

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 35407
Docket No. MW-35069
01-3-98-3-810**

The Third Division consisted of the regular members and in addition Referee Ann S. Kenis 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 discipline assessed Mr. E. N. Hartley for his alleged unsafe work practices in that he sustained a personal injury on May 19, 1997 in the kitchen car at Reading, PA was without just and sufficient cause, based on an unproven charge, arbitrary and capricious (System Docket MW-4856-D).**
- (2) Cook E.N. Hartley shall now ‘ . . . be immediately restored to service, that this incident be stricken from his record, and that he be compensated on a make whole basis for any and all time that he lost because of the unjust decision by the Carrier.’”**

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 May 19, 1997, the Claimant was assigned as a Cook on Kitchen Car CR 62205 at Reading, Pennsylvania. That morning, food supplies had been delivered from the commissary, including a 30-pound box of frozen chicken parts. It was the Claimant's job to take the food that had been delivered and put it on a nearby table. While moving the box of chicken from the floor to the table, the Claimant sustained an injury to his back.

The Claimant immediately advised supervision of his injury and Assistant Production Engineer Lesh arrived on the scene to interview the Claimant about the incident. According to Lesh, as the Claimant turned to put the box of chicken on the table, the box had not been lifted high enough to reach the surface of the table. Instead, the Claimant bumped the box into the side of the table, whereupon he felt the pain in his back.

The Claimant was taken to a nearby hospital, where he was treated and diagnosed with a lumbar strain. He was subsequently notified to report for an Investigation to determine whether he committed unsafe work practices or violated certain Safety Rules in connection with the injury sustained on May 19, 1997. Following the Investigation, the Claimant was assessed a five-day deferred suspension. The discipline was reduced to a reprimand during handling of the case on the property.

At the Hearing, the Claimant asserted for the first time that the handle on the box of chicken broke as he was lifting the box, causing it to fall against the table. When asked why he failed to inform supervision about the broken handle, the Claimant testified that he "just never thought of it."

The Carrier contends that the Claimant's newly offered excuse is unpersuasive. The Board agrees with the Carrier that it is unlikely that the Claimant would have omitted such an important detail in recounting to supervision the circumstances surrounding his injury. If in fact there was a broken handle that caused the Claimant to drop the box of chicken against the table, straining his back in the process, it is reasonable to assume that the Claimant would have immediately brought the matter to the attention of supervision.

However, we must always bear in mind that the burden is on the Carrier to establish with probative evidence that the employee is guilty of the charges preferred

against him. In the instant case, the Carrier's sole witness, Assistant Production Engineer Lesh, testified as follows:

"Q. What information do you have to present to us today that would indicate that [Claimant] did not work to avoid an injury?

A. The fact that he incurred an injury that was as a result of an error on his part.

Q. So - - -

A. When he was handling material, he did not lift the material high enough.

Q. - - simply because he sustained an injury it is your opinion that he violated a safety rule; is that correct?

A. That is correct."

The Board has consistently held that the mere fact of an injury does not in and of itself support a finding of guilt. Third Division Awards 16166, 18320 and 30107. Here, the Carrier's witness was commendably frank in stating his belief that the injury sustained by the Claimant established, at least in part, the Rule violation. If that were the sole basis for the Carrier's imposition of discipline, we would necessarily have to sustain the claim.

We note, however, that the Carrier's determination is also predicated on the fact that the Claimant failed to lift the box high enough to reach the table. Had the Claimant exercised ordinary care in lifting the box to the proper height of the table, he would have avoided the injury. Because the record supports the finding that the Claimant was not mindful of his safety responsibilities, if only for the brief moment in which he banged the chicken box into the side of the table, we must conclude that a reprimand was fully warranted as a reminder to the Claimant to exercise caution in the performance of his job duties in the future.

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 26th day of April, 2001.