

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 36109
Docket No. MW-36187
02-3-00-3-375**

The Third Division consisted of the regular members and in addition Referee Robert M. O'Brien when award was rendered.

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(The Burlington Northern Santa Fe Railway**

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The discipline[dismissal subsequently reduced to a six (6) month suspension] imposed upon Mr. S. E. Rowland on November 30, 1998 for alleged:**

' . . .violation of Maintenance of Way Operating Rule 1.2.7 (Furnishing Information) and Rule 28.2.5 (Reporting) for alleged failure to comply with Company practices and policies, and furnish factual and pertinent information when reporting your alleged injury on Wednesday, October 14, 1998 while assigned and working as truck driver on Lincoln Hump Section.' (Emphasis in bold in Original)

was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement [System file C-99-S090-4/10-99-0104(MW) BNR].

- (2) As a consequence of the violation referred to Part (1) above, all references of this discipline must be removed from Claimant S. E. Rowland's personal record, he shall be compensated for all lost wages suffered and have all rights restored."**

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 October 14, 1998, the Claimant was working as a Truck Driver for the hump section in the Lincoln Terminal. Several sections, including the Claimant's section, were involved in changing out track panels on a bridge over the Salt Creek. The Claimant and Laborer Steve Hensel were responsible for drilling holes in the rail to allow an angle bar to join them. They were operating a rail drill that weighs somewhere between 85 and 120 pounds. The rail drill has a handle on each side for lifting.

After the Claimant and Laborer Hensel finished drilling their last hole, they moved the rail drill from the south side of the bridge to the north side. They planned to leave it on the walkway that was on the north side of the bridge. The Claimant was lifting the rail drill from one side and Laborer Hensel was lifting it from the opposite side.

Shortly before noon, the Claimant and Hensel were lifting the rail drill onto the walkway when the drill went down. The Claimant thought that Hensel slipped and fell and that this caused the drill to fall. When the drill went down, the Claimant twisted his back. During the lunch break the Claimant told Hensel that he thought he re-injured his back. The Claimant had sustained a back injury in March 1998, about seven months earlier.

The Claimant's immediate supervisor on the Salt Creek Bridge track replacement project was Lincoln Terminal Section Foreman Raymond Brennan. Foreman Brennan observed the Claimant against the guard fence on the walkway and he appeared to be

in pain. Brennan asked the Claimant if he was hurt and he said he thought he "popped" his back again.

At around 1:00 P.M. on October 14, 1998, the Claimant reported his injury to Lincoln Terminal Roadmaster Gary Odenbach. The Claimant completed a personal injury report and was taken to Saint Elizabeth Medical Center for an examination. He was diagnosed with a lower lumbar strain and was prescribed medication.

The Claimant was notified to attend a formal Investigation on November 4, 1998, to ascertain the facts and determine his responsibility for his alleged failure to comply with Company practices and policies and to furnish factual and pertinent information when reporting his alleged personal injury on October 14, 1998. On November 30, 1998 the Claimant was advised that he was dismissed from service for his purported violation of Maintenance of Way Operating Rule 1.2.7 and Rule 28.2.5. On February 19, 1999 the Claimant's discipline was reduced to a six month suspension. The Organization has appealed that suspension to the Board.

We are not persuaded that the Claimant violated either Operating Rule 1.2.7 or Operating Rule 28.2.5. He immediately reported his personal injury to Foreman Brennan and Roadmaster Odenbach and completed a personal injury report as required by Rule 28.2.5.

It is the Carrier's position that the Claimant made contradictory oral and written statements about his personal injury to Roadmaster Odenbach on October 14, 1998. However, the Board is not convinced that the Claimant intentionally withheld information about his back injury or willfully failed to give all the facts regarding his injury.

The Claimant assumed that Laborer Hensel had dropped the rail drill when he fell and he told this to Roadmaster Odenbach. Hensel said that he never fell down on the Salt Creek Bridge while he and the Claimant were moving the rail drill to the walkway. However, he admitted that the rail drill was going down while the Claimant was moving it. Whether Hensel actually fell is immaterial. It is undisputed that the rail drill went down while the Claimant was holding the handle and this caused him to sustain a personal injury to his back.

The Carrier further argues that the Claimant told Roadmaster Odenbach that he should have asked for more help with the rail drill and also should have had a better briefing with Hensel before moving the equipment. The Claimant denied making either statement. No one else was present when the Claimant made these purported admissions.

In any event, it was standing operating procedure for two employees to lift a rail drill. There is no evidence in the record that the accident would have been prevented if a third employee assisted the Claimant and Laborer Hensel with moving the rail drill. Moreover, Hensel never said that he should have held a better job briefing with the Claimant before lifting the rail drill.

Inasmuch as the Carrier failed to establish by substantial evidence that the Claimant violated either Operating Rule 1.2.7 or Operating Rule 28.2.5, the discipline assessed him was unwarranted. The discipline must therefore be removed from the Claimant's record and he must be made whole for his losses.

AWARD

Claim sustained.

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 22nd day of July 2002.