Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 9832
Docket No. 9833
2-CR-MA-'84

The Second Division consisted of the regular members and in addition Referee Robert W. McAllister when award was rendered.

Parties to Dispute: (International Association of Machinists and Aerospace Workers
(Consolidated Rail Corporation

Dispute: Claim of Employes:

1. That the Consolidated Rail Corporation be ordered to restore Machinist Brian P. Szarek to service and compensate him for all pay lost up to time of restoration to service at the prevailing machinist rate of pay.

2. That Machinist Brian Szarek be compensated for all insurance benefits, vacation benefits, holiday benefits and any other benefits that may have accrued and were lost during this period, in accordance with Rule 7-A-1 (e) of the prevailing Agreement which was effective May 1, 1979.

3. The Consolidated Rail Corporation violated Rule 6-A-1 (a) and (b) of the prevailing Agreement effective May 1, 1979.

4. The Consolidated Rail Corporation violated Rule 6-A-3 (a) of the prevailing Agreement effective May 1, 1979.

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 employes 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 Claimant, Brian P. Szarek, entered the Carrier's service as a machinist on September 30, 1969. On February 9, 1981, the Claimant suffered an on-the-job injury. According to the injury report, the Claimant was signaling Unit 8842 to move back for water, and, in so doing, he slipped on ice injuring his lower back and shoulder. On March 16, 1981, the Claimant attempted to return to work and was given a letter informing him he was being held out of service pending the outcome of a formal trial and review of his accident/injury record since the inception of his employment. On April 16, the Carrier gave the Claimant notice of his dismissal for the offense of being accident prone and failing to conduct himself in a manner so as to avoid personal injury.

The Organization appeals the Carrier's actions on multiple grounds. It argues the charges are vague and ambiguous; the trial was not convened within the mandatory thirty day time limit in violation of Rule 6-A-3 (a); the charges are insupportable and the record reveals the Carrier did not provide its employes with a safe working place; the Claimant was improperly withheld from service in violation of Rule 6-A-1 (b); the Claimant complied with Carrier's rules and reported all injuries which are now improperly being used against him; and finally, the discipline assessed constitutes double jeopardy.

With respect to the charge the Carrier improperly withheld Claimant from service, we note his removal was based upon the assertion the Claimant was accident prone and, therefore, a potential danger to himself and fellow workers. This allegation is a serious offense which, if proven, could justify the Claimant's removal. We find no deprivation of rights granted Claimant by the contract.

The Organization also contends the charge against Claimant is vague and, therefore, lacks the preciseness required by the agreement. Our examination of the transcript leads us to conclude the Claimant and his representative demonstrated quite clearly that they were not in the dark and were prepared to defend against the charges.

Additionally, the Organization argues the Claimant's trial was not convened within thirty days of Carrier's knowledge of employe's involvement and emphasizes the Carrier reached back eleven years from February 9, 1981. We concur that, if February 9 was the day the Carrier's representative had reason to conclude the Claimant was accident prone, the lapse in time would violate Rule 6-A-3 (a). However, we first must acknowledge the Carrier did conduct a separate investigation as a result of the Claimant's injury on February 9. Herein, the charges against Claimant are two fold:

> "(a) Being accident prone, and
>
> (b) Failing to conduct yourself in the performance of your duties in such a manner as to avoid personal injury, thereby establishing yourself as an unsafe and unsatisfactory employee."

These charges clearly must relate to a period of time over which an employe accumulates a number of injuries. At the time of Claimant's last injury on February 9, 1981, this Board believes the Carrier would have been precipitous in lodging the above charges without benefit of additional information concerning the nature and extent of Claimant's then current disability. Thus, we find it reasonable for the Carrier to have waited until the Claimant attempted to return to duty before taking action. The charge, by its very nature, encompasses the Claimant's personal injuries and, as such, extends through the duration of the most recent disablement.

The record establishes Claimant attempted to return to work on March 16, 1981, following his last and seventeenth personal injury since the beginning of his employment in 1969. Statistically, the last four injuries occurred in just less than eleven months. Between 1977 and February, 1981, the total work force at the Frontier Diesel facility, numbering eighty-seven, incurred one hundred forty-one injuries. Thus, for this four year period, each employe averaged 1.6

injuries as contrasted with the Claimant's ten. Of the seventeen injuries, two could be related to the actions of another employe; four involved slipping and falling incidents; three were essentially repetitious involving brake shoes and resulting hand injuries. The Carrier argues this record clearly indicates the Claimant is accident prone.

Prior Board awards have frequently referred to the definition of what constitutes an accident prone employe, as set forth in Award No. 20438:

> "As to the first, the term 'accident proneness' must be defined. 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 or had possessed better physical or mental traits, such as faster reflexes and better neuromuscular 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."

Herein, there is no question that Claimant had a poor accident frequency record and that it was significantly higher than the rate for the overall unit. There is no evidence the Claimant's accident/severity rate was disproportionate nor is there any medical evidence which would support a conclusion Claimant would be more accident prone in the future.

This Board is unwilling to abandon the line of reasoning set forth in Award No. 20438, supra. However, that award, among many, does not support a purely statistical approach to proving the charge of accident proneness. The serious nature and consequences of such a charge requires an analysis of all aspects of each and every injury. Factors, such as physical condition, fault, the severity and nature of the injuries as well as the effects upon fellow employes, must also be taken into consideration. The Carrier has enormous responsibility to its employes and the public to insure safety. The Claimant's record of injuries and their acceleration in 1980 and 1981 warrant a more specific warning than his prior injuries have apparently provided. This Board, however, does not view the evidence as supporting Claimant's discharge. The Claimant's removal and long period of separation from work should now have sufficiently alerted him that there is no place for inattention and carelessness in the railroad industry. We, therefore, conclude Claimant may now be restored to service with seniority unimpaired, but without compensation for time lost. In returning, he must understand that he must exercise reasonable care in the performance of his duties at all times.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 7th day of March, 1984.