

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 33447
Docket No. MW-34499
99-3-98-3-141**

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

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(Consolidated Rail Corporation**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The five (5) day suspension assessed Welder Foreman D. J. Watson for his allegedly causing a personal injury to himself on May 8, 1996 was without just and sufficient cause, based on an unproven charge and in violation of the Agreement (carrier’s File MW-4540-D).**
- (2) Welder Foreman D. J. Watson shall now be exonerated of the charge and made whole.”**

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.

Claimant, an employee of the Carrier for approximately 23 years, was assessed a five day suspension following a Hearing for “failure to comply with S-7-C Safety Rules

and Procedures governing Maintenance of Way Employees, specifically the following rules: 60.2, Paragraph 1 and 5 and 66.3, paragraph 3 and 5 and also NORAC Rules B and S," for allegedly causing injury to himself "by failing to insure that a rail clamp on the boutet weld shear had properly released before attempting to lift the boutet weld shear from the rail" and for his "failure in properly lifting the machine." The witnesses to the incident were solely the Claimant and a fellow employee, a welder. The Rules at issue are:

"Conduct

60.2 Attending to Duties

Follow these precautions to prevent injury to yourself and others:

1. Be alert and attentive at all times when performing your duties.

* * *

5. If you are not sure what course of action to take, always take the safe course.

66.3 Lifting Material

3. Test the weight of the load by tipping it slightly. If the weight is beyond the limit of your capability, do not lift the load. Get other employees to help you lift the load, or haul the material in several trips.

* * *

5. Lift the object slowly using you leg muscles, not your back.

NORAC

B. Rules and Special Instructions

Employees must be familiar with and obey all rules and special instructions that relate to their duties. If in doubt as to the meaning or

application of a rule or special instruction, an employee must request an explanation from the proper authority.

S. Following the Safe Course

Safety is of first importance. These rules provide for a safe and efficient operation. In case of doubt, the safe course must be followed."

The Claimant, a Foreman Welder, was injured attempting to remove a hydraulic weld shear from the rail. The Claimant turned the rail clamp release handle and assumed the clamp released when he started to lift the hydraulic weld shear. In fact, there is no dispute that the release handle was defective and did not release. The issues in dispute are whether the Claimant should have visually confirmed that the clamp had released and whether the Claimant used proper lifting techniques in his attempt to lift the hydraulic weld shear.

The Organization asserts that the Carrier failed to provide a fair and impartial hearing in that the Carrier failed to call a witness that was pertinent to the investigation, the Hearing Officer badgered the Claimant, and the Carrier's witness provided a completely speculative and subjective report. The Carrier did not call the Welder that was working with the Claimant when he was injured; however, the Carrier allowed into evidence the statement from the Welder that, despite the Carrier's witness's unclear recollection, was verified as the Welder's representation of events. The Hearing Officer was persistent in questioning the Claimant in relation to "testing the weight" of the hydraulic weld shear; however, the Claimant appeared purposefully obscure in responding to direct questions, because he believed the responses required a greater explanation. Regarding the Organization's characterization of the Carrier's witness's report as being "speculative and subjective," such an assertion is more an attack on the relevance and materiality of the testimony. The Organization has not met its burden of proof in support of its assertion that the Carrier failed to provide a fair and impartial Hearing.

The Carrier's only witness was an Engineer of Track who did not have direct knowledge of the events. The Carrier's witness gathered his information from alleged statements made by the Claimant and his evaluation of certain Rules. This witness never operated a shear, never received "formal schooling or training" on a shear's operation, and never instructed anyone on the operation of the shear. The witness did

claim to have a "working knowledge of the principle of the tool" through "lots of observations" and the fact that it was a simple hydraulic tool.

