Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 30908
Docket No. MW-31494
95-3-93-3-537

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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(Kansas City Southern Railway Company

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

(1) The discipline and subsequent dismissal imposed upon Machine Operator L. Poullard beginning May 8, 1992, in connection with an injury sustained on January 20, 1992 and for alleged ". . . violation of General Notice, Rule B, E, L, N, and 681 of the Rules and Regulations of the Maintenance of Way and Signal Department . . ." was unwarranted, without just and sufficient cause, on the basis of unproven charges and in violation of the Agreement. (Carrier's File 013.31-455).

(2) As a consequence of the violation referred to in Part (1) above, the Claimant shall be reinstated to service with all rights 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 January 20, 1992, Claimant injured his ankle while working. On January 31, 1992, Claimant was advised to report for an Investigation on February 20, 1992, to determine his responsibility in connection with the "personal injury allegedly sustained by you on January 20, 1992, and in connection with your injury proneness as indicated by thirteen reported personal injuries sustained by you during the period November 18, 1970, to and including your last reported personal injury on January 20, 1992." The Investigation was postponed to and conducted on March 3, 1992, and on May 8, 1992, Claimant was advised that he had been found to have violated General Notice, Rule B, E, L, N, and 681 of the Rules and Regulations of the Maintenance of Way and Signal Department and that he was dismissed from service.

The Organization contends that Carrier failed to afford Claimant a fair hearing. The Organization argues that the charge was vague and failed to specify the rules Claimant was alleged to have violated. The Organization further contends that Claimant was found guilty of violations with which he was not charged. The charge went back almost twenty-two years and the Investigation amounted to an improper fishing expedition.

The Organization argues that Carrier failed to prove Claimant's culpability in connection with his January 20, 1992, injury. The Organization maintains that none of the witnesses who observed Claimant fall testified to any action by Claimant that was unsafe or otherwise negligent.

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 eight employees closest to him in seniority. 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.

Furthermore, the Organization contends that Carrier never charged Claimant with a safety or other rule violation after any of his injuries prior to January 20, 1992, 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 contends that the hearing officer provided Claimant with a fair and impartial hearing. Carrier further contends that the statistical comparisons established that Claimant was an unsafe

employee. Carrier points 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.

Carrier further argues that it proved Claimant's culpability with respect to his January 20, 1992, injury. Carrier contends that every witness who observed Claimant fall testified that Claimant slipped on loose gravel and did not indicate any conditions that were out of the ordinary on the date in question.

Initially, we find that Carrier failed to present specific evidence of Claimant's culpability with respect to his January 20, 1992, injury. Claimant was walking to get a tool. The grade consisted of loose gravel. Claimant slipped, fell and broke his ankle.

Three witnesses testified in this regard. A machine operator testified that he saw Claimant fall. He described the roadway conditions as, "... really bad . . . or like normal. Anybody can do it -- just slip."

A mechanic testified that he did not observe Claimant directly, but just saw him on the ground after his fall. The mechanic described the conditions as, "... real bad to walk and just getting around the machines and going back and forth. As a mechanic I had to go from machine to machine and I had a real problem climbing up that embankment."

The assistant foreman testified that he did not see the Claimant fall. He described the conditions as normal, "... just rocks and some rail that we had set out for the day."

It is apparent that none of the witnesses observed the Claimant doing anything specifically unsafe. None observed the Claimant being inattentive to the roadway conditions. 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. In the absence of any specific evidence of culpability, the January 20, 1992, injury 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 quoted a frequently-cited definition of accident prone which 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."

We do not find persuasive the Awards which require that every injury be the subject of an individual Investigation with specific evidence of the employee's culpability. These Awards fail to recognize that statistical evidence may establish a pattern or practice of unsafe conduct in particular cases. Such a pattern or practice may support disciplinary action even though direct evidence of specific rule violations was not presented. On the other hand, we do not agree that every statistical pattern will support an inference of culpable conduct. Each case must be evaluated on its individual facts.

A statistical analysis of an employee's injury pattern begins with the identification of a peer group of similarly situated employees. Based on the peer group's record, one may calculate an expected injury rate. When a particular employee's observed injury rate deviates from the expected rate, one must inquire whether the deviation is the result of chance. If the deviation is not likely to be the result of chance, it is likely to have been caused by something specific. In the absence of another explanation, one may infer that its cause was the employee's inadequate care or foresight.

Statisticians have developed several techniques to calculate the probability that the deviation between the observed injury rate and the expected injury rate was the result of chance. The Awards dealing with charges of being accident prone, however, do not employ standard deviations, Chi Squares, or other sophisticated techniques. Rather, they rely on raw data. Considerable caution must be exercised when relying on raw data that has not been refined with the level of precision that might otherwise be available.

The primary factor to consider when evaluating raw data is the magnitude of the disparity between the employee's observed injury rate and the expected value. The greater the magnitude, the more confident we can be that the deviation is not the result of chance, even in the absence of more sophisticated analysis. Also significant is the size of the peer group from which the expected value was derived. Consideration must also be given to the seriousness of the injuries. If all of the injuries were minor, resulting in no time lost, it is possible that the disparity between the employee's injury rate and the peer group resulted because the employee was more meticulous than his co-workers about reporting his injuries. Finally, specific evidence of employee culpability in some of his injuries, particularly where the evidence is contemporaneous with the injuries themselves, may reinforce an inference that the employee is accident prone.

Taking all of the evidence into consideration in the instant case, we conclude that Carrier proved, 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. Carrier's Superintendent of Safety constructed a peer group consisting of the eight employees with comparable duties who were closest in seniority to the Claimant. This group averaged fewer than two injuries in their careers.

Claimant, on the other hand, accumulated 13 injuries. Although the size of the peer group (eight employees) was relatively small, the deviation between Claimant's accident rate and the peer group's was quite large. Claimant's rate was more that six times greater than the expected injury rate. The disparity between Claimant's injury rate and his relevant peer group was so great that one can confidently conclude that it is highly unlikely to have resulted from chance, even though the peer group was small and even in the absence of more sophisticated refinement of the data.

Furthermore, Claimant's injury record cannot be dismissed as the result of meticulous reporting of minor injuries that did not result in lost time. Many of his injuries were serious, resulting in substantial amounts of lost time.

Most importantly, the statistical record was accompanied by contemporaneous evidence of Claimant's culpability. Claimant was counselled regarding the need to pay greater attention to safety in 1980, 1981 and 1984. Despite these efforts by Carrier, Claimant's safety record did not improve. As we observed in Third Division Award 30747:

> "Such actions [counsellings], 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."

Accordingly, we conclude that Carrier proved that Claimant was injury prone. The next issue is the severity of the discipline imposed. Under the circumstances of this case, we find that the penalty of discharge was excessive. In particular, we find significant Claimant's long record of service to Carrier (almost 22 years) and the absence of any formal discipline imposed on Claimant, and Carrier's failure to prove with specific evidence Claimant's culpability in connection with his most recent injury. We find that progressive discipline was warranted prior to imposing the industrial capital punishment of discharge. See Second Division Award 10395; Third Division Award 25895.

Accordingly, we will reduce the discipline from dismissal to a suspension equal to time held out of service. Claimant shall be reinstated to service, conditioned on passing a reasonable physical exam, with seniority and benefits unimpaired, but without backpay.

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.