

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 38025
Docket No. MW-38947
06-3-05-3-424**

The Third Division consisted of the regular members and in addition Referee Danielle L. Hargrove when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division –
(IBT Rail Conference
PARTIES TO DISPUTE: (
(Consolidated Rail Corporation**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline [five (5) days actual suspension served on November 1 through November 5, 2004] imposed upon Mr. E. Montagano on September 30, 2004 for his alleged violation of Rule 1.10, 7(b) in connection with a personal injury report on July 17, 2003 was arbitrary, capricious and in violation of the Agreement (Carrier’s File MW-0068/3040500011).**
- (2) As a consequence of the violation referred to in Part (1) above, Mr. E. Montagano 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.

The Organization's first issue is that the Claimant was denied a fair and impartial Hearing because the Claimant did not receive a postponement notice which rescheduled the Hearing from September 9 to September 14, 2004. It also objects to the testimony of witnesses at the Hearing because they were not listed in advance to be witnesses and the process of receiving the witness testimony at the Hearing.

The Board does not find that the Claimant's Hearing was unfair or prejudicial in any manner. The Claimant was given the opportunity to fully cross-examine each witness and was not hindered in any way in putting on any evidence, including providing his own witnesses if he desired. As to the Notice of Investigation, the transcript evidence is clear that the Claimant's representative received notice of the Hearing for September 14, 2006. It is for that reason that they were present and ready to proceed with the Hearing. While we find this was not a model inquiry, we find no procedural error in the calling of the witnesses nor in the sequence in which they were called. There was no infringement upon the Claimant's Agreement due process rights in this matter.

As to the Claimant's issue of the five-day suspension for violation of Rule 1.10, 7(b) many Awards have acknowledged the latitude given to the Carrier for the enforcement of safety regulations. The evidence revealed that the Claimant lost an entire year of work due to an injury he received when he decided to use material on the ground to build himself up to install an over-height sign post. This decision was not an exercise of good judgment. By imposing a five-day suspension on the Claimant for not asking for assistance or guidance, not stably bracing himself, and not overreaching in the use of his equipment to install the sign post, the Carrier did not abuse its discretion.

AWARD

Claim denied.

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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 7th day of December 2006.