

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

and

UNION PACIFIC RAILROAD COMPANY
(former Chicago and Northwestern Transportation Company)

Case No. 258

Award No. 234

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

1. The dismissal of Foreman C.R. Gatewood for his alleged violation of Rules 1.1.2 and 1.6 of the General Code of Operating Rules and Rules 70.1, 70.4 and 70.5 of the Union Pacific Railroad Rules when he sustained an injury on August 7, 2000 was without just and sufficient cause and based on unproven charges (System File 2WJ-7311D/1249823).
2. Foreman C.R. Gatewood shall now be reinstated to service with seniority and all other rights unimpaired and compensated for all wage loss suffered."

FINDINGS:

Claimant C.R. Gatewood was employed by the Carrier as a foreman on Gang 2947 at the time of the incident at issue in this claim.

By letter dated August 10, 2000, the Carrier informed the Claimant to appear for an investigation and hearing on charges that he allegedly violated Carrier Rules 1.1.2, 1.6, 70.1, 70.4, and 70.5 in connection with an incident during which the Claimant incurred an injury. The investigation and hearing was conducted on August 16, 2000. As a result of the investigation and hearing, the Claimant was found guilty of violating Carrier Rules 1.1.2, 1.6, 70.1, 70.4, and 70.5. The Claimant accordingly was dismissed from the Carrier's service effective August 24, 2000.

The Organization filed a claim on the Claimant's behalf, challenging his dismissal from

service as being without just and sufficient cause. The claim requests that the Claimant be reinstated to service with his seniority and all other rights unimpaired, and that he be made whole for all wages lost. The Carrier denied the claim.

The Carrier contends that the evidence demonstrates that the Claimant was afforded all elements of due process. The evidence demonstrates that the Claimant received proper and timely notice, and that he was afforded the opportunity to present witnesses in his own behalf. The Carrier asserts that the Claimant was provided a fair and impartial hearing in accordance with the provisions of the parties' Agreement.

The Carrier also maintains that there is substantial evidence to support its finding that the Claimant was guilty of violating its rules. The Carrier argues the Louris' testimony establishes that the Claimant failed to be alert and attentive when he placed his fingers under the tie plate that was under the suspended rail. The Carrier emphasizes that the Claimant previously had been instructed that employees were not to use their hands and fingers to remove/insert tie plates because of the possibility of sustaining a personal injury if their fingers are pinched or crushed. The Carrier points out that this is how the Claimant incurred his injury on August 7, 2000.

The Carrier maintains that the record demonstrates that the Claimant was negligent and careless of his own safety when he ignored Manager Deurloo's repeated instructions, given during safety audits on August 2 and August 4, 2000, and then wrongfully placed his fingers under the tie plate on August 7, 2000. The Claimant was not being responsible for his own safety, was not allowing himself a safe work place, and was acting in defiance of his supervisor's instruction and Carrier rules when he placed his fingers in a position where they might be pinched or crushed, which is what occurred. The Carrier argues that the Claimant refused to

abide by Carrier rules requiring that employees follow the safe and proper procedure for the installation of tie plates; as a result of his own negligence, the Claimant sustained a personal injury.

The Carrier argues that the evidence proves that the Claimant understood Deurloo's repeated instructions about the proper and safe procedure for installing tie plates, as well as Deurloo's concern that employees risked getting their fingers pinched or crushed if they put their fingers under the tie plates. The Carrier maintains that on August 7th, the Claimant disregarded Deurloo's instructions, and it points out that if the Claimant had been in compliance with these instructions, there would have been a broken stick instead of crushed fingers. The Carrier argues that the evidence therefore establishes the Claimant's willful, flagrant, and reckless disregard for Carrier safety rules, and his unwillingness and inability to comply with his supervisor's instructions.

The Carrier maintains that the Claimant acknowledged that as foreman in charge of three gangs, he was cautioned on August 2 and again on August 4, 2000, about unsafe work practices. The Claimant further admitted that in connection with a previous personal injury that he sustained in July 1999, he was told that he needed to slow down and work safer. The Carrier contends that the Claimant has chosen to ignore the Carrier's counseling, instructions, and safety rules, and he has continued to use unsafe work habits in the performance of his duties. The Carrier asserts that as the foreman in charge of three gangs, the Claimant should have been setting an example for the employees working under his jurisdiction regarding the safe performance of their duties. The Carrier asserts that the Claimant instead showed a total lack of judgment and a willful disregard for the safety of both himself and those employees.

The Carrier argues that there is no support for any claim that the equipment caused the Claimant's accident. Instead, if the Claimant had complied with Deurloo's repeated instructions, his fingers would not have been under the tie plate and there would have been no injury. The Carrier contends that the Claimant's admissions make it clear that he is guilty of the charges against him. The Carrier accordingly asserts that there can be little doubt that the Claimant was in violation of Carrier Rules 1.1.2, 1.6, 70.1, 70.4, and 70.5.

