Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 30560
Docket No. MW-31185
94-3-93-3-133

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 a forty-five (45) day suspension] imposed upon Machine Operator B. L. Johnson for allegedly '[b]eing an unsafe and accident-prone employee as evidenced by your six (6) personal injuries since being hired on May 3, 1976. * * * ', was without just and sufficient cause, on the basis of unproven charges and in violation of the Agreement (System Docket MW-2366).

(2) As a consequence of the violation referred to in Part (1) above, Machine Operator B. L. Johnson's record shall be cleared of the charges leveled against him with all benefits and credits restored for the period in question and he shall be compensated for all lost wages."

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 Adjustment 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 Class II Machine Operator in the Track Department. He has 15 years of service and has worked as a Track Laborer and Machine Operator. During Claimant's service, he reported to the Carrier six personal injuries: a bruised top of his left foot, a bruised right foot, a foreign object in his eye, a bruised left rib, a laceration to his left knee, 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. Claimant had received a 30 days suspension, subsequently reduced to a reprimand, in 1989 for misconduct unrelated to personal injuries.

On October 31, 1991, Claimant was operating a Ballast Regulator. In dismounting from the machine, Claimant "strained" his right knee. He reported the injury to the Carrier, as required.

In response, the Carrier charged Claimant with "[b]eing an unsafe and accident prone employee", citing his six 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.

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 45 days. The Organization brought the dispute to this Board.

The Carrier argues that Claimant's record of six personal injuries in 15 years is substantially in excess of the industry average of 4-5, a Trackman average of 3.8, a Class II Machine Operator average of 3.6 and a Vehicle Operator average of 2.3. 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 suspension. It urges that the October 31, 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 reduced by the time between October 30th and November 7th when Claimant was off work on medical disability and receiving compensation under the wage continuation program.

The Organization argues that Claimant works in a hazardous environment and that his six minor injuries do not establish that he is accident prone. It points out that Claimant has never been accused of being responsible for the injuries and that he has never been counselled or disciplined in connection with any of them. It points out, further, that the Carrier introduced no evidence 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 refusing to make available the injury reports for the injuries constituting his injury record and by having the hearing officer ask suggestive and leading questions of the Carrier witness to complete the record.

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 sixth injury when the industry average is, in the Carrier's description, "four or five" is simply not sufficiently in excess of the average to conclude that Claimant is actionably accident prone. Likewise, the 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. Insofar as the record indicates, he was not counselled or disciplined for them; and 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 Claimant's supervisor, who testified that Claimant did not appear, based on his observation in working with Claimant, to be clumsy, careless or accident prone.

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 October 31st injury was the "last straw" is not supported by any evidence that it utilized any counselling, special safety training, or lesser corrective discipline to address its stated concerns about his injuries. Indeed, until after Claimant bruised his knee, there is no indication that the Carrier ever advised Claimant that his number of injuries was unacceptable.

The Board is not persuaded that the hearing officer's conduct was sufficient to establish his prejudgment of Claimant. 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.

Of the Carrier's argument that any award of lost wages be reduced by the monies received from the Carrier through its wage maintenance program or any other settlement between the Carrier and Claimant the Board is not persuaded. While the record does not describe the exact nature of the wage maintenance program or any settlement, the record does not establish Claimant's culpability in the actions which led to his injury; and the record contains no basis upon which Claimant should, as a result of that injury, be deprived of a benefit to which he would otherwise be entitled.

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.