

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 35918
Docket No. MW-35688
02-3-99-3-629**

The Third Division consisted of the regular members and in addition Referee Nancy F. Murphy 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 [thirty (30) days’ actual suspension] assessed B&B Foreman E.G. Gallis for his alleged violation of Conrail’s S7-C Safety Rules in that he sustained a personal injury on November 24, 1997 without just and sufficient cause, based on an unproven charge, arbitrary, capricious and in violation of the Agreement (System Docket MW-5200D).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant E.G. Gallis shall receive the remedy prescribed by the parties in Rule 27, Section 4.”**

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 E. Gallis established seniority as a B&B Foreman, and was assigned and working as such under the supervision of B&B Supervisor J. Gilbert, at Bridge 1746 on the Indy Line when this claim arose.

On November 24, 1997, the Claimant and his gang, Structural Welder Smith, Crane Operator Hartley, and Repairmen Jones, Sacher, Finley and Carmean, were assigned to install a concrete backwall on the east end of Track No. 1 at Bridge 1746. As part of the process, the new backwall needed to be placed under new, yet uninstalled ribbon rail which was to be placed across the bridge between Track Nos. 1 and 2. Repairmen Jones, Sacher and Carmean were positioned under the bridge on a scaffold, while the Claimant, Supervisor Gilbert and Repairman Finley worked above. The backwall was lifted by slings, with a crane operated by Hartley.

As the crew was preparing to complete the installation, the Claimant grasped the backwall with his left hand and grabbed the ribbon rail with his right hand. Thereafter, when Finley signaled the Crane Operator to lift the backwall, the sling caught on a piece of the ribbon rail causing it to twist. As a result, the fingers on the Claimant's right hand were pinched between the rails, causing an injury which required medical attention.

On December 9, 1997, the Claimant was directed to attend a Hearing in connection with the incident and was charged with violation of Safety Rules 1.10, 60.2, 62.3 and failure to comply with instructions given by his immediate Supervisor. The Hearing, which was originally scheduled for December 16, 1997, was postponed and conducted on February 17, 1998. Shortly thereafter, the Claimant was informed that he had been found guilty as charged and was assessed a 30-day actual suspension.

The Organization protested the discipline, asserting that the Carrier failed to present any evidence "whatsoever" to show that the Claimant's actions on November 27, 1997 were in violation of any of the Rules for which he was cited. According to the Organization, the Claimant's injury was sustained because he was "performing his duties," and not because of neglect, carelessness or in violation of a direct order.

In that connection, the Organization further asserted that although the Claimant had suggested that he knew a "better way" to accomplish the task, "Mr. Gallis got hurt by doing it Mr. Gilbert's way." Finally, the Organization contends that the Claimant was disciplined "solely" because he sustained a personal injury.

The Carrier denied the claim maintaining that the manner in which the backwall was moved had been accomplished in the “safest and most efficient” manner, and that the Claimant made no “contrary comments or suggestions” regarding the proposed procedure. The Carrier asserts that the Claimant violated each of the Rules for which he was cited, as well as the instructions of his Supervisor, when he allowed his hand to get caught in a pinch point between the two pieces of welded rail.

The Rules for which the Claimant was cited provide that:

“RULE 1.10 WORKING WITH TOOLS:

5. Brace yourself when using any tool or tackle, as follows:

* * *

- C. Keep your hands and other body parts clear of pinch points.

RULE 60.2 ATTENDING TO DUTY:

Follow these precautions to prevent injury to yourself and others. Plan your work to avoid injury. Look for hazards before you start work and either avoid hazards or protect against them.

RULE 62.3 SAFETY PRECAUTIONS:

10. Brace yourself when using any tool or tackle, as follows:

* * *

- C. Keep your hands and other body parts clear of pinch points.

**FAILURE TO COMPLY WITH INSTRUCTIONS GIVEN BY
IMMEDIATE SUPERVISOR.”**

There is no dispute that the Claimant was instructed, at least three times, to keep his hands away from the rail and to avoid the pinch points. According to Supervisor Gilbert, the Claimant was instructed as follows:

“Q. Prior to Mr. Gallis getting his fingers pinched, had anything been said about watching out for pinch points?”

A. Yes, I had Elmer (Claimant) and the gang right there before the incident and we had a little mini job briefing. I personally told the guys that this rail was going to move and we were going to have to stay clear of it. I told them twice. And then again when I saw him with his hands stuck between the rails and I hollered at him and told him to watch his hands.

Q. When you told Mr. Gallis to keep his hands clear of the rail, did he acknowledge what you had said, are you sure he heard you?

A. I am absolutely sure, he even repeated that he was going to keep his hands clear of the pinch points.”

In that connection, according to Repairman Finley: “Jon (Gilbert) had just given the ‘watch pinch point’ order twice, and had told Elmer to watch the rail, when I gave the signal to winch up.” For his part, Repairman Sacher stated that he heard Gilbert urge the Claimant to: “Keep your hands out of the pinch points, Elmer.” Finally, Repairman Carmean stated that, although he did not specifically hear the supervisor speak to the Claimant, Supervisor Gilbert had instructed “all of us” to be mindful of the pinch points.

The Carrier maintains the right and responsibility to establish and enforce the safe conduct of its operations, and rightfully expects its employees to have a thorough knowledge of, and to obey, all Safety Rules in the performance of their duties. There is no question that, on three occasions on November 24, 1997 the Claimant was instructed to keep his hands clear of the pinch points. After the Claimant had been given those warnings, for some inexplicable reason, he placed his right hand in a position so that it was caught between the two pieces of welded rail, pinching all of his fingers.

The only remaining question to be decided by the Board is whether the discipline of a 30-day suspension was commensurate with the offense. A review of the record evidence demonstrates that the Claimant violated each of the Safety Rules for which he was cited, as well as the instructions of his Supervisor. In such circumstances, the assessment of a 30-day suspension cannot be considered excessive or unreasonable, and therefore, will not be disturbed by the Board.

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 22nd day of January, 2002.