Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 30747
Docket No. MW-31239
95-3-93-3-302

The Third Division consisted of the regular members and in addition Referee Martin H. Malin when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(CSX Transportation, Inc. (former Chesapeake
(and Ohio Railway Company)

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

1. The dismissal of Mr. R. L. Drown, in connection with a personal injury incurred on March 17, 1992, for alleged failure to exercise caution and safe work practices and being prone to injury was without just and sufficient cause, on the basis of unproven charges and in violation of the Agreement. [System File C-D-7725/12(92-841) COS].

2. The Claimant shall be reinstated to service with all seniority and benefits 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 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.

On March 17, 1992, Claimant was operating a backhoe. In accordance with instructions from the Assistant Roadmaster, he used the backhoe to retrieve switch ties. This required crossing the tracks with the backhoe. After crossing the tracks several times, Claimant felt a sharp pain in his back. He reported the incident and, when his back did not improve, Claimant was transported to a hospital where he received medical attention. Claimant was unable to work for a considerable period of time.

On March 23, 1992, Claimant was advised to report for an Investigation on April 6, 1992, to determine his responsibility in connection with his injury and to determine whether he was injury-prone, in light of his having sustained eleven injuries since September 7, 1978. The Hearing was postponed and held on June 29, 1992. On July 15, 1992, Claimant was advised that he had been found to have failed to exercise caution and safe work practices on March 17, 1992, and that his, "past history of personal injuries shows, beyond doubt, that you do not exercise caution and good judgement insofar as your personal safety and well-being is concerned." Consequently, Claimant was advised that he was dismissed from service.

The Organization contends that Carrier violated Rule 21 by calling on Claimant to answer for injuries sustained more than twenty days prior to the scheduled Investigation date. All injuries, except for the injury sustained on March 17, 1992, in the Organization's view, are barred from consideration by the time limits set forth in Rule 21.

The Organization further argues that Carrier failed to prove Claimant's responsibility for the March 17, 1992, injury. The Organization argues that Carrier required Claimant to drive the backhoe across the tracks, knowing that there were safer methods of performing the job available. The Organization argues that Carrier should have used the tie handler to transport the ties across the tracks, built a temporary rock crossing, or had Claimant use a newer backhoe which had an air-cushioned seat to perform the job. The Organization contends that the Assistant Roadmaster admitted that these actions could have been taken and would have been safer, but failed to adequately explain why they were not done.

The Organization also maintains that Carrier failed to prove that Claimant was accident prone. Carrier's proof consisted of a comparison between Claimant's injury rate and the injury rates of the seven employees above him and the seven employees below him on the seniority roster. The Organization attacks the use of such statistical comparisons as capable of manipulation and not probative of Claimant's responsibility for any of the injuries. The Organization further argues that the statistical comparison was flawed because most of the other employees whose records were used in the analysis worked mainly as a Foreman or as Track Inspectors, positions which were not as hazardous as Claimant's.

Finally, the Organization contends that Carrier never took remedial action after any of the injuries. The Organization observes that Claimant testified that three-fourths of his injuries were the result of Carrier's failure to provide proper tools, machinery or manpower. The Organization notes that none of the injuries was subject to investigation and concludes that the prior injuries are not probative of the charge of being injury prone.

Carrier argues that Rule 21 does not preclude it from considering Claimant's prior injuries. Carrier analogizes this case to a dismissal for excessive absenteeism. In both cases, according to Carrier, the employee's record over time furnishes the basis for the disciplinary action taken.

Carrier further argues that the evidence established that Claimant was accident prone and that Carrier would be remiss in its duty to provide a safe work environment if it retained Claimant within its employ. Carrier relies on the evidence presented that Claimant had a far more extensive injury record than any other employee in the group to which he was compared. Carrier observes that its statistical analysis broke the injuries down between those serious enough to be reported to the FRA and those not so serious, and broke them down between active and passive injuries. In all classifications, Carrier contends, Claimant's record shows him to be considerably more prone to injury than his coworkers.

Carrier also argues that it proved Claimant's responsibility for his March 17, 1992 back injury. Carrier contends that the backhoe's seat was inspected after the incident and found to be free of defects. Furthermore, in Carrier's view, the use of the backhoe in this manner was common-place. Carrier argues that if the ride across the tracks was as jarring as Claimant contended, Claimant, who had a history of back problems, should not have continued to take the same path. Carrier maintains that Claimant could have crossed the tracks at a smoother location.

