

The Third Division consisted of the regular members and in addition Referee Thomas J. DiLauro when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(
(CSX Transportation, Inc. (former Louisville
(and Nashville Railroad Company)

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

(1) The dismissal of B&B Helper J. R. Williams for alleged '*** responsibility in connection with the personal ... injury sustained ... on July 11, 1990 *** also ... with being accident prone ***' was without just and sufficient cause, capricious, on the basis of unproven charges and in violation of the Agreement [System File 2(26)(90)/12(90-827) LNR].

(2) As a consequence of the violation referred to in Part (1) hereof, the Claimant shall be reinstated with seniority and all other rights unimpaired, his record shall be cleared of the charges leveled against him and he shall be compensated for all wage loss suffered."

FINDINGS:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employees 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 employed as a B&B Carpenter Helper, and he served on the Carrier's CRR Seniority District which was comprised of the territory of the former Clinchfield Railroad Company. The crew to which the Claimant was assigned consisted of a Foreman, a Carpenter, and a Helper. At the time of the incident, he was assigned and working under the supervision of a B&B Foreman and a B&B Engineer.

On July 11, 1990, the Claimant's crew was assigned to build crib walls in the vicinity of Mile Post VB 199.0. The crib walls were being constructed by stacking 80 pound bags containing sand and concrete mix in a wall at the ends of culverts in a ditch.

The Claimant and Carpenter were required to unload each eighty pound bag, carry it on an embankment, and lift it over their heads to the Foreman, who placed the bag on the wall. About half way through carrying his second load of fifty bags, the Claimant was walking toward the truck. Suddenly, the Claimant felt a pain in his back, he dropped the bag, and he fell to his knees in pain. According to the Claimant, he was eventually diagnosed as having sustained a pulled ligament or a possible separated disc.

Under date of August 13, 1990, the Carrier notified the Claimant he was being charged with responsibility for the injury sustained on July 11, 1990, and with being accident prone. By letter dated September 12, 1990, the Claimant was notified he was being dismissed from the Carrier's service because he was guilty of being accident prone.

The Organization contends the Carrier's decision to dismiss the Claimant based on its allegation that he is accident prone was based on flawed reasoning. The Organization argues the application of the probability theory to real world situations is extremely difficult, because there are so many variables and outside influences in any given situation which cannot be measured, assigned a value, or controlled. Therefore, the Organization maintains the Carrier's statistical comparison of the Claimant's injury record with the injury records of other employees with comparable seniority is flawed, because it fails to account for a number of variables.

The Organization maintains the Carrier did not prove that the Claimant caused his injury on July 11, 1990. The Carrier asserts the Claimant testified that his knees were straight when he picked up the sand bag. According to the safe procedure for lifting, the knees should bend and allow the leg muscles, not the back muscles, to do the work of lifting.

The Organization contends the Claimant was not afforded a fair and impartial Hearing. The Organization asserts the Claimant was not provided with a proper notice of the charges leveled against him, and the Claimant was disciplined for charges not leveled against him.

The Carrier argued it had no alternative but to dismiss the Claimant. Indeed, the Carrier stated its firm and honest conviction that if the Claimant is permitted to return to service, he will most likely seriously injure or kill himself and/or his fellow employees, and such a distinct possibility simply cannot be ignored.

With respect to the substantive charge, the Board finds that there is sufficient probative evidence in the record to establish that the Claimant is guilty of the charge against him. The Claimant admitted he failed to use proper lifting techniques on the day of the incident.

The Carrier also demonstrated the Claimant is accident prone in that the average railroad employee sustains an average of 0.076 injuries per year. The Claimant far exceeded this rate. The Claimant sustained an average of 0.941 injuries per year.

Further, the Carrier noted the Claimant was injured eight times in the eight years prior to his dismissal. When the Claimant's injury record is compared to those with comparable seniority his rate of injury was far greater than those of the other employees. The other employees averaged one to two injuries over a comparable time period.

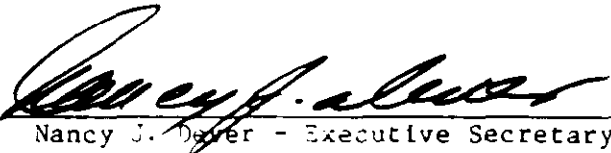
With respect to the disciplinary action, the Board will not set aside discipline imposed by a Carrier unless it is unreasonable, arbitrary, or capricious. Third Division Award 26160. The Board has held that a carrier is not required to retain in its service an employee who cannot, or does not, perform his work with safety to himself or to other employees. Second Division Award 8912. In this case, dismissal is warranted because the Carrier proved the Claimant's culpability for the present injury, and the Carrier established the Claimant is accident prone.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Oyster - Executive Secretary

Dated at Chicago, Illinois, this 21st day of October 1992.