Relating to the Rule 60.2, Paragraphs 1 and 5, alleged violations, and the question of whether it "would be normal for someone to look at the clamp either to see if it's applied or it's released," the Carrier witness testified:

"I think it would be and in fact we have instructed our people in the past. When I asked . . . if he had looked to see if it had been released, he said no, that for hundreds of times they used these machines, they turned the clamp handle a half a turn to apply it and they turned it half way back and it always disengaged. So from the statement he gave me, he told me he never rechecked to see if it had been disengaged.

* * *

I feel that he failed to follow these safety rules in that he wasn't alert and attentive at the time that he released the handle of the rail clamp that holds the rail shear to the rail. If he was attentive and alert he would have noticed that the handle turned more freely than before. He automatically would have looked down to see if the clamp had been released from underneath the ball of the rail before he attempted to lift it off the rail and I also believe that if he had done that, that paragraph 5 wouldn't have been involved"

Regarding the assertion that the Claimant should have observed the clamp to make sure it released, the Claimant testified:

"No sir. I did not look at the rail clamp. I was instructed . . . that because the rail clamp is one solid piece welded that way that when you turn the rail clamp handle parallel to the rail, the rail clamp would automatically release."

In response to whether he had ever been told "to bend down to make sure that the rail clamp has been released," the Claimant said, "No, Never." Regarding the temperature of the area where he was working and the safety of putting his "face down near this area of molten steel to find out if the rail clamp had been released," the

Claimant testified that the temperature was "around 2000°" and that such "didn't seem practical" and that there were "hot cinders on the ground."

In regard to the assertion that the Claimant should have noticed that "the handle turned more freely," the Claimant stated that he followed the procedure he was instructed to follow and took no exception and the Welder, Claimant's co-worker, in his written statement stated that the handles "appeared (and felt) as though they had released."

The Carrier did not rebut the Claimant's testimony regarding his instructions, the temperature of the work area, or his assertion of the safety issues relating to the direct observation of the rail clamp due to the temperature of the work area.

Relating to Rules 66.3, paragraphs 3 and 5, The Carrier's witness testified:

"... one of the questions I asked him was, did you bend at the knees and squat, grab the handle, lift with your legs or did you just bend over, grab the handles of the machine, lift it up and stand at the same time. Mr. Watson told me that he bent over, turned the handle, the handle turned to release the clamp. Once that was done he was still in a bent over position. He grabbed the handle. The other individual working with him grabbed the handle and he stood up lifting with (sic) at the same time"

When the Carrier's witness was questioned on whether he wrote down the responses he attributed to the Claimant, he responded that he had not. When questioned as to whether there were witnesses to the responses, the witness said he thought there were two, another supervisor and the Claimant's co-worker, the Welder.

The Claimant testified that he did bend at the knees and lifted with his back straight. When questioned on the Carrier's witness' testimony, the Claimant testified:

"That's incorrect. I don't believe you can bend over and pick up that shear without bending your legs. You'd be bumping into the partner across from you."

Again, later the Claimant testified:
“... You have to bend your legs.”

The Carrier did not rebut the Claimant’s assertion regarding the inability of two people to lift the equipment without bending at the legs. Also, the Carrier did not bring in either of the two witnesses to the statements attributed to the Claimant that were disputed by the Claimant and relied on as the primary evidence against the Claimant.

Regarding the issue of “testing the weight” before the lift, there is no doubt that the Claimant did not test the weight of the load immediately before the lift that resulted in his injury. The Claimant testified that he tested the equipment earlier on another weld set up simultaneously, and that it was “not part of procedure” to test for each lift, stating: “That’s not proper procedure and this is something I do four times a day, 4 days a week.” Later, the Claimant stated, “We have a procedure that I was taught to adjust it for each rail size, each rail condition and to determine if the rail clamp is secure or released by the position of the handle.”

The Carrier did not enter evidence to rebut these assertions.

After a careful review of the entire record, Board finds that the Carrier failed to meet its burden of proof, and the disciplinary suspension assessed the Claimant can not be upheld.

AWARD

Claim sustained.

Form 1
Page 7

Award No. 33447
Docket No. MW-34499
99-3-98-3-141

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 23rd day of August 1999.