

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 33217
Docket No. MW-33778
99-3-97-3-257**

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Burlington Northern Santa Fe (former Burlington
(Northern Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The letter of censure placed on Grinder Operator K. L. Berg for the alleged personal injury he sustained on October 17, 1994 was without just and sufficient cause, based on an unproven charge and in violation of the Agreement (System File T-D-866-H/MWB 95-04-10AB BNR).**
- (2) Grinder Operator K. L. Berg shall now have the letter of censure removed from his personal 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.

Upon his return from vacation, Claimant reported to work on a new position on a welding gang at Minot, North Dakota, at 7:00 A.M. on October 17, 1994. In attempting to retrieve keys from the tool box on the truck bed, Claimant leaned over tools and equipment blocking his path. As he bent to lift the 25 pound box, he experienced re-injury to a previously damaged disc in his lower back.

On October 24, 1994, Carrier directed Claimant to attend a formal Hearing five days later, subsequently postponed to November 7, 1994. On December 1, 1994, Claimant was assessed a letter of censure reading as follows:

“Censured by Burlington Northern for violation of Rule 1.1.2 of the Burlington Northern Rules of the Maintenance of Way Department for failure to be alert and attentive in connection with his personal injury at about 0700 hours on October 17, 1994.”

Operating Rules 1.1.2 provides as follows:

“Rule. 1.1.2 Alert and Attentive

Employees must be careful to prevent injuring themselves or others. They must be alert and attentive when performing their duties and plan their work to avoid injury.”

The Carrier maintains that Claimant had previously received training on proper lifting techniques; that in reaching approximately three feet to obtain the keys in the tool box, Claimant ignored that training; that he had special reasons to be sensitive in this area, having been previously given 60 and 90 day leaves for treatment of his past and continuing back problems; and that it spends significant time, energy and resources in efforts aimed at insuring safety in the workplace.

The Organization asserts several procedural violations of Claimant's contractual rights. First, it contends that the notice of charges was so imprecise it prejudiced Claimant's ability to prepare his defense. Second, it argues that Carrier vaguely charged the Claimant with negligence, but found him guilty of violating its Rule 1.1.2. On the merits, the Organization maintains that the record is devoid of credible evidence of negligence; that there were no witnesses to this minor incident; that Carrier's Manager of Safety testified that the placement of the keys made their retrieval difficult; and that in a nutshell, discipline was imposed merely because an injury was incurred.

The Board finds the charges sufficiently clear to put Claimant on notice of Carrier's allegations, and there is no evidence in the record to suggest that he was in any way surprised or prejudiced by any lack of precision therein. Secondly, the Board finds the contention that Claimant was charged with one offense and found guilty of another to be without merit. Carrier's October 24, 1994 notification to Claimant summoned him to a meeting to determine the facts and "your responsibility, if any" for his back injury, clearly implying a possible finding of negligence.

With respect to the merits of this dispute, the Board concurs fully with the Organization's contention that no rational justice system could mechanically equate injury with negligence. In our review of this well-developed record, however, we find substantial evidence to support the Carrier's conclusion that Claimant did not follow proper technique as he bent to lift a heavy tool box on a dark and rainy morning without moving the equipment and material that lay in his path. Particularly in view of Claimant's past record of serious back problems, we find nothing in the record evidence to suggest that Carrier's judgment was an abuse of discretion, or that the censure it issued was disproportionate to the offense.

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 21st day of April 1999.