Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 28917
THIRD DIVISION Docket No. MW-29522
91-3-90-3-462

The Third Division consisted of the regular members and in addition Referee John C. Fletcher when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(CSX Transportation, Inc. (former Seaboard Coast Line
(Railroad)

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

(1) The dismissal of Bridgeman B. M. Fields for alleged '... violation of Rule 10 of the CSX Transportation Safety Rules ... being "Accident Prone."' was without just and sufficient cause, arbitrary and on the basis of unproven charges [System File BMF-89-53/12(89-857) SSY].

(2) As a consequence of the violation in Part (1) hereof, the Claimant shall be reinstated with seniority and all other rights unimpaired, his record cleared of the charges leveled against him and he shall be compensated for all wage loss suffered as a result of said charges including pay for attending the hearing involved here with travel time thereto and from."

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.

On August 14, 1989, Claimant, while working as Bridgeman, leveling fine stone material placed as bank stabilizer in preparation of an application of rip rap, stepped on a nail protruding from a plank completely concealed under the fill. A week after the injury Claimant was notified to attend an Investigation on the incident. He was also charged with being accident-prone as a result of sustaining 14 injuries during his career as a Bridgeman.

At the conclusion of the Investigation Claimant was notified that he was dismissed from service. The notice of dismissal stated in part:

> "A careful review of the transcript of the investigation, along with statistical charts clearly substantiates the charges.
>
> The first rule in the CSX Transportation Safety Rule Book states, 'safety is of the first importance in the discharge of duty.' You have sustained (14) personal injuries resulting in (125) lost work days.
>
> This type of safety performance is unacceptable."

After review of the entire record it is the decision of the Board that the discipline assessed is flawed for several reasons and must be rescinded. When charges of the type under review here, accident-proneness, are the basis for disciplinary action, two elementary conditions must be met. First, culpability on the part of the employee must be established on the triggering event and, second, contributory responsibility, (or a demonstrable rule violation), for the historical incidents within the charge must be conclusive. Statistical analyses of accident records which do not contain a causal nexus between the accident and the injured employee are insufficient proof to support such a charge.

In looking at the triggering event in this matter, the Board finds that Carrier's Investigation failed to establish that Claimant was in any manner responsible, or that he failed to follow safe work practices, or that he was in violation of any Rule or regulation at the time of his injury. Simply stated, the Board finds Carrier's case to be one that an injury occurred and this fact automatically establishes that Claimant was responsible. The facts, recorded in the Investigation transcript, but nonetheless seemingly ignored by Carrier, clearly indicate that a causal nexus is missing. As Claimant started down an embankment to do some leveling work on crusher run fill, he stepped on a nail protruding from a plank which was completely concealed by the fill material. Later when other employees attempted to find the nail, even with the knowledge of its approximate location, they experienced difficulty in locating it.

The Rule alleged to have been breached in the triggering event provides:

> "10. Employees must watch where they step at all times. When working at night, employees must exercise utmost care to avoid the hazards caused by shadows resulting from use of lights. Employees must avoid stepping on hoses, cables, etc."

The Investigation transcript does not contain evidence to support a conclusion that Claimant did not watch where he was stepping at all times. Also, the transcript does not contain evidence to support a conclusion that

Claimant did not exercise the utmost care at the time. He stepped on a nail protruding from a buried plank. The situation was almost like a booby-trap. The tip of a nail protruding from a buried plank would be missed or overlooked even by the most cautious individual. A greater causal nexus between the incident and a violation of the Rule is required to support imposition of discipline.

On the allegation that Claimant was accident-prone, Carrier avers that its statistics supported this conclusion. This Board, in the past, has looked with disfavor on a pure statistical approach to support an accident-prone charge, (see for example Second Division Award 6306). The facts in the instant case bear out the correctness of this holding. Carrier contended that Claimant had sustained 14 personal injuries within 19 years. This injury rate was extraordinarily high when compared to his peers, it was argued. Thus, this was proof positive that he was accident-prone.