The Carrier then argues that the discipline assessed in this matter was not arbitrary or capricious, nor was it an abuse of managerial discretion. The Carrier maintains that the Claimant's record demonstrates that he is incapable of working safely and that he continually ignores safety instructions. Despite safety and rules training, counseling, and safety audits, the Claimant has failed to positively respond to Carrier's attempt to have him become a productive and safe employee. The Carrier asserts that the Claimant's conduct was sufficiently serious to warrant his dismissal. The Carrier therefore contends that the instant claim should be denied in its entirety.

The Organization contends that the evidence establishes that the Carrier failed to provide the employees working on the project at issue with the proper tools to perform the necessary functions associated with the tie replacement project. The Organization points out that it was not until after Deurloo's August 2d visit to the work location that the Carrier provided the employees with some shop-made hooks for removing the tie plates from under the suspended rails.

The Organization additionally maintains that during Deurloo's August 4th visit to the site, Deurloo observed employees installing tie plates by hand, but Deurloo did not take exception to any particular part of the replacement process that was being performed. The Organization

asserts that Deurloo's comment that "we're going to have to find some better way to do it," was general in nature and did not specifically address any one aspect of the process being used. Moreover, Deurloo did not explain how the process should be changed or performed differently. The Organization contends that Deurloo did not advise the Claimant of his objection to the use of hands for placing the tie plates until Deurloo's report was presented at the August 16th hearing.

The Organization then addresses the Carrier's contention that the Claimant should have used a stick, maul handle, shovel, or some type of bar to position the tie plates under the rails. The Organization emphasizes that the use of such tools for anything other than their intended purpose would be in violation of Carrier safety rules. The Organization maintains that if the Claimant had used one of these tools on August 7th, he still would have sustained an injury, but he would additionally have been charged with violating Carrier Safety Rules 76.0, 76.1, and 76.8. The Organization asserts that the Carrier failed to provide the Claimant with a proper tool to perform the tie plate installation.

The Organization asserts that the Carrier has failed to prove that the Claimant was performing his work in a "careless" manner, as charged. The Carrier did not demonstrate that the Claimant was advised that the Carrier considered his method of installing the tie plates to be a violation of any specific safety rules. The Organization emphasizes that this Board consistently has ruled that an accident or injury, by itself, does not constitute a rule violation. There must be evidence of negligence or carelessness, but the Carrier has not presented any such evidence in this case.

The Organization argues that the Carrier has failed to meet its burden of proof with regard to the charges against the Claimant, so the assessed discipline must be deemed improper and

must not stand. The Organization contends that the instant claim should be sustained, and the Claimant should be immediately reinstated to his employment with all rights unimpaired and made whole for all wages lost.

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 the Carrier has failed to meet its burden of proof that the Claimant acted in violation of any safety rules on August 7, 2000, when he sustained an injury. There is no question that the Claimant was told on several occasions by his supervisors that he and his workers should improve the procedures they were using in performing their tasks. However, the record is not clear that the Claimant was told specifically to use certain tools and provided with the appropriate tools and that those procedures and tools would have prevented the injury that occurred. Consequently, the claim will have to be sustained.

It is fundamental that just because an accident or injury occurs does not necessarily constitute a rule violation. The Carrier in this case has cited several rules which it contends were violated by the Claimant that led to his injury. For example, the Claimant is being charged with not being alert and attentive. However, there was no proof provided at the hearing that the Claimant was not alert or attentive. The Claimant was also charged with being careless for the safety of himself and others. However, there is no proof of any carelessness on the part of the Claimant. It is true that the Claimant did not totally protect his body parts since he wound up being injured by getting his hand and fingers pinched or crushed. However, in order to be found guilty of a violation of that rule, it must be shown that the Claimant did something out of the ordinary and carelessly that caused that type of injury. In this case, although the Carrier has

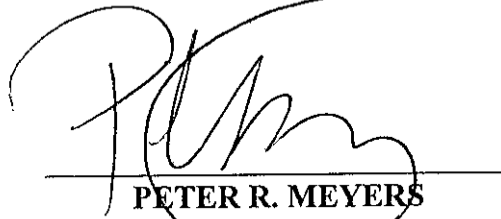
SBA 924
Awd 234

some hooks and other devices that can be used in an effort to perform the tasks that were being performed by the Claimant and his crew on the date in question, it is not clear from the record that the Claimant and his crew were properly trained in the use of those hooks and that those hooks were made available on the date in question.

In order to sustain the finding of guilty, the Carrier must show with sufficient proof that the Claimant not only was injured as a result of his actions, but acted in violation of the rules and thereby caused the injury. In this case, the Carrier has failed to meet its burden of proof. Therefore, the claim shall be sustained.

AWARD:

The claim is sustained. The Claimant shall be reinstated to service with all back pay and other rights unimpaired.


PETER R. MEYERS
Neutral Member


ORGANIZATION MEMBER

DATED: 7-26-02


CARRIER MEMBER

DATED: 7-26-02