Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 30905
Docket No. MW-31249
95-3-93-3-154

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
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(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 Vehicle Operator H. A. McCray for allegedly 'Being an unsafe and injury prone employee as evidenced by seven (7) personal injuries sustained by you since April 1, 1976 . . . ', was without just and sufficient cause, on the basis of unproven charges and in violation of the Agreement. (System Docket MW-2315).

(2) As a consequence of the violation referred to in Part (1) above, Vehicle Operator H. A. McCray's record shall be cleared of the charges leveled against him, 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.

On October 10, 1991, Claimant slipped while climbing the steps of a camp car, injuring his knee. On October 15, 1991, Claimant was advised to report for an Investigation on November 1, 1991, to determine his responsibility in connection with his allegedly, "Being an unsafe and injury prone employee as evidenced by seven (7) personal injuries sustained by you since April 1, 1976. . . ." The notice further listed the dates and nature of the seven injuries. The Investigation was conducted as scheduled and on November 20, 1991, Claimant was advised that he had been found to be an unsafe and injury prone employee and that he was dismissed from service. Subsequently, Carrier reduced the discipline to a forty-five day suspension.

The Organization contends that Carrier violated Rule 27 by failing to afford Claimant a fair Hearing. The Organization contends that Carrier refused a request from Claimant's representative for copies of documents relating to the prior injuries which formed the basis of the charge. The Organization further contends that the Hearing Officer improperly led Carrier's witness and thereby attempted to establish elements of the case that would otherwise have been missing.

The Organization also maintains that Carrier failed to prove that Claimant was accident prone. Carrier's proof consisted of comparisons between Claimant's injury rate and the injury rates of the five employees above him and the eight employees below him on the Maintenance of Way Track Seniority Roster and the injury rates of the six employees above him and the six employees below him on the Maintenance of Way Vehicle Operator 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 comparisons were flawed because there was no showing that the other employees whose records were used in the analysis worked under conditions comparable to the Claimant. The Organization observes, in this regard, that all of the Claimant's injuries appeared to have occurred while he was performing track work.

Furthermore, the Organization contends that Carrier never charged Claimant with a Safety or other Rule violation after any of his injuries and may not do so years later. The Organization also argues that Carrier offered no proof other than the statistical comparisons that Claimant fails to work safely and that the statistical comparisons standing alone lead only to speculation as to Claimant's work habits. Such speculation cannot support any discipline.

Carrier argues that Rule 27 does not require it to produce documents prior to the Hearing. Carrier further contends that the Hearing Officer provided Claimant with a fair and impartial Hearing.

Carrier contends that the statistical comparisons established that Claimant was an unsafe employee. Carrier pointed out that Claimant had been counselled previously concerning his injury record and the need to exercise greater attention to working safely. Despite this, Claimant continued to injure himself at a rate considerably above the norm.

Initially, we observe that there was no specific evidence of any unsafe acts on Claimant's part leading to his injury on October 10, 1991. Indeed, although Claimant appeared and testified at the Hearing, he was asked no questions about the October 10, 1991 incident. The only other witness, Carrier's Production Engineer, testified only to a statistical comparison of Claimant's injury record with that of other employees. 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 October 10, 1991 injury thus stands only as part of a statistical pattern on which Carrier relies to establish that Claimant was accident 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. In Third Division Award 30747, issued with this Referee, we found it unnecessary to choose among the conflicting authorities. In the instant case, for similar reasons, we find such a choice also unnecessary.

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 . . . ."

As we observed in Award 30747:

> "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. . . . 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."

The only evidence in this case consisted of Claimant's injury record and the Production Engineer's statistical comparisons to other employees. Claimant's record showed that the Claimant sustained injuries on May 24, 1983, September 15, 1983, June 1, 1984, July 1, 1985, and October 2, 1985. On December 10, 1986, Claimant was counselled concerning his injury record and the need to work more safely. On November 12, 1987, Claimant sustained a sprained lower back. Thereafter, Claimant sustained no other injuries until the October 10, 1991 incident which led to the instant Hearing.

The Production Engineer compared Claimant's seven injuries to the injury rates of the five employees above him and the eight employees below him on the Maintenance of Way Track Seniority Roster, which showed an average of 2.15 injuries per employee. He also compared the Claimant's record to the injury rates of the six employees above him and the six employees below him on the Maintenance of Way Vehicle Operator Seniority Roster, which showed an average of 2.5 injuries per employee. Based on this comparison the Production Engineer concluded that the Claimant was not a safe employee.

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 employee had exercised more care or foresight. The Production Engineer testified that Claimant's injuries were minor and resulted in no time lost. Moreover, the Production Engineer's comparisons were flawed.

The Production Engineer compared Claimant's seven injuries dating back to 1983 with Claimant's peer group. Such a comparison might have been appropriate had Claimant's injury rate remained the same following the 1986 counselling. The record, however, demonstrates that following counselling, Claimant showed substantial improvement in avoiding injury.

Eleven months after the counselling, Claimant did sustain a sprained back. Carrier, however, apparently did not consider the injury worthy of corrective action, as it did not investigate the injury or further counsel Claimant. Thereafter, Claimant went for three years and eleven months without a reportable injury. The almost four year period ended with the October 1991 injury. As noted above, however, there was no specific evidence of culpability on Claimant's part for the 1991 injury. The evidence in the record is at least as supportive of the view that the 1986 counselling was effective and that Claimant had become a relatively safe worker as it is supportive of the charge of being injury prone. Under these circumstances, we must hold that Carrier failed to prove the charge and we must sustain the claim.

Carrier argues that Claimant should not be awarded backpay because he was disabled since October 10, 1991, and compensated from Carrier's temporary wage continuation program until he was furloughed on November 8, 1991. The record, however, is ambiguous. In its January 8, 1992 denial of Claimant's appeal, Carrier stated:

> "[Claimant] has been off injured since October 10, 1991, and as of this date he is still disabled. In addition, [Claimant] would have been furloughed November 26, 1991. Upon return from injury, [Claimant] will have to serve the 45 days."

The record does not disclose whether Claimant actually served the 45 day suspension or otherwise suffered any wage loss as a result of the suspension. If Claimant did serve the suspension, he should be compensated for his lost wages. Even if Claimant did not suffer any wage loss, his record should be cleared of the charge.

AWARD

Claim sustained in accordance with the Findings.

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 8th day of June 1995.