

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 30849
Docket No. MW-31569
95-3-93-3-569

The Third Division consisted of the regular members and in addition Referee Carol J. Zamperini when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(
(CSX Transportation, Inc. (former
(Louisville & Nashville Railroad Company)

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

- (1) The discipline (letter of reprimand) imposed upon Track Repairman R. C. Kissick in connection with his alleged responsibility for the injury sustained on July 20, 1992 was without just and sufficient cause and on the basis of an unproven charge (System File 4(17) (92)/12(92-1267 LNR).
- (2) As a consequence of the violation referred to in Part (1) above, Track Repairman R. C. Kissick shall receive the remedy prescribed by the parties in Rule 27(f)."

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 waived right of appearance at hearing thereon.

The Claimant was notified by letter dated August 26, 1992, that he was supposed to be present at an Investigation to determine his responsibility for sustaining a back injury on July 20, 1992. The Hearing was postponed and eventually held on September 17, 1992.

The Claimant, a Track Repairman, was working on July 20, 1992. As one of his assigned duties he, along with another employee, was to load a filled oxygen cylinder from the ground onto a flat car. In order to complete the task they had to carry the cylinder approximately 15 to 20 feet. When he and his co-worker were picking up the cylinder, the Claimant felt a sharp pain in his back. This did not prevent them from completing the job of loading the cylinder. The Claimant and his co-worker were the only witnesses present while they performed the job. After the cylinder was loaded, the Claimant reported a possible back injury. The Claimant was accompanied to a medical facility, where a doctor reported that he had a lumbar strain. The injury was subsequently determined to be a herniated disc.

The Claimant lost time as a result of the injury. He was still off work at the time of the Investigation. He was present at the Hearing, along with his co-worker, who was a witness, and two Carrier witnesses.

There were no Rule violations alleged in the Notice of Investigation, but several Safety Rules were read during the Investigation. In each case, the Claimant affirmed, when asked, that he had complied with each Rule.

After the Hearing, the Carrier determined there was sufficient evidence to support a finding that the Claimant had violated Rule 922, that portion of which reads as follows:

"Rule 922:

When lifting, start and finish the lifting task at waist height, if possible. Avoid reaching to initiate a lift. When possible slide the load close to you. Flex the knees when possible to gain the advantage of stronger leg muscles. Before beginning the lift be sure the route to be traveled is clear of tripping hazards. Ascertain in advance that the location for placing the load is suitable. Get a good grip. Use palm and fingers. Wear gloves if practical. Be certain that they are dry and free of grease. If load is dirty, greasy, or wet wear an apron or protective clothing that will allow the load to be kept close to the body. Analyze the load. Know the weight. Check all handles for security. Be aware the contents may shift. Know what is being lifted. If load is awkward to handle, or too heavy, get help. When weight or size requires more than one lifter: Have a clear understanding for all movements. Place lifters according to size, strength and experience. Avoid walking backwards, if possible. Movements must be coordinated, with one person designated to give commands.

The Claimant was issued a letter of reprimand.

The Organization appealed the Carrier's decision. It contends that the Claimant was not afforded a fair and impartial Hearing. He was notified of the Hearing, but at no time was he advised he was charged with the violation of a particular Rule or regulation. The notification letter merely told him he was charged with ". . . responsibility in connection with lumbar strain that occurred to his lower back. . . ." It was only during the Hearing the Carrier read a multitude of Rules, one of which was Rule 922, which the Carrier subsequently determined the Claimant had violated.

According to the Organization, the Carrier failed to present substantial evidence that the Claimant had violated the aforementioned Rule. Its determination was groundless. Because the Carrier violated the Claimant's due process rights and failed to substantiate any violation of Carrier Rules and/or regulations, the claim must be sustained in its entirety.

The Carrier urges that the Claimant was afforded a fair and impartial Hearing in accordance with Agreement Rule 27. His rights were fully protected. He was given appropriate notice of the charges against him and had ample opportunity to prepare a defense.

Furthermore, the Carrier urges that it provided substantial evidence the Claimant had lifted the cylinder improperly, causing an injury to his back. He was charged with responsibility in connection with injuring his back and the evidence supported this conclusion. In addition, he failed as required by Rule 922 (i), which reads:

"(i) Analyze the load:

- (1) Know the weight.
- (2) Check all handles for security.
- (3) Be aware that contents may shift.
- (4) Know what is being lifted."

According to the Carrier, the Claimant's complacent attitude toward safety, as evidenced by the manner in which he responded to questions during the Hearing, is unacceptable. The Carrier has placed great emphasis on safety. The Board is equally mindful of the responsibilities and discretion with which the Carrier must approach matters involving safety.

The Board has looked carefully at the issues raised by both Parties. The Board shares the concern of the Organization regarding an individual's right to due process, while at the same time, equally appreciates the Carrier's need to assure the safe operation of the day-to-day operations of the railroad.

This Board finds itself in agreement with the Carrier that if an employee requires assistance to lift something because it is too bulky or too heavy, the employee must request help in order to avoid injury. Failure to do so not only places the employee in jeopardy of injury, but it also is a violation of the Safety Rules. In this case, however, we do not have a situation where the Claimant should have realized the cylinder was too heavy to lift and required more than two men. In fact, we have just the opposite. The normal practice on this crew, at least, was for two men to load and move the oxygen tanks without any other assistance. This method had been used with the full knowledge of supervisory personnel. It was not an unusual or unfamiliar task. Even if the Claimant could not iterate the weight and exact size of the cylinder, it is obvious members of the crew were aware of the weight, size and their ability to move the object. After all, the Claimant had performed the task over the last seventeen years. While not aware of the exact weight and measurement, he was obviously aware of what was required to lift the cylinder. Unless the Carrier provided evidence to support a conclusion that the particular cylinder lifted by the Claimant and his co-worker was somehow different than the usual cylinder moved by the crew, the Board cannot arrive at a decision which blames the Claimant for performing a duty he was instructed to perform, had performed without incident many times in the past and had, by all indications sufficient assistance.

Concurrently, the Board finds the Carrier failed to prove the charges against the Claimant. The only witnesses to the incident were the Claimant and his co-worker. Both testified that the Claimant used good lifting mechanics while performing his job. They also testified, along with the Supervisor, that they had performed their warm-up exercises that morning. It is not enough to simply assume the Claimant did something incorrectly, thereby injuring himself. When an employee is disciplined for a Rule violation, the evidence must support the charge. If it does not, the Board has little choice but to sustain the claim. In this regard, we fully agree with Second Division Award 1969:

"As we said in Award 1769, discipline must be based upon something more than a mere suspicion or possibility that an employee failed in his duties. Courts have frequently stated in weighing the proof offered by a plaintiff in tort actions that no number of possibilities makes a probability. Such is the case before us and we are compelled to sustain the Claim upon the grounds that the penalty was wholly unwarranted for want of proof of the charge made. The action of the carrier under the record made was arbitrary and the charge should not be considered in derogation of grievant's service record."

(See also Third Division Awards 18817 and 24574, as well as Second Division Award 4468.)

AWARD

Claim sustained.

O R D E R

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 27th day of April 1995.