The first issue before the Board is whether substantial evidence supports the finding made on the property that Claimant failed to exercise caution and safe procedures on March 17, 1992, thereby rendering him responsible for his back injury. This Board does not review factual findings de novo and generally defers to findings made on the property. Those findings, however, must be based on the evidence in the record and cannot be based on speculation or conjecture. The fact of an employee injury alone does not establish that the employee operated without proper caution or in an unsafe manner. See, e.g., Third Division Award 22986.

The evidence showed that Claimant was operating the backhoe in accordance with the Assistant Roadmaster's instructions. The evidence further showed that the tracks were seven to eight inches above the ground where the Claimant crossed them with the backhoe. The Assistant Roadmaster testified that it would have been safer to use the tie handler to move the ties across the tracks and that it would have been safer to have spread gravel to make a temporary road crossing. His only explanation for not using the tie handler was that it was being used to insert ties. He admitted, however, that the tie handler could have gotten all of the ties that required transport across the tracks in a single trip. When asked why a temporary crossing was not constructed, the Assistant Roadmaster replied, "We could have but we didn't."

To establish the Claimant's responsibility for the injury Carrier points to the inspection of the backhoe seat, contends that if Claimant was experiencing such a rough ride he should have chosen another route across the tracks, and contends that a smoother route was available to Claimant. We do not find Carrier's assertions probative of Claimant's responsibility.

The backhoe seat was cushioned by three inches of foam padding. The finding that the seat was not defective, i.e. that it complied with the manufacturer's specifications, does not mean that the seat was capable of absorbing the impact of climbing over the tracks while carrying a load of switch ties. Moreover, ruling out one possible cause of an injury, i.e. defective equipment, does not establish employee carelessness or unsafe behavior as the real cause. The finding that the equipment was not defective, without more, leaves one to speculate concerning, but not find employee culpability.

The suggestion that the Claimant should have sought an alternate crossing point if the ride was as jarring as he maintained also does not persuade the Board. It is tantamount to using perfect hindsight to say that the Claimant must have done something wrong or he would not have been injured. To show Claimant's responsibility on this theory, Carrier must show that there was a safer crossing available to Claimant. This leads us to consider Carrier's contention that such a crossing was available.

The Organization objected to this contention, arguing that Carrier failed to raise it on the property. Because of our disposition of Carrier's position, we need not rule on the Organization's objection.

Carrier cites the Assistant Roadmaster's testimony in support of its contention. In response to a question as to why a temporary crossing was not constructed, the Assistant Roadmaster testified:

> "Yes we could have. We could have but we didn't. We were down and working in an area where there were a lot of switches. If he had to cross the tracks, he could have went (sic) up closer to the east end of the yard and went about it that way. The switch ties were across the tracks closer to the switch we were working at[;] that was the reason why he had to cross the track. This is an every day thing we use the backhoe for all the time to cross the tracks. We wasn't (sic) the first day we used the backhoe to cross the tracks."

Our review of the transcript fails to disclose any statement that the crossing would have been smoother at the east end. The Assistant Roadmaster did not state why he referred to the possibility of crossing at the east end of the yard. There is no description of the crossing at the east end of the yard or any specific testimony comparing it to the place where Claimant crossed the tracks. Carrier reads too much into the Assistant Roadmaster's defensive reaction as to why he did not construct a temporary crossing, an admittedly safer approach to the job.

Accordingly, we conclude that Carrier failed to prove Claimant's responsibility for his March 17, 1992, injury. We next consider the charge that Claimant was injury prone.

There are numerous and conflicting Awards considering charges that employees were accident prone. Among other things, these Awards conflict over whether a separate, timely Investigation is required for each injury and over the probative value, if any, of statistical comparisons of employee injury records. Because of the particular facts of this case, we find it unnecessary to choose among the conflicting authorities.

A frequently-cited definition of accident prone was first provided in First Division Award 20438:

> "[A]n accident-prone employe is one who has demonstrated a propensity to get hurt in performing service in his occupation under conditions where successive injuries could have been avoided if the employe had exercised more care or foresight or had possessed better physical or mental traits . . . ."

