]umerous arbitral awards have already determined that where there is a factual dispute over an essential fact, the Board must either dismiss the case or rule against the moving party."

Stressing that the Claimant incurred a personal injury to his back while manually turning the machine allegedly in violation of his Supervisor's instructions, the Carrier asserts that the discipline assessed was not arbitrary, capricious, or excessive.

There is sharply conflicting testimony regarding whether Supervisor Davis demonstrated how to rotate the MC3 Grinder using the machine's turntable. If the Claimant's testimony were to be credited, the Supervisor did not demonstrate how to use the turntable to rotate the machine. The Supervisor, on the other hand, testified that he did demonstrate for the Claimant and his coworker how to use the turntable, cranking it down and partially rotating the unit.

The Claimant, however, did not contradict Supervisor Davis's testimony that he orally instructed the Claimant and his coworker to use the turntable or the boom

on the truck to turn the unit, but not to try to do it manually because the unit was too heavy and too awkward. The Claimant's testimony was that the Supervisor demonstrated how to load and unload the machine and grind with it, but did not demonstrate how to use or crank down the turntable. But the Claimant said nothing about whether or not the Supervisor gave oral instructions concerning the turning of the machine. The Claimant would have been in violation of Operating Rule 1.13 even if he disobeyed oral instructions to him that were not accompanied by a physical demonstration of how to use the turntable.

It is nevertheless possible to understand the Claimant's testimony as a general denial that the Supervisor even addressed the question of how to turn the machine. On that interpretation of the record we have an issue of credibility. If we credit the Claimant's denial, we must find the Supervisor's testimony to be lacking in credibility and the charge against the Claimant to be without evidentiary support. In Second Division Award 7325 the Board declared that it "has consistently refused to determine the credibility of witnesses" and that "the Board has left to the trier of the facts the matter of weighing or resolving conflicts in the evidence." The Board further stated, "If, as in this dispute, there be a conflict in the testimony adduced, it is the function of the trier of the facts and not the function of this Board to resolve such conflict. (See Third Division Awards 16168, 13475, 12074, 9326, 9175, and 9046)."

In the present case there was substantial evidence to support a finding that the Claimant violated Operating Rule 1.13 by failing to follow his Supervisor's instructions to use the machine's turntable or the boom on the truck to rotate the unit and not to do it by hand because it was too heavy or awkward. The Supervisor so testified. In addition, the Claimant's coworker, who, it is not disputed, received the same instructions from the Supervisor as the Claimant and at the same time, was charged with the same violation as the Claimant. Unlike the Claimant, however, the coworker signed a waiver of an Investigation and accepted the identical discipline as was assessed against the Claimant, thereby, in effect, admitting his guilt. The combination of the Supervisor's testimony and the acceptance of discipline by the coworker, who was not called as a witness by the Organization to back up the Claimant's version, provided substantial evidence to

support a finding sustaining the charge that the Claimant failed to follow his Supervisor's instructions regarding how to turn the MC3 Grinder.

The Board finds no evidence of prejudice of his case in the fact that the discipline assessed against the Claimant was the same as was originally offered as the penalty should he sign a waiver. The identity between the original offer and the ultimate penalty assessed may indicate no more than that the initial offer was a fair one. There is no evidence of a practice to discount the penalty for a Rules violation where an employee waives an Investigation and accepts proposed discipline without a contest.

The evidence does not support the Claimant's contention that he was merely following the instructions of his coworker, the Welder A in charge of the crew, when he and the coworker manually turned the MC3 Grinder together. As the Carrier notes, the Claimant's own written statement regarding the incident asserts that Welder A Turney agrees with him that the Grinder was too heavy for them to handle manually. The picture painted by the Claimant's statement is of a Supervisor making unreasonable demands on both the Claimant and his coworker, not of a coworker, in charge of the job, issuing unreasonable instructions that the Claimant followed for fear of being charged with insubordination.

Nor does the record support a finding that Supervisor Davis forced the Claimant and the Coworker to turn the MC3 Grinder manually. The Claimant's written statement says that the Supervisor "is more [or] less forcing us to this stage . . ." by requesting that they do more switching and more grinding. However, the Claimant's written statement also recognizes that he "should have used my own judgment before this happened." In addition the phrase "more [or] less" indicates that there was no actual order given by the Supervisor to lift the unit manually or otherwise work unsafely. It was their own work ethic (no doubt energized by the Supervisor's direction) that was driving the Claimant and his coworker to work as hard as they did, but they must recognize that it cannot be at the expense of their health and safety. There is nothing in the record of this case to persuade the Board that either the Claimant or his coworker would have suffered any discipline or other disadvantage had they taken the time to turn the Grinder by means of the turntable every time that the unit had to be turned or rotated.

The Board carefully considered the Organization's contention that the Carrier's Policy for Employee Performance Accountability required that the present incident be handled pursuant to the Safety Incident Analysis Process (SIAP) set forth in Appendix A of the Policy. However, because, as found in the Investigation, this case involved an injury to the employee resulting from the disregard of an express instruction designed to protect the employee from injury, the Board is of the opinion that, under Appendix B of the Policy, the Carrier was justified in treating this case as a serious Rule violation. The Policy does not require the Carrier to apply the Safety Incident Analysis Process for serious Rule violations.

The Board further notes that the discipline imposed in this case is less than that permitted by the Policy for a first serious Rule violation. See paragraph b. of the Policy under the heading Serious Rule Violations. The specific penalty meted out by the Carrier reflects recognition by it of the mitigating elements present in the case.

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 29th day of February 2008.