This approach, though,, ignored the fact that none of the previous injuries resulted in disciplinary action being taken against Claimant. Also, Claimant had never been counseled by Carrier officers concerning his work habits. The statistical analysis, moreover, treated each injury equally. No matter how serious the injury, whether or not time was lost or if someone or something else was a contributing factor, each was given the same weight and was counted as a full contributor to the conclusion of being accident-prone.

The Board also has questions concerning the validity of the peer group from which Carrier's statistics were developed. Carrier's witness indicated that the peer group consisted of the seven individuals above and below Claimant on the seniority roster. The Board is of the opinion that the comparison base is imperfect, because one of the individuals included had worked as a mid-level Supervisor for some years, (an occupation with less exposure to industrial accidents than Claimant), and others had been laid off for significant periods, (another situation of less exposure).

Moreover, the Board is of the firm opinion that use of statistical data for the express purpose of establishing a conclusion that an employee is accident-prone, without more, is fraught with fundamental problems which cannot be overcome. Statistical analysis is subjective and at best an inexact science. A host of variables, the choice of which is controlled by the statistician, are available to dictate support for, and direct the result toward, a preordained notion. The opportunity for manipulation is ever present. In this regard a comment in Award 1, PLB 5015 (BRAC v. Norfolk Southern) seems appropriate:

> "Another problem with average is what is included and what is excluded. Why was the line drawn at five? Why not ten or two, twenty or the entire facility? It is a well understood fact of statistical development that measurement parameters can, and often times are, used to slant the result to

> support a preconceived conclusion. In this regard one is reminded of [a] recent pickup truck commercial which contended that Chevy outsold Ford in Ford County, Illinois. This was technically correct in one brief 28 [day] sales period, however, for the entire model year Ford outsold Chevy."

While Carrier has the license, indeed an obligation, to separate from its enterprise individuals that are truly accident-prone, (for the individual's well-being and that of his coworkers, public safety and preservation of Carrier resources), in doing so it is required to demonstrate a propensity on the part of the charged employee to work unsafely. This Board has stated in Second Division Award 9583 that:

> "An injury per se does not establish a rule violation."

Such seems in harmony with Award 5, PLB 4219, (BMWE v. UP), wherein that Board stated:

> "Nevertheless, the mere fact that he has been engaged in prior accidents does not prove that he consistently is careless or that he was careless on the day in question. The transcript in the instant case does not disclose any examination of whether the Claimant's previous work-related injuries or accidents were due to his own fault, inherently unsafe working conditions, a mixture of the two, or some other reason.... This is not sufficient to establish that he failed to display care in preventing an injury to himself or others, after many prior accidents
>
> ...
>
> The time to examine whether the Claimant was negligent in regard to past injuries was when those injuries occurred. ... [T]he fact that the hearing officer merely took the record at face value, without any examination of the circumstances of any individual incident, means that it was misused in this proceeding."

Claimant's dismissal notice leaves no doubt that his termination was based on statistical data arguably supporting a conclusion that he was accident-prone. Award 42, SBA No. 18, (UTU-SP) examined this situation in detail:

> "Ordinarily an employee 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 employee 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.

After a careful study of the subject or concept of 'accident-proneness' this arbitrator cannot concur with the idea loosely articulated in some awards cited by the carrier, to the effect that raw statistics are a satisfactory basis for termination of an individual's employment rights in the absence of any specific proof of fault or negligence.

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 54 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 arbitrator in a reported case designated as Northup Aircraft, Inc., 24 LA 732. In that case, the discharge was 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.'

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 on competent medical evidence and allow the employe the contractual rights provided to contest any medical discharge."

This Board, in embracing the statistical aspects of the above, rejects as appropriate or authoritative here, citations relied upon by Carrier, which it argued supports a statistical approach demonstrating accident-proneness. For one thing the Awards relied on by Carrier, for the most part, included one or two factors besides raw statistics - a showing of negligence or violation of Safety Rules in the incidents tabulated or some history of counselling the charged employee on unsafe work practices. (One also involved an element of insubordination.) These differences, to say nothing of the fact that no discipline, not even a letter of warning, was ever issued Claimant on any of the earlier incidents, must be recognized.

Accordingly, on this record the Board must conclude that Carrier was without license to administer discipline in this matter. The Claim of the Organization will be sustained.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 29th day of August 1991.