Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 27760
THIRD DIVISION Docket No. MW-26795
89-3-85-3-698

The Third Division consisted of the regular members and in addition Referee Edward L. Suntrup when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
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(Terminal Railroad Association of St. Louis

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

(1) The discipline imposed upon Track Laborer M. R. Kopp for allegedly being accident prone was without just and sufficient cause and on the basis of unproven charges (System File 1984-11 T.R.R.A./013-293-14).

(2) The claimant's record shall be cleared of the charge leveled against him."

FINDINGS:

The Third 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 was advised to attend a hearing "...in connection with (his)... being injury prone." The hearing was held on October 23, 1984. The record shows that the Claimant was hired on August 22, 1977, and that he had suffered the most recent of twelve (12) personal injuries on October 10, 1984. On that date he injured himself while putting in a clip bolt while working his assignment as track laborer. After the hearing the Claimant was advised by the Assistant Chief Engineer that he had been found guilty as charged and that his injuries were caused by his failure to be able to detect unsafe conditions which would cause him injury. The Claimant was also advised that his safety record needed to be improved or "...stronger measures (would) be necessary." The Organization subsequently filed an appeal with request that information about the hearing and related matters be removed from the Claimant's file. It was the position of the Organization in this first and subsequent appeals that the Claimant had broken no rule, and that there was insufficient evidence to support the Carrier's decision to hold the hearing and find him guilty of being injury prone.

The first issue which the Board must deal with is whether the instant claim should be sustained because no rule was cited. The charge against the Claimant is that he engaged in a pattern of behavior which the Carrier held to be potentially injurious to his own person and his fellow employees and the public. The Board has ruled on such claims in the past, on grounds that such behavior "directly challenges or endangers the fulfillment of the employer's responsibilities which underlie all ---- written rules of the employer governing employee behavior" (First Division Award 20438). This Award, which the Board believes reasonably disposes of this first objection by the Organization, states also the following:

> "The Division finds that accident-proneness is a behavioral characteristic of certain employes which endangers the fulfillment of a carrier's responsibilities; that a carrier need not have had a specific rule against same; and that, unless the investigation rule directly requires that a matter to be investigated must involve an alleged violation of a written operating or safety rule, a charge of accident-proneness as such may be properly be made against an employe and may be properly investigated."

Rule 24(a), cited by the Organization in its submission, does not state that a specific Rule must be cited in advising employees of investigations, but it states that a "specific charge" must be made. The notice of investigation fulfilled this latter requirement. As a general arbitral axiom, arbitrators have ruled that it is not necessary to have a written shop rule in order to rule on claims dealing with discipline for offenses involving such types of behavior as insubordination and theft, and that companies in this and other industries need not have such rules in order to levy discipline for such types of alleged behavior. As a matter of precedent in this industry, there have been numerous Awards issued by the various Divisions and by Public Law Boards which have assumed jurisdiction over cases parallel to the instant one. Of those cited by the Organization, in its defense of the claim, it is true that some of the sustaining Awards deal with claims where discipline was levied for alleged violation of a specific company Rule. Such is the case in Second Division Award 6306; Award 1 of Public Law Board 1103; and Third Division Award 16600. There are other sustaining Awards cited by the Organization, however, which show that neutral forums in this industry have forged ahead in their determinations in accordance with the reasoning found in First Division Award 20438 cited above. In those cases the fact that a Rule was not cited by the Carrier when making a charge did not forestall conclusions, in those cases, on other grounds.

Accident prone cases can be brought forth before the Board when alleged Rules violations are cited by the Carrier in their original notice of hearing. There is sufficient precedent, however, to suggest that absence of such Rule citings need not lead to forfeiture of such cases by Carriers on that basis alone.

The second issue raised by the Organization deals with merits. Is a record of twelve (12) personal injuries in seven (7) years of service sufficient evidence to permit a reasonable conclusion that the Claimant is accident prone? There is clearly divided arbitral precedent on the question of "statistical proof" and the evidentiary value of such proof. Opinion against the value of such proof is found in Special Board of Adjustment 18, Decision 4714; Public Law Board 1103, Award 1; and Second Division 6306. The reasoning used in some of these Awards becomes, at times, tortuous. For example, Second Division Award 6306 states:

> "A conclusion that a person is accident prone is not logical or reasonable. The mathematics of Possibility and Probability enter into this matter. It is possible that Nobody in the carrier's service would have an accident for a year, although it is not probable. It is equally possible that one person in the employ of the carrier at this location would have all of the accidents in one year. This statistical and mathematical concept would not even infer that the person having those accidents had violated the safety rules.

In Award 1 of Public Law Board 1103 the referee refers back to his own Decision 4714 of Special Board of Adjustment 18 and reasons as follows:

> "Ordinarily an employe may be discharged under certain circumstances for negligent involvement in a serious accident or for negligent involvement in two or more less serious accidents. In such cases the employe is entitled to a hearing in which the employer must carry the burden of proving that the accident occurred under circumstances such that the employe could have prevented or avoided the accident if he had performed and reacted in the manner expected of an average, reasonable and prudent individual. In the present case, the employer seeks to avoid that burden of proof and to establish a different ground for discharge--discharge without fault for involvement in unexplained accidents more numerous than average.
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> The fact of the matter is that accident proneness is a rather complex problem. The Lawyer's Medical Cyclopedia Revised Volume 3 has an entire chapter of 4 pages devoted to the subject and points out that there are physiological, emotional and psychiatric bases for the condition which may be detected and treated by competent medical personnel.

> The complicated nature of the problem is well illustrated in a lengthy arbitration decision by an experienced and respected arbitrator in a reported case designated as Northrup Aircraft, Inc., 24 LA 732. In that case, the discharge was properly handled by the employer as a medical discharge, and the decision was based on the informed opinion of a physician experienced in industrial medicine. There was medical evidence for both parties and the arbitrator's opinion refers to the fact that the dispute involved 'a highly specialized aspect of industrial psychology.'
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> The claim as asserted in the present case asks for a ruling that the carrier violated the Agreement by preferring a charge of accident proneness. It must be concluded that when the carrier elects to discharge for 'accident proneness' as distinguished from negligent responsibility for an accident or accidents, it must handle the matter as a medical discharge based upon competent medical evidence and allow the employe the contractual rights provided to contest any medical discharge."

There are other Awards, however, issued in this industry which reject the type of thinking found in the three Awards cited in the foregoing. For example, Award 57 of Special Board of Adjustment 589 states:

> "(A) Claimant is not entitled to an unlimited number of opportunities to flout the standards of reason and due care in the exercise of his prescribed duties before (a) Carrier may take summary action."

Similar conclusions are found, with respect to accident proneness, in First Division Award 20438, Second Division Awards 5205, 5962, 8912, and more recently Second Division Award 11237 and Third Division Award 24534. Second Division Award 8912, as well as Award 1 of Public Law Board 2828 states that an employer is not required to retain in its service an employee who does not perform his work with safety to "himself and to other employees." Third Division Award 24534 examines closely, as the Board has done again here, Second Division Award 6306 and has concluded, as the Board does again here, that this Award represents reasoning which has not been followed by the majority. It should be underlined that a number of these Awards deal with dismissal of employees for accident proneness. In the instant case, the Carrier effectively gave a first warning. In view of the evidence of record, and in view of arbitral precedent which the Board finds to be the more reasonable, the instant claim cannot be sustained. The Carrier correctly concluded that the Claimant was accident prone because he sustained twelve (12) injuries in seven (7) years. The corrective actions the Carrier took were neither arbitrary nor capricious.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 2nd day of March 1989.