Award No. 5205
Docket No. 5011
2-PTRA-CM-'67

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Howard A. Johnson when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 162, RAILWAY EMPLOYES' DEPARTMENT, AFL-CIO (Carmen)

PORT TERMINAL RAILROAD ASSOCIATION

DISPUTE: CLAIM OF EMPLOYES:

1. That under the current agreement, Promoted Carman Helper C. L. Payne was unjustly dismissed from the service of the Carrier on August 26, 1965.

2. That accordingly the Carrier be ordered to restore C. L. Payne to service with seniority rights unimpaired and compensate all time lost retroactive to and including August 26, 1965.

EMPLOYES' STATEMENT OF FACTS: Promoted Carman Helper C. L. Payne, hereinafter referred to as the claimant, was employed as a Carman Helper February 19, 1963, and was temporarily promoted to a carman mechanic the same date that he was employed by the Port Terminal Railroad Association, hereinafter referred to as the Carrier at Houston, Texas. On August 16, 1965, Carrier's Trainmaster E. F. Balke, Jr., addressed a letter to the claimant, reading:

"Houston, Texas
August 16, 1965

Mr. C. L. Payne, Carman
Houston, Texas

Dear Sir:

A study of the records of the Association show that you entered the service of this Carrier as a carman with a seniority date of February 19, 1963. Since the date of first service as an employe, you have claimed injury eleven times, which are briefly described as follows:

The Carrier respectfully requests a denial award in all respects.

All information and data included herein have been submitted to the Organization. The Carrier does not desire oral hearing before the Division unless requested by Petitioner, in which event the Carrier also asks to be heard.

(Exhibits not reproduced.)

FINDINGS: The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe 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 waived right of appearance at hearing thereon.

The Carrier delivered a notice to Claimant detailing eleven personal injuries reported by him in the period from July 13, 1963 to July 13, 1965, inclusive, charging him with not being a safe and satisfactory employe, and calling a hearing to determine the cause and his responsibility, if any, for the condition.

He was notified on August 27, 1965, two days after the hearing, that he had been found not to be a safe and satisfactory employe, and was, therefore, dismissed.

It is first objected that the Carrier is not entitled to bunch eleven such items over a period of two years, and include them in one charge; but, in First Division Award No. 20438, where a like charge had been made against an employe who had incurred nine injuries in seven years' service, that Division said:

> "* * * By its very nature this charge could not properly have been made right after the first injury reports were filed by claimant. To have proper foundation, said charges could have been correctly made only after an accumulation of injury reports * * *."

The same is true here, and clearly the Carrier was entitled to bring such a charge.

It is next objected that none of the other thirty-two employes at the point were disciplined for like cause; but, in view of the record as hereinafter reviewed, there is no apparent reason why any of them should have been.

It was further contended, but was denied by the Carrier and not proven, that the Carrier's premises, equipment, and working requirements were responsible for many accidents on its property; moreover, it was not shown that such conditions caused Claimant's accidents, or related to his accidents rather than to those of the other employes who experienced so relatively few of them, 27 of the 33 having had one or less each during the two-year period.

At the conclusion of the hearing, Claimant's representative objected that the Carrier had been requested to have six witnesses present on Claimant's behalf, but had refused, stating that "it was his own responsibility to produce his witnesses." Rule 25 provides, in part:

> "At a reasonable time prior to the hearing, such employe shall be apprised of the charge against him and be given reasonable opportunity to secure the presence of necessary witnesses * * *."

Under this rule it was clearly not the Carrier's duty to provide witnesses for him. Furthermore, Claimant's representative answered in the negative when he raised this objection and was asked: "Well, would you desire to recess and call further witnesses?" Claimant and his representative both then agreed that the hearing had been held in a fair and impartial way, and in accordance with the agreement.

The final question is whether the record sustains the Carrier's conclusion that Claimant was not a safe and satisfactory employe.

It shows that during this period 41 reported injuries occurred to the 33 carmen at the point, or an average of less than 1¼ per man, and that 11 of them occurred to Claimant, being about 9 times the average, or 26.8% of the entire number for all 38 employes; 13 of the other 32 carmen had one injury each, and 14 of them none at all. The other 5 had 17 injuries, or an average of between 3 and 4 each. Each of the 5 had at least 2 injuries which accounts for 10, leaving 7 others divided among them. The exact number for each is not shown, but the Employes do not contend that any one of them received all the other seven, so as to have had a total of nine, which would have approached Claimant's record, but still would not have placed him in the same class.

The contention is made that Claimant was more honest than the other carmen in reporting every injury, however trivial, as required by the rules; but this contention was denied and was not proven.

Nine of Claimant's 11 injuries occurred on the riptrack, and constituted 36% of the 25 injuries there during the period. His other 2 occurred in the yards, and constituted one-eighth of all the 16 injuries there.

The record shows that Claimant was repeatedly warned against carelessness during the period. It shows also that his first 6 injuries were relatively trivial, only one of them involving any loss of time, and it only 5 days; but that of the last 5 injuries, which occurred during less than 9 months, all but one involved loss of time, the number of days lost because of the four being twenty-four, eleven, ten and nine, respectively, or a total of forty-four working days — practically 9 weeks out of 38, or nearly one-fourth of that time. Claimant stated that his injuries resulted partly because he was required to work alone, when two men were needed; but only the last injury resulted under such conditions, and the record shows that he was repeatedly cautioned not to attempt such work alone.

In First Division Award No. 20438, mentioned above, which involved only 9 injuries in 7 years' service, that Division said:

> "The Division understands that an accident-prone employe is one who has demonstrated a propensity to get hurt in performing service

in his occupation under conditions where successive injuries could have been avoided if the employe had exercised more care or foresight, possessed or had better physical or mental traits such as faster reflexes and better neuro-muscular coordination. Evidence suggesting accident-proneness would include a rate of accident frequency and/or severity that is significantly higher for said employe than the rates which in the light of past experience might reasonably be expected of him."

It seems clear that the Carrier has a responsibility to each employe, to his fellow employes, to the general public, and to itself to protect each of them from unnecessary hazard, and that the record of even the last five injuries alone is more than sufficient to demonstrate Claimant's accident-proneness, and to indicate that he needed a more pointed warning than his injuries seemed to have given him.

The Division feels, however, that the discipline imposed by his discharge as of August 27, 1965, may have been sufficient for the purpose, and that Plaintiff should now be returned to service with seniority and vacation rights unimpaired, but without pay for time lost, and with a renewed caution against carelessness resulting in injury to himself or others.

AWARD

Claim one denied.

Claim two sustained to the extent indicated in the findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 27th day of June, 1967.

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