

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 32773
Docket No. MW-32731
98-3-96-3-34**

The Third Division consisted of the regular members and in addition Referee Richard R. Kasher when award was rendered.

**(Brotherhood of Maintenance of Way Employes
PARTIES TO DISPUTE: (
(Southern Pacific Transportation Company (Eastern Lines)**

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The dismissal of Track Foreman D. M. Lowry for alleged violation of Rules 1.1, 1.1.2 and 1.6 of the Safety and General Rules For All Employees, in connection with ' . . . your responsibility in being an unsafe worker as evidenced by your record of personal injuries and your responsibility in those sustained by your fellow employees, most recently by the injury you allegedly sustained August 18, 1994.', was arbitrary, capricious, without just and sufficient cause, on the basis of unproven charges and in violation of the Agreement (System File MW-95-31/MW D95-4 SPE).**
- (2) As a consequence of the violation referred to in Part (1) above, the Claimant shall be reinstated to service with seniority, credits for vacation and all other benefits unimpaired, his record shall be cleared of the charges leveled against him and he shall be compensated for all wage loss suffered beginning October 10, 1994 and continuing until he is returned to service."**

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.

On August 18, 1994 the Claimant allegedly sustained an injury, straining a muscle in his leg, while in the process of moving a bag of grease to the rail oiler. The Claimant was unable to work for a period of time, and the Carrier, based upon the Claimant's prior record involving personal injuries, issued a Notice of Investigation.

Based upon the Investigation, and primarily focusing upon the accident/injury records of the three employees above and the three employees below the Claimant on the seniority list, the Carrier concluded that the Claimant was "accident prone" and thus terminated his employment.

At the time that the Claimant was terminated he had a seniority date of November 2, 1971. Prior to August 18, 1994, when the accident/injury occurred, apparently the Claimant had not sustained and/or reported a personal injury for a period of more than ten years.

The Carrier has contended that the Claimant's prior record of personal injuries, and the fact that he had been previously placed in a "repeater" program as a result of his having sustained several personal injuries during his first 13 years of employment, justified a conclusion that the Claimant's safety record warranted his termination. The Carrier relied as well upon the fact that the three employees above the Claimant on the seniority roster had no injuries and the three employees below the Claimant on the seniority roster had only one injury among them.

The Organization has raised several arguments in support of its position that the claim should be sustained. The Organization has argued that the Claimant was not afforded the opportunity at the Investigation to call several witnesses who might have placed in context the statistical analysis utilized by the Carrier in determining the

Claimant's alleged propensity for accidents/injuries. The Organization has further contended that the record does not contain sufficient probative evidence regarding the Claimant's prior accidents/injuries to support the conclusion that his termination was for just cause.

After fully considering the record, this Board concludes that the Carrier has not presented sufficient substantial and convincing evidence that the Claimant was "accident prone." The selection of three employees above and three employees below the Claimant on the seniority roster and a review of their personal injury records does not represent, in this Board's opinion, a sufficiently reliable test for determining the degree to which the Claimant may be properly considered "accident prone." Such an unscientific random test leaves too much room for error, and its results cannot be relied upon by this Board as being conclusive in terms of a determination of accident proneness.

Additionally, when one employee's record is compared to the record of six other employees one might be interested in knowing whether they all had worked the same amount of time, even though their seniority may have been substantially the same, and whether they had worked under the same or similar conditions for substantial periods of time.

In any event, this Board finds that in the absence of clear and convincing evidence that the Claimant was accident prone, the claim will be sustained. Insofar as an award of backpay is concerned, the Claimant will be entitled to backpay as of the time he was able to physically return to employment. Additionally, the Claimant will be entitled to restoration of his seniority with all rights unimpaired and the instant discipline shall be expunged from his personal record.

AWARD

Claim sustained in accordance with the Findings.

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 23rd day of September 1998.