NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 22471
Docket Number MW-22438

George S. Roukis, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(The Denver and Rio Grande Western Railroad Company

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

(1) The five (5) work days' suspension imposed upon Section Laborer Juan A. Ortega, from February 9, 1977 through February 15, 1977, was improper and without just and sufficient cause. (System File D-1-77/MW-6-77)

(2) The Claimant's record be cleared of this suspension and he be compensated for all wage loss suffered in accordance with Rule 28 (d) of the Agreement."

OPINION OF BOARD: Claimant was suspended for five (5) days following an investigative hearing held on January 31, 1977 to determine the facts and personal responsibility, if any, respecting his wrist injury, sustained on January 19, 1977.

Carrier contends that claimant was not in compliance with Safety Rule 240, which is referenced hereinafter, since the investigative transcript shows that he was struck by a spike maul and therefore within the swing of that tool.

Safety Rule 240 reads "Standing within swing of tools in the hands of workmen is prohibited."

Claimant, on the other hand, argues that he was outside the swing arc of his partner's spike maul and was injured when the tool missed the spike head and bounced off the rail.

Our review of the record indicates that claimant was not working in a safe manner when struck, since he was already into the swing with his spike maul before the other employe was able to remove his spike maul from the area.

Inasmuch as it was quite possible to be outside the swing area and still be injured accidentally by a ricochetting spike maul, the evidence of record shows that claimant was working too fast and placed himself in a precarious position at that time. If he had waited until the other tool cleared the area before beginning his down swing, he might have avoided the injury.

In the record claimant admits that he was going down when the other spike maul bounced off the rail and it is confirmed by his partner's personal injury and accident report.

The other employe noted in the space marked, Details of Accident, that "We were spiking together and I hit the rail and the spike maul bounced up and hit the other man on the right hand while he was going down to hit the spike." He stated that the accident was caused by their "spiking too fast."

While claimant was perhaps located in the correct working position vis-a-vis his colleague, he endangered himself when he came down with the spike maul before the area was cleared. By this precipitate action he technically placed himself within the swing area.

We recognize, of course, that claimant didn't plan the accident. The incident just happened. But his fast moving work pace under the precise circumstances of the moment violated the spirit and basic thrust of Safety Rule 240.

Unlike most rule violations where specific intent must be established, incidents of this type must be assessed by the actual result. Claimant's unnecessary fast spiking movements exposed him to this unforeseen danger and he was unfortunately injured. We regret that he had to suffer this injury, but Safety Rules are written to promote the common good. We do not find that raising the applicability of this rule was improper, since claimant did not protest its introduction and discussion at the hearing. Accordingly, we will deny the claim.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A.W. Paulka
Executive Secretary

Dated at Chicago, Illinois, this 31st day of July 1979.