Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 30559
Docket No. MW-31163
94-3-93-3-13

The Third Division consisted of the regular members and in addition Referee M. David Vaughn when the award was rendered.

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 discipline [dismissal reduced to time out of service, i.e., twenty-three (23) day suspension] imposed upon Machine Operator T. W. Marion for allegedly being an unsafe and accident-prone employe in connection with seven (7) personal injuries sustained since April 1, 1976 was an abuse of the Carrier's discretion, without just and sufficient cause, on the basis of unproven charges and in violation of the Agreement (System Docket MW-2190).

(2) As a consequence of the violation referred to in Part (1) above, Machine Operator T. W. Marion's record shall be cleared of the charges leveled against him and he shall be compensated for all lost wages, benefits and credits."

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 employee within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

Claimant is employed by the Carrier as a Machine Operator in the Track Department. He has 18 years of service and has worked as a Track Laborer, Machine Operator and Track Foreman. During Claimant's service, he reported to the Carrier seven personal injuries: bruised fingers handling rail by hand, cut leg or foot, pulled muscle, right groin, dirt in left eye, pinched left thumb, neck pain, and the injury which triggered the instant dispute. Insofar as the record indicates, Claimant's negligence or unsafe work had not been established for any of the prior injuries; and he had not been disciplined or counselled for any of them.

On July 15, 1991, Claimant was operating a Backhoe. Claimant's Foreman sent him to handle tie plates. Upon his return from the job, Claimant reported discomfort in his back, apparently the result of a pulled muscle. Claimant received medical treatment and returned to work without any time lost.

In response, the Carrier charged Claimant with "[b]eing an unsafe and accident prone employee", citing his seven personal injuries; and it convened an investigatory hearing. At the hearing, the Carrier did not introduce evidence that Claimant had been unsafe or negligent in his work, either in the actions which led to his most recent injury or in any of the others. Despite the Organization's requests, the Carrier did not furnish the reports of the injuries suffered by Claimant. It relied on a summary listing of the injuries in Claimant's personnel record.

Instead of establishing Claimant's unsafe or negligent work, the Carrier introduced evidence to demonstrate that some employees are accident-prone and some evidence, based on a sample of 10 employees, that Claimant's injuries were more frequent than employees with comparable seniority. Witnesses testified that some employees could have incurred more injuries than Claimant, without being disciplined and that the comparison of Claimant with some of the other employees was unfair.

The Carrier did introduce evidence that Claimant had previously received a personal injury review in 1988 and had been counselled for injuries in January of 1991. However, there is no evidence that he received other, or earlier, training or counselling and no indication that he previously received corrective discipline.

At the hearing, several supervisory officials testified that Claimant was not clumsy or unsafe in his work; indeed, several indicated that they believed, on the basis of their observations, that Claimant was a safe employee.

Following the conclusion of the hearing, the Carrier dismissed Claimant from service for being an unsafe and injury-prone employee. The dismissal was reduced, on appeal, to a suspension of time held out of service: 23 days. The Organization brought the dispute to this Board.

The Carrier argues that Claimant's record of seven personal injuries in 18 years is substantially in excess of the average of 2.2 injuries for 10 similar employees on the same roster as Claimant. It urges that Claimant's preventable injuries took place despite the Carrier's efforts to instill safety consciousness in its workers. The Carrier argues that Claimant's injuries establish a pattern of accident-proneness which poses a danger to himself and his co-workers and justifies his dismissal. It urges that the July 15, 1991 incident was the "last straw". The Carrier urges that it established Claimant's guilt and that its reduced discipline is fair. It urges that the claim be denied. It urges that, if the claim were to be sustained, any wages be limited to time actually lost.

The Organization argues that Claimant works in a dangerous environment and that his seven minor injuries over 18 years do not establish that he is accident prone. It points out that Claimant has never been accused by the Carrier of being responsible for the injuries and that he has never been charged or disciplined in connection with any of them. It points out, further, that the Carrier introduced no evidence at the hearing that Claimant was unsafe or that any of the accidents were the result of any rules violation.

The Organization asserts that the Carrier's effort to establish Claimant's guilt on the basis of statistical comparisons is flawed by use of a small, selective sample and lack of demonstration that the employees in the sample worked comparable amounts of time or in comparable assignments. The Organization argues that the fact that an employee suffers injury, or even that an employee has suffered more injuries than his fellow-employees, is not determinative of whether the employee was negligent. It asserts that proof of responsibility for the injury is necessary before discipline can be imposed.

The Organization also argues that the Carrier violated Claimant's rights to due process and fair hearing by issuing a vague, inadequate and untimely charge, involving incidents which had taken place over Claimant's entire career and by furnishing a defective and incomplete transcript of the hearing. The Organization urges that the hearing was simply a formality, the Carrier having already made up its mind to discipline Claimant.

