NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 25672
THIRD DIVISION Docket Number MW-25904

John W. Gaines, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Consolidated Rail Corporation

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

1. The dismissal of Trackman J. M. Taylor for allegedly 'Being accident prone' was without just and sufficient cause, on the basis of unproven charges and in violation of the Agreement (System Docket CR-203-D).

2. The Claimant shall be reinstated with seniority and and all other rights unimpaired, his record shall be cleared of the charge leveled against him and he shall be compensated for all wage loss suffered.'

OPINION OF BOARD: Claimant, a Trackman who was complaining of the infliction on him, while on the job, of eye irritation. pain between the eyes, and headache in general, failed to report back for work on April 27, 1983, and thereafter. Carrier's letter dated the next day advised Claimant he was being suspended from service beginning April 29, 1983, in connection with being accident prone. Claimant was accordingly given an investigative hearing on May 10, 1983, in that connection and, thereupon, he was dismissed on May 19, 1983, by a Notice of discipline so dated and effective immediately.

Earlier Claimant, regarding his need to improve his injury record with Carrier, had been so advised on October 18, 1982, again on March 18, 1983, and there following on March 25, 1983, he was personally counselled on work habits, safety, and avenues of injury avoidance, one being that for his own safekeeping maybe due to his pronounced height he was not physically adaptable to a Trackman's employment. Then by way of a follow up letter from Carrier dated April 6, 1983, Claimant was particularly reminded that the fact existed "of the injury experience of your (Claimant's) fellow employees immediately preceeding (sic) and following you on the roster, and the fact that they have sustained fewer personal injuries than you." This affirmative action showed Carrier's evident concern and effort to induce some response and improvement in a deteriorating situation.

Claimant was suspended on the date noted under Rule 27(b) until the issue could be fairly decided following the scheduled hearing. Carrier was aware that a sizeable number of accidents could under circumstances pose the serious possibility of an employee being determined to be accident prone, and the service record in Claimant's particular example showed his accidents to be in sizeable number and to

be continuing. Fully knowledgeable of the foregoing as to its Seriousness, Carrier felt it incumbent to treat the situation, because Of its very cumulativeness and foreseeably only in short term at most, as having full overtones of and being tantamount to the "major Offense" in Rule 27(b) as it relates to suspensions. Doing so cannot be deemed capricious or arbitrary; indeed we find Carrier's judgment justifiable, for assuredly over what is less than a sizeable period, simply out of consideration as to Claimant, the fellow workers, and Carrier for their immediate safety. We must leave Carrier's judgment undisturbed.

The Organization contends Carrier invalidated its investigative hearing because Claimant was without representation during the investigation. But Claimant expressly waived right to representation when he testified "Yes, I am (willing to proceed)". The Transcript. covering 107 net pages of testimony, evinces a fair and impartial hearing with none of Claimant's procedural rights violated. The Claimant was not present at the appointed time of hearing, which accommodatingly was immediately postponed and then formally convened over an hour later. Claimant appeared, alone, in just a matter of minutes afterward. Claimant was either being addressed, giving testimony, raising objections, cross examing witnesses, interjecting comment or summing up, according to the Transcript record, at some point on about 75 different pages thereof. He was accorded an extremely wide latitude in the areas whereof he questioned the Hearing Officer and witnesses and when he freely volunteered comment of his own. The testimony ranged over the entire gamut of subjects involved including goggle types, weed spray, first aid kits, injuries, averages, safety, and so forth.

Further, the Organization urges on us that what one significant consideration need be is the causal connection between Claimant's violation or not of Carrier's Safety Rules, and the assessment of his injuries, particularly those resulting directly from a safety violation. Such a restrictive approach as to what the Board is allowed to consider as a practical mattes would lead to evident complication in proof, an endless series of challenges, and undue burden imposed on a Carrier in every Award in order to make out its case. The term accident prone speaks for itself as covering a broad spectrum, not just a class limited to causal connected injuries, i.e., from neglect of safety rules or even negligence generally. We adopt the prevailing view which is to take a simple statistical approach.

A statistical analysis of Claimant's experience shows first that, in 7 1/2 years with Carrier, the continuing injuries he suffered have the characteristic of a large number and relative severity, the number being twelve by count. Above his name on the roster, the three fellow employees showed one, zero, and zero injuries for themselves. The two below accounted for, respectively, six and four. In this Division's Award 24534, a Signalman had been dismissed as accident prone because of his propensity in incurring on-duty injuries. The Signalman experienced twelve injuries in seven years, with five bunched in a year. He far exceeded other employees in his section in their individual accident record; we upheld dismissal from service of the Signalman as accident prone, and denied his Claim for reinstatement.

Upon basis of the entire record before us, the Claimant's past record, and all the evidence and facts as ably presented to us, we must deny the Claim.

Claimant, personally present before the Board, was not only capably represented throughout but also in the proceeding gave his own summation. At the representative's conclusion of the case, he handed out copies of a recent statistical approach in Second Division Award 10395. While we endorse that Second Division Opinion certainly to the extent of its full reliance on what the statistics were for accident rates and its finding of accident proneness as a proven fact, we find from noting our fact situation that that Award is readily distinguishable on an unusual combination of its facts of the case, many of which involve highly singular circumstances and some of which that Division evaluated as significant mitigating circumstances. Three matters thus found in mitigation were no serious injuries, little time lost in service to Carrier, and Carrier's lack of progressive discipline.

Yet on the other hand, one of the contrasting and contributing circumstances which faced us in our decision presently has to do with a continuous period of 27 months between a dismissal for fighting and a subsequent reinstatement of Claimant. The period intervened nearly midway of the overall term of 7 1/2 years' employment in which Claimant accumulated the total of the injuries he sustained while performing on the job. That accumulation took place over course of actual work which we must, for a true perspective, arithmetically shorten to 7 1/2 years, less the 27 month period, less an earlier 10 day suspension due to an injury received from acts in violation of Safety rules 3504 and 3516, and less another 477 days off duty due to his other injuries.

Hence Claimant's notably disproportionate number of injuries, stretched out in covering the overall term considered above, was really accumulating at a significantly higher frequency -- two times faster, in fact -- when bunched in the more representative time frame (3 1/2 years) restricted, not to virtual, but to actual work exposure.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employes involved in this dispute are respesctively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 28th day of October 1985.