Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 32430
Docket No. SG-32755
98-3-96-3-53

The Third Division consisted of the regular members and in addition Referee Hyman Cohen when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(
(CSX Transportation, Inc. (former Seaboard
(Coastline Railroad Company)

STATEMENT OF CLAIM:

"Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the CSX Transportation Company (former Seaboard Coast Line):

Claim on behalf of R. A. Thompson for compensation for all time lost as a result of his suspension from service in connection with an investigation conducted on June 7, 1995, and for his record to be cleared of all charges in connection with this discipline, account Carrier violated the current Signalmen's Agreement, particularly Rule 47, when it did not provide the Claimant with a fair and impartial investigation and assessed harsh and excessive discipline against him in this matter. Carrier's File No. 15 (95-212). BRS File Case No. 9711-SCL."

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 April 4, 1995 the Claimant, a Lead Signalman was directing the work of Signal Gang 7805 at Warsaw, North Carolina. While doing so, Signal Maintainer J. T. Mitchum approached the Claimant and inquired about the work being performed by the Signal Gang. Although the Claimant provided several explanations to Mitchum's persistent inquiry, Mitchum placed his hand forcibly on the Claimant's chest and pushed him. The unprovoked attack caused the Claimant to fall backwards over a nearby railroad track. As a result, the Claimant sustained wrist, shoulder and back injuries. Pursuant to his doctor's advice, the Claimant did not return to work until he recovered from his injuries.

In a letter dated May 8, 1995 the Carrier instructed the Claimant to attend a formal Investigation on May 18, 1995 "to determine the facts and place responsibility in connection with a lost time personal injury beginning April 24, 1995, which allegedly occurred when you lost your balance during a verbal altercation with Signal Maintainer J. T. Mitchum . . . on April 4, 1995."

The Carrier also charged the Claimant:

> ". . . with possible falsification in connection with the injury report and/or negligence if the injury occurred as you reported.
>
> . . . with being careless and accident prone in that you have reported ten (10) personal injuries."

After the Investigation was conducted, the Carrier advised the Claimant by letter dated June 30, 1995 that he had "a propensity for working in an unsafe manner . . . by review of your personal injury record." This finding led the Carrier to suspend the Claimant for 30 calendar days, beginning with his return to work, after he recovered from his injuries resulting from the April 4, 1995 episode.

The Carrier issued discipline against the Claimant due solely to