Awards which accept this definition and accept the use of statistical comparisons generally find accompanying evidence of employee culpability in at least some of the prior injuries. For example, in First Division Award 20438, the claimant had nine prior injuries. The Board found that the evidence established claimant's responsibility for the first seven injuries. With respect to the eighth and ninth, the Board found evidence that the carrier shared in the responsibility, but also found that the claimant "could reasonably be expected to but was unable to handle himself so as to avoid said injuries."

In Second Division Award 8912, the claimant had already been tried for previous charges of personal injuries and had been dismissed and reinstated on a leniency basis for violating safety standards. In Second Division Award 5205, the record showed that the claimant had been warned repeatedly against carelessness. In Third Division Award 28266, the Board reaffirmed its prior finding that the claimant had been given progressive and extensive counselling on work habits, safety and avoidance of injury, as well as on his injury record.

In Public Law Board No. 5367, Case 2, the claimant had been given several letters of caution and was twice required to attend remedial safety classes. Such actions, although not disciplinary in nature, are significant for two reasons. First, they place the employee on notice that his conduct requires improvement and assist him with remediation. Second, they indicate that contemporaneously with the prior injuries, the carrier analyzed them and concluded that the employee's conduct required remediation. In Public Law Board No. 3530, Award 82, the claimant had been the subject of numerous safety violations and numerous counsellings.

A few Awards suggest that statistical comparisons standing alone may raise an inference of a pattern of culpable conduct. Other Awards suggest that statistical comparisons may never be probative of a pattern of culpable unsafe behavior. A middle ground suggests that where there is evidence of culpable conduct in some of the prior injuries, an injury record which deviates significantly from the norm on the property may establish that the employee is accident-prone.

We need not decide which view to follow. The evidence in the instant case fails to establish that the Claimant was accident-prone, as defined above. Carrier's Engineer Administration performed the statistical comparisons and testified that Claimant had eleven injuries since 1978, three of which were not sufficiently severe to report to the FRA. He compared the Claimant's record to that of the seven employees immediately ahead of him and the seven employees immediately behind him on the seniority roster.

The Engineer Administration's analysis showed that during the period in question, Claimant had 50 percent of all injuries reported by members of the group (11 of 22) 50 percent of all FRA reportable injuries (8 of 16) and 50 percent of all non-FRA reportable injuries (3 of 6). The next closest employee in each category had 33.3 percent of the non-FRA reportable injuries (2 of 6) 25 percent of the FRA-reportable injuries (4 of 16) and 18.2 percent of all injuries (4 of 22).

The Engineer Administration also classified each employee's injuries as active or passive. He defined active injuries as those which the employee could have avoided. He classified ten of the Claimant's eleven injuries as active and all of the other employees' injuries as active. He found that Claimant accounted for 45.5 percent of the total active injuries.

The Engineer Administration explained that he drew the comparison from the Equipment Operator seniority roster, but doubted that all employees within the comparison were working as Equipment Operators. This was consistent with Claimant's testimony that many were working as Foremen and Track Inspectors, which were less hazardous positions. The lack of homogeneity across the group undermines the probative value of the within group comparisons.

Furthermore, the Engineer Administration's classification of the injuries as active or passive was based entirely on his review of the descriptions contained in the files. There is no evidence contemporaneous with the injuries themselves indicating that Carrier regarded them, at that time, to be matters of concern. None were subject to investigation. Claimant was never even cautioned about his alleged carelessness. The Engineer Administration's characterizations, in some cases more than ten years after the fact, are no substitute for contemporaneous evidence.

Most importantly, the injury which triggered the review of Claimant's prior record occurred on March 17, 1992. We have found that Carrier failed to establish Claimant's responsibility for that injury. It is impossible to say that the March 17, 1992 injury represented the culmination of an ongoing course of conduct exhibiting lack of caution and lack of regard for safety.

Taking all of the evidence into consideration, we are compelled to conclude that Carrier failed to prove, by substantial evidence, that Claimant demonstrated a propensity to get hurt in performing service in his occupation under conditions where successive injuries could have been avoided if the employe had exercised more care or foresight. The claim must be sustained. Subject to passing a reasonable medical examination which Carrier may require, Claimant shall be reinstated to service with seniority and contractual benefits unimpaired, shall be compensated for his lost wages and shall have his record cleared of the charges. We note the possibility that Claimant may pursue an FELA claim based on his March 17, 1992 injury. In the event such a claim is pursued, it is not our intent in sustaining this claim to afford Claimant a double recovery for lost wages.

AWARD

Claim sustained.

O R D E R

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 24th day of February 1995.