

BEFORE SPECIAL BOARD OF ADJUSTMENT NO. 924
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

UNION PACIFIC RAILROAD COMPANY
(FORMER CHICAGO & NORTH WESTERN TRANSPORTATION COMPANY)

Case No. 262

Award No. **238**

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

1. The Level 2 assessed Laborer W.C. Martinez for his alleged failure to watch his footing which caused him to fall and injure his hand on April 21, 2003, was without just and sufficient cause, based on an unproven charge and in violation of the Agreement (System File UPSW-2050D/1383293D).
2. As a consequence of the violations referred to in Part (1) above, Laborer W.C. Martinez "... must have his record cleared of the charges and have the discipline assessed, as set forth in the Carrier's notice dated July 29, 2003, stricken from his record. Claimant must be compensated at his applicable rate and be reimbursed for his expenses incurred in connection with his attending the July 16, 2003, hearing."

FINDINGS:

At the time of the events leading up to this claim, the Claimant was employed by the Carrier as a Laborer, working on Gang 9065.

By letter dated May 28, 2003, the Claimant was notified to appear for a formal investigation and hearing to develop the facts and determine the Claimant's responsibility, if any, in connection with the Claimant's alleged failure to watch his footing, thereby tripping and falling, resulting in an injury to the Claimant's hand. After a

postponement, the hearing was conducted on July 16, 2003. By letter dated July 29, 2003, the Claimant was notified that he had been found guilty as charged, and that he was being assessed a Level 2 discipline. The Organization thereafter filed a claim on the Claimant's behalf challenging the Carrier's decision, and the Carrier denied the claim.

The Carrier initially contends that the Claimant was afforded all elements of due process in accordance with the Agreement. The Claimant received adequate notice of his investigation, was allowed ample representation, and was able to present his own witnesses, as well as cross-examine all of the Carrier's witnesses who were present at the investigation. The Carrier points out that the Organization's only procedural objection is based on the argument that the Carrier allegedly failed to provide adequate notice to the General Chairman of the charges against the Claimant. The Carrier insists that this argument fails because Rule 48 stipulates only that the General Chairman shall be notified of such charges, and this Rule does not contain any time limit requirement. The Carrier asserts that the assessed discipline cannot be overturned on procedural grounds alone.

The Carrier then argues that there is no basis for the Organization's assertion that its finding of guilt is unsupported by the testimony at the investigation. The Carrier emphasizes that the testimony demonstrates that the Claimant tripped when he carelessly stepped into a large and reasonably obvious hole on the Carrier's property. The Carrier points out that its Rules highlight the importance of alertness and safety for Carrier employees. The Carrier maintains that although it is true that under normal

circumstances, people are not held responsible for tripping and injuring themselves, the considerations are different when such an incident occurs on railroad property. The Carrier argues that its employees are subject to a heightened duty of care, and any accidents on the property are subject to extreme scrutiny.

The Carrier cites the Claimant's testimony that he had received multiple job briefings on the special need for safety, and that the hole was at least seven inches deep. The Carrier argues that the hole should have been clearly visible to anyone paying attention to his immediate surroundings. The Carrier points out that the Claimant could have stepped into this hole only if he were careless and inattentive to his surroundings, thereby violating the Carrier's Rules.

The Carrier then addresses the Organization's argument that the mere fact that an accident occurred on the property does not equate to a rule violation. The Carrier maintains that this argument does not apply to the instant case because the circumstances surrounding this accident were such that it was entirely preventable had the Claimant exercised normal care while on the property. Under the circumstances, the Carrier asserts that it had no option but to find against the Claimant.

The Carrier goes on to contend that once an arbitral panel verifies that substantial evidence supports a finding of guilty, the panel lacks authority to overturn the level of discipline assessed, even if the discipline may seem harsh, unless there is a sufficient demonstration that the discipline was arbitrary, capricious, or an abuse of Carrier

discretion. The Carrier insists that the discipline at issue was not arbitrary, capricious, or an abuse of Carrier discretion. The Carrier emphasizes that the Level 2 discipline assessed in the Grievant's case was correct and in accordance with the Carrier's UPGRADE Policy. The Carrier maintains that the Level 2 discipline at issue was merely cautionary and was assessed correctly. There is no evidence of arbitrariness or capriciousness in connection with the assessment of this discipline, and the same amount of discipline in similar situations has been upheld in a number of prior Awards. The Carrier argues that there is no reason for this discipline to be overturned. The Carrier also insists that there is no language in Rule 48 that provides for an award of expenses for attending the hearing.

The Carrier ultimately contends that the instant claim should be denied in its entirety.

The Organization initially contends that in a high percentage of cases involving personal injury, the Carrier has relied on the adage that if an employee is injured, he must have violated a safety rule. To satisfy its burden of proof in this matter, the Carrier must establish that the Claimant's ~~actions~~ ^{actions} were somehow in violation of the cited Rules. The Organization maintains that the Carrier has not done so and cannot do so based on the record. As has been held in prior awards, the instant claim must be sustained because there is no proof that the Claimant was negligent or failed to perform his duties in a safe manner.

The Organization ultimately contends that the instant claim should be sustained in its entirety.

The parties being unable to resolve their dispute, this matter came before this Board.

This Board has reviewed the evidence and testimony in this case, and we find that there is insufficient evidence in the record to support the finding that the Claimant was guilty of violating Carrier rules when he fell and injured his hand on April 21, 2003. The charging officer, Mr. Reimer, testified at the hearing that "... nobody had seen the actual fall ..." and the Claimant "... evidently tripped in an open crib and fell forward, landing on the right palm of his hand, or palm of his right hand." There is no testimony in this record by any witness that supports the fact that the Claimant violated Carrier rules and thereby caused the accident.

The record is clear that the Carrier has numerous safety rules which require that employees take precautions when walking, take short deliberate steps with toes pointed outward, and make sure that their front foot is flat before moving their rear foot.

The record also reflects that the Carrier has rules that require that employees be careful to prevent injuring themselves or others and that they be alert.

However, as this Board has stated on numerous cases in the past, the fact that an accident occurs does not necessarily prove that a Claimant violated the Carrier rules and thereby subjected himself to discipline. The Carrier must come forward with evidence

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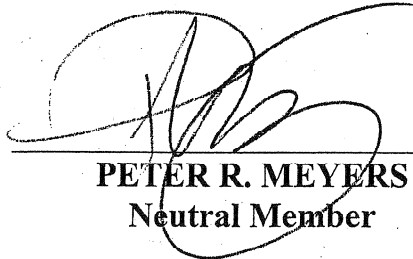
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that the rules were violated before it has just cause to issue discipline to a Claimant.

In this case, the Carrier failed to come forward with sufficient evidence to prove that the Claimant acted in violation of the Carrier rules at the time he was injured on April 21, 2003. Consequently, this Board must sustain the claim.

AWARD:

The claim is sustained.



PETER R. MEYERS
Neutral Member



ORGANIZATION MEMBER

DATED: 11-9-05



CARRIER MEMBER

DATED: November 9, 2005