The Organization urges that the Claim be sustained, that the suspension be rescinded, and that Claimant be made whole for wages and benefits lost.

While the Carrier's right to maintain a safe workplace and to discipline employees who are unsafe is well-established, it is also well established that the mere fact that an employee is injured does not mean, without more, that the employee has been negligent or can be subjected to discipline. Proof that the injury was preventable and that the employee bore responsibility for failing to prevent it is a necessary element of a charge of unsafe conduct. See, e.g., Third Division Awards 25872, 26183, 26341, 27172, 26665.

The concept that an employee may be so accident-prone as to be a threat to himself and his fellow-workers as to support dismissal has been accepted by the Board. See, e.g., Third Division Award 26183. However, the Board has not favored discipline based solely on statistical evidence and has looked, in such cases, to the nature, circumstances and consequences of the injuries and to the question whether the employee was culpable. See the extended discussion in Third Division Award 28917.

The Carrier failed to prove the charges against Claimant. To establish even a prima facie case that an employee is actionably accident prone, the number of accidents must be clearly and substantially in excess of comparable employees. In this case, however, the number of injuries suffered by Claimant is not so clearly or substantially in excess of those suffered by other, similar employees to deem him to be "accident-prone". The statistical basis for the Carrier's conclusion is simply too imprecise and narrow: the reporting of a seventh injury when the average for employees described by the Carrier as similar is 2.2 would be sufficiently in excess of the average to conclude that Claimant is actionably accident prone only if the sampling method and sampling size produced a valid conclusion. In this case, the Carrier's use of a sample of ten employees on the same roster as Claimant, bracketing his seniority but excluding some employees, and without correlation of total service and prior work assignments, is too small and unscientific to provide a statistically-valid base for the Carrier's conclusion.

The Board has repeatedly recognized that not every injury is preventable and that not every preventable injury is the result of actionable negligence or unsafe work practices by the injured employee. See, e.g., Third Division Award 22986. An employee's failure to work safely must be proven. In this record, there is simply no evidence to support the Carrier's charge that Claimant was an "unsafe" employee: there is no evidence that either

Claimant's October 31st injury or any of his earlier injuries were the result of his negligence or unsafe work practices. All of the injuries appear, from the Carrier's summary, to be relatively minor. There does not appear to be any particular pattern or timing to the injuries. If there is a history of extended absences or monetary claims from the injuries, it does not appear from the record. Claimant was not charged at the times with any rules violations for his conduct related to the injuries. The record indicates that Claimant was counselled once in 1991 and his injury record reviewed in 1988, but he certainly was not afforded the right to contest the culpability which the Carrier now infers.

The Board notes that the statistical evidence is only one factor in assessing Claimant's vulnerability to injuries. The Board concludes that the particular history of Claimant's injuries, and the Carrier's own treatment of those injuries, is sufficient to negate the inferences which might be drawn from the statistics. In this case, the limited statistical evidence is also rebutted by the testimony of several supervisors, who testified that Claimant did not appear, based on their observations in working with him, to be clumsy, careless or accident prone. Indeed, they confirmed that he was a safe employee.

An employee's propensity for injury, whether the result of carelessness or some physical or psychological condition, is presumptively subject to correction. Before a Carrier may invoke dismissal or major discipline against an employee for being accident prone, it must demonstrate that it placed him on notice of the problem and attempted, through counselling and use of appropriate progressive discipline to correct the problem. In this case, the Carrier's complaint that Claimant's July 15th injury was the "last straw" is supported by a "review" conducted three years before and a "counselling" conducted earlier in 1991. The leap from that notice to a 23 day suspension - let alone dismissal - for a minor injury which resulted in no lost time and for which there was no showing of negligence or rules violations, is not sufficient to satisfy the Carrier's obligation to demonstrate that it utilized any counselling, special safety training, or lesser corrective discipline to address its stated concerns about his injuries.

The Board is not persuaded that the incomplete and defective transcript was intentional or prejudicial. Nor were the charges excessively vague; they were sufficiently specific to allow Claimant to know the charges and to fashion his defense. However, the Board notes that the Carrier's refusal, in response to the Organization's request, to submit Claimant's prior injury reports precluded it from proving Claimant's culpability in those incidents and is a factor in sustaining the Claim.

The Board accepts the Carrier's argument that any award of lost wages be limited to time Claimant was actually held out of service. The "make-whole" Award is intended to so reflect.

The suspension shall be rescinded and expunged from Claimant's records and he shall be made whole for all wages and benefits lost.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 9th day of November 1994.