

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 32017
Docket No. MW-32623
97-3-95-3-550**

The Third Division consisted of the regular members and in addition Referee Nancy F. Murphy when award was rendered.

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(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., forty-five (45) day suspension] imposed upon Vehicle Operator J. F. Kane for alleged violation of Safety Rules 3000, 3030 and 3033 when, on July 5, 1994 at approximately 7:30 A.M., he sustained a personal injury and responsibility of being accident prone by sustaining five (5) injuries from July 31, 1978 to July 5, 1994, 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-3498-D).**
- (2) As a consequence of the violation referred to in Part (1) above, Vehicle Operator J. F. Kane's record shall be cleared of charges leveled against him 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 were given due notice of hearing thereon.

Claimant is employed as a Vehicle Operator on the Carrier's Harrisburg Division. On July 5, 1994, Claimant sustained an injury, as a result of which Carrier notified him to attend an Investigation regarding the following:

"Violation of Safety Rules 3000, 3030, and 3033, when on July 5, 1994, at approximately 7:30 a.m., you sustained a personal injury while walking down a set of stairs, slipping on stones and falling, spraining your left shoulder.

Your responsibility of being accident prone, wherein you sustained five (5) injuries from July 31, 1978, to the most recent being July 5, 1994. This injury frequency rate and severity being in excess of employees with comparable seniority and work history."

The Rules for which Claimant were cited state:

"RULE 3000

You must use care to prevent injury to yourself or others. You must be alert and attentive at all times when performing your duties and plan your work to avoid injury.

RULE 3030

You must walk, not run, keeping your hands out of your pockets. Be alert for tripping and slipping hazards. Do not jump across excavations, holes or open pits. Walk around them.

RULE 3033

Clean and scatter salt, sand or other suitable material on slippery walking surface when necessary to use it in the performance of your

work. If cleaning is not practical, wear anti-slip footwear, take smaller steps and turn your feet out to prevent falling."

Subsequent to two postponements, the Hearing convened and was completed on September 6, 1994. By letter dated September 16, 1994, Claimant was notified that he had been dismissed. During grievance handling, Carrier Manager-Labor Relations reduced the discipline to a 45 day suspension, based on Claimant's long service and good discipline record.

The Organization protested the discipline, premised upon:

- 1. The Hearing Officer's refusal to recess the Investigation, per the Organization's request, because Claimant had not yet returned to work.**
- 2. Claimant had sustained only five injuries in his 17 year tenure, therefore, he could not be considered "accident prone."**
- 3. The Hearing Officer refused the Organization the opportunity to explore the work histories of the six individuals with whom Claimant's injury record was compared; the three individuals above Claimant on the seniority list, and the three individuals beneath Claimant on the seniority list.**
- 4. Carrier failed to prove that Claimant violated any of the three safety rules with which he was charged.**

The General Chairman further noted that the handrail on the steps where Claimant had incurred the injury was missing. Finally, the General Chairman maintained that Claimant had not been charged with a specific rule violation, nor had he received any discipline with respect to his prior injuries, thereby rendering Carrier's assessment of discipline "harsh and excessive."

For its part, Carrier denied the claim asserting that:

- 1. The request to have the Hearing continued when Claimant returned to work was not valid. No medical documentation was**

presented to show why Claimant could not continue with the Hearing. Claimant was present when the proceedings opened, and "not only" prepared to proceed, but, in fact, "actively participated" in his own defense.

2. At the Hearing, Harrisburg Division Manager of Safety J. Harris, noted that the average for Class 1 Railroads is three injuries per employee, which Claimant exceeded.
3. The six employees with whom Claimant's record was compared were not on trial, therefore, their work record was not in dispute. Further, the Organization's Representative was permitted to question the witnesses relative to the charge, and did not object to the work histories not being made available until the close of the Hearing.
4. Claimant's violation of Rules 3000 and 3030 resulted in the accident.

The Organization based its procedural objection upon the Hearing Officer's "refusal" to adjourn the Investigation until Claimant was able to return to work. We found no evidence on this record which would indicate that the Hearing Officer's refusal to that request was inappropriate or that it constituted a violation of Claimant's rights. Claimant received proper and timely notification of the pending Investigation, appeared at the Hearing and participated in his own defense.

Turning to the merits of this issue, Claimant was disciplined, as a result of the injury which he sustained on July 5, 1994, and for alleged "accident proneness" due to four previous injuries. In order to justify the imposition of any discipline, Carrier must, at the threshold, establish Claimant's culpability for violating cited rules in connection with the "triggering incident" of July 5, 1994. Speculation and suspicion are not evidence. Carrier failed to adduce even a shred of evidence that Claimant violated the rules as charged. Nor did Carrier provide any rebuttal of Claimant's testimony that he was "not running", did "not have his hands in his pockets" at any time, and that he was "wearing anti-slip footwear." Given the undisputed facts of record, Carrier failed to carry its burden of proving just cause for this disciplinary action.

Prior to July 5, 1994, Carrier had not cited Claimant for any rule violation on the four prior occasions in which he sustained similar injuries. In the absence of any information concerning the facts surrounding those injuries, it is purely speculative to label Claimant "accident prone." Reasonable concerns about a pattern of injuries might appropriately have prompted a referral to Carrier's Safety Council for counseling prior to July 5, 1994. The belated response to those incidents provides no adequate justification for imposing discipline because Claimant injured himself again on July 5, 1994.

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 6th day of May 1997.

**CARRIER MEMBERS' DISSENT
TO AWARD 32017 (Docket MW-32623)
(Referee Murphy)**

Concerning Claimant's July 5, 1994 injury, he testified as follows:

"Q. Could you describe the condition of the steps and the area?

A. I would say I really never noticed too much, the conditions. I do know in fact, there were stones on the steps because that is how I slipped. I hadn't really taken notice as to the conditions of the area until right after my injury. The B&B Department was instructed to immediately cleaned the area of all debris, overhanging brush and to construct a handrail.

* * * *

Q. Did you take notice prior to the accident date that there was stones on the steps?

A. No I didn't."

On this record it is not disputed that Claimant failed to be alert to hazards that were before him and the record contains evidence - Claimant's own admissions - of the rules violated. The Majority's conclusion otherwise ignores the record.


Further, such admission does establish guilt. See Third Division Awards 20250, 29711; Fourth Division Award 4979. The only issue before this Board was to decide whether the 45 day suspension was proper discipline. Claimant's injury was the result of his own admitted negligence.

Given the result, one must also wonder if this Majority was swayed by the volume of new material injected into the record by the Organization, which had no place being before the Board. However, we will never know. While there might and could be a reason to modify the discipline assessed in this case - based on the factual evidence of record - there is no support for the Majority's conclusion that Claimant is without blame for the July 5, 1994, injury to himself.

**Carrier Members' Dissent
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We Dissent.


P. V. Varga


M. W. Fingerhut


M. C. Lesnik