NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 24534
THIRD DIVISION Docket Number SG-24590

Paul C. Carter, Referee

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(
(The Long Island Rail Road

STATEMENT OF CLAIM: "Claim of the General Committee of the Brotherhood of Railroad Signalmen on The Long Island Rail Road:

Appeal on behalf of G. W. Drew, who was dismissed by letter dated September 8, 1981, for allegedly being accident prone."

OPINION OF BOARD: The record shows that Claimant entered the service of the Carrier as a signal helper on July 24, 1974, and was promoted to assistant signalman on November 6, 1975. The Carrier says that within Claimant's seven years of employment, he incurred twelve reported on-the-job injuries, and five of the injuries occurred within a period of one year prior to the date he was instructed to appear for a hearing (August 19, 1981):

> "... to show cause why your service with the Carrier should not be terminated on account of your accident proneness in that since October 15, 1974, you have incurred 12 reported on-the-job injuries, five of which occurred within the past year.
>
> This investigation is provided in Rule 55 of the Agreement.
>
> You may, if you so desire, be accompanied by a duly accredited representative of your own choosing, without expense to the Company.
>
> You may produce witnesses in your behalf, without expense to the Company, and you or your duly accredited representative may cross-examine these witnesses.
>
> You will be expected to be present throughout the entire investigation."

Following the investigation, which was conducted on September 1, 1981, after being postponed at the request of the Organization, Claimant was notified on September 8, 1981, by Carrier's Assistant Chief Engineer - Signals and Communication:

> "As a a result of the hearing held on September 1, 1981, concerning your propensity to become involved in on-duty injuries, it has been determined that you are accident prone.

This conclusion is based upon the number and relative severity of each of your 12 reported on-duty accidents over a span of seven years, 5 of which have occurred within the past year.

Comparison of your rate of incident (sic) to those of workers similarly situated, i.e., helpers and other employees performing the same or similar duties at the time of each reported accident, is a totally disproportionate ratio.

Accordingly, at the end of your normal tour of duty (4 PM) on September 9, 1981, your services are terminated with this Company through the process of an administrative termination unrelated, in any respect, to a disciplinary sanction."

The phraseology used in the last paragraph of the above-quoted letter is unusual, to say the least. The only meaning that we can reasonably place upon it is that, for all intents and purposes, Claimant was dismissed from the service at the completion of his tour of duty on September 9, 1981. In our opinion, any investigation looking to the possible termination of an employe's services, as in a case of the kind here involved, properly comes under the discipline rule of the Agreement. See First Division Award No. 20438, and Second Division Awards Nos. 8912, 5205 and 5962. At the beginning of the investigation, the conducting officer stated:

"This is an investigation to determine whether or not cause exists to terminate Mr. Drew's service on account of his accident proneness in that since October 15, 1974 he has incurred twelve (12) reported on-the-job injuries, five (5) of which occurred within the past year. At this time I want to emphasize that these proceedings are not in the nature of a disciplinary proceeding. The Carrier is being governed in these proceedings by Rule 55 which provides that Carrier may hold investigations. The Discipline Rule does not apply; however, you are being accorded the right to representation and you may produce witnesses in your own behalf. And you will be expected to be present throughout this entire investigation."

We think that the Carrier has misconstrued Rule 55. That rule provides only for the manner in which employes will be paid for attending investigations. We find, however, that Claimant's substantial rights under the discipline rule have not been violated. Claimant was represented at the investigation and was advised that he could have witnesses present in his behalf. While there was some give-and-take between the conducting officer and Claimant's representative, the Board does not consider any of it, or all of it, of sufficient significance to invalidate the proceedings. We will say, however, that in our opinion the investigation was not conducted in an exemplary manner.

In the investigation, the following evidence was presented by Randall Dean, Office-Engineer-Communication:

"Mr. Morrison (conducting officer):

How many employees are in the Communication Section of the Signal Department?

Mr. Dean

There is ninety-six (96).

Mr. Morrison;

Did any of those employees have twelve (12) or more reported on-the-job injuries in their career?

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Mr. Dean

No.

Mr. Morrison:

Did any of those employees have five (5) on-the-job injuries within the time frame of approximately one year?

Mr. Dean

No.

Mr. Morrison:

How does Mr. Drew's accident record compare to that of others in the Communication Section?

Mr. Dean:

His accident record far exceeds the other employees of the Communications Section."

The foregoing testimony establishes that the Claimant was accident or injury prone. In Award No. 1 of Public Law Board No. 2828, with the present referee as neutral, the Claimant, who had been dismissed on the charge of being injury prone, had suffered 17 alleged injuries, covering a span of 8 years, 11 months, and it was developed in the investigation that no other employe in the shops had that many injuries, regardless of length of service. In the Award the dismissal of the Claimant was upheld, citing First Division Award No. 20438, Award 84 of Public Law Board 596, and Award 1 of Public Law Board No. 542. See also Second Division Award No. 8912, Second Division Award No. 5205, Second Division Award 5962, in which First Division Award No. 20438 was endorsed; Third Division Award No. 22628, and Award 57 of Special Board of Adjustment No. 589, wherein the Referee stated in part:

"... The claimant is not entitled to an unlimited number of opportunities to flout the standards of reason and due care in the exercise of his prescribed duties before the Carrier may take summary action."

As the Board stated in Award No. 1 of Public Law Board No. 2828: "... The Carrier is not required to retain in its service an employe who cannot, or does not, perform his work with safety to himself or to other employes." Second Division Award No. 8912 contains similar findings.

The Organization cites and relies upon Second Division Award No. 6306. We have reviewed that Award and note that no other awards are cited therein in support of the findings. We also note that it is contrary to prior Adjustment Board Awards, and Public Law Board Awards, and has not been followed in subsequent Awards of the Second and Third Divisions and Public Law Boards. We do not consider Second Division Award No. 6306 controlling over the other awards cited herein.

For the foregoing reasons, the claim herein will be denied.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was not violated, except as to procedure as indicated in Opinion.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: Nancy J. Dever
Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 19th day of October, 1983.