

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 35982
Docket No. MW-35893
02-3-99-3-904**

The Third Division consisted of the regular members and in addition Referee Nancy F. Eischen when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Union Pacific Railroad Company (former Missouri
(Pacific Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The discipline [level 2 requiring one (1) day alternative assignment to develop a corrective action plan] imposed under date of September 29, 1998 upon Trackman W. R. Wallace 'for allegedly violating Union Pacific Rule 70.12 effective April 10, 1994, in connection with a personal injury sustained by Welder Helper J. Mouton on September 3, 1998, was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File MW-99-22/1164602 MPR).**
- (2) As a consequence of the violation referred to in Part (1) above, the Carrier shall remove all references of this discipline from Mr. W. R. Wallace's personal record and he shall now be compensated for eight (8) hours' pay at his respective rate of pay for attending the investigation on September 15, 1998 and for any expenses incurred in connection therewith."**

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.

W.R. Wallace (Claimant) has been employed by the Carrier as a Trackman for approximately 31 years and was assigned as such to Gang 4138, under the supervision of Foreman R. Roberts, when this issue arose.

On September 3, 1998, Gang 4138 consisted of the Claimant, Foreman Roberts, Welder Helper J. Mouton and Welder Helper J. Noel, who were assigned to install track panels on a bridge on the Glidden Subdivision. Specifically, the Claimant was instructed to "tap" the bars in place beneath the rail. While swinging the maul, the Claimant inadvertently struck Welder Helper Mouton on his left hand which resulted in lacerations on two of his fingers.

As a result of the incident, the Carrier sent the Claimant the following Notice of Investigation:

"Please report to the Union Pacific Railroad Company on Tuesday, September 15, 1998 for investigation and hearing on charges to develop the facts and place responsibility, if any, that while working as Trackman on Gang 4138, you allegedly struck Welder Helper J. Mouton on fingers, causing an alleged personal injury to Mr. Mouton on September 3, 1998, in possible violation of Union Pacific Rule 70.12."

The Investigation was held as scheduled, and on September 29, 1998 the Carrier informed the Claimant that he had been found guilty of violating Rule 70.12. As a result, the Claimant was assessed a Level 2 Discipline.

The Organization protested the discipline, asserting numerous procedural violations. Specifically, the General Chairman maintained that the Carrier had charged the Claimant with violating Rule 70.12, "Safe Working Space" and swinging tools, but had reviewed the Investigation transcript with regard to Rule 70.2 "Drop or Throw Objects." The General Chairman further maintained that because the Charging Officer was not present at the Hearing, the Carrier premised its decision to discipline the Claimant upon "second hand information and hearsay."

With respect to the merits of the issue, the General Chairman notes that the Claimant was working in a confined area, and that Mouton was "an inexperienced man assisting in the performance of this work with little or no training."

Finally, the General Chairman pointed to the Claimant's 31 years of unblemished service, contending that the charges should be dropped and the Claimant should be compensated accordingly.

For its part, the Carrier maintained that the Claimant was afforded a fair and impartial Hearing, and asserted that it had proven, by substantial evidence, that the Claimant was guilty of violating Rule 70.12. Finally, the Carrier pointed to the serious

nature of Mouton's injury, contending that the assessed discipline was commensurate with the violation.

Although the Organization asserts certain procedural "defects," there is no evidence that the Claimant's rights were compromised during the handling of this issue.

Turning to the merits of the dispute, on September 3, 1998 as Gang 4138 installed track panels, Manager Track Maintenance J. A. Flores Jr. instructed the Claimant to "knock the bars in" with a 12 pound maul. For the majority of the project, the Claimant "tapped" the bar in with the maul, while Welder Noel inserted the bolts. However, at approximately 5:00 P.M., when Welder Noel went to get a drink of water, Mouton, without being assigned to do so, took Welder Noel's position. Shortly thereafter, the injury now under discussion occurred.

There is no dispute that the unfortunate series of events that took place on September 3, 1998 led to Welder Helper Mouton's injury. However, there is no evidence on this record which supports the Carrier's assertion that the Claimant was responsible for the injury, or that he violated Rule 70.12. In fact, the record evidence demonstrates that the Claimant was keenly "aware of the work and movement of other group members," and did all that he could to avoid/mitigate serious injury.

Specifically, Foreman Roberts, who was directing the project, stated the following:

“Q. When Mr. Walker was tightening the bolts down, what was Mr. Mouton doing?

A. He was inserting bolts on the east end of the joint.

Q. Would you say Mr. Wallace was paying attention to what he was doing?

A. Yes. Ray (Claimant) was tapping, there were so many people, he couldn't hit hard. He was just tapping, he wasn't putting all of his power into it because there were just too many people. If he had, he would have taken the man's finger off completely.

Q. What did you see?

A. What I saw was a man that was installing bolts, and he should not have put his hands in the place he did at the time, and he was struck.”

For his part, and in that connection, Welder Mouton stated that he believed that the Claimant did "everything he could to avoid the accident." Finally, the Claimant, who had been performing the identical task for some 31 years "without incident," maintained that Mouton was merely "inexperienced" and "lost focus" on the task.

In the circumstances, the Carrier was unable to prove that the Claimant was responsible for Mouton's injury, or that he violated the Rule for which he was cited. Therefore, this claim must be sustained.

AWARD

Claim sustained in accordance with the Findings.

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 19th day of March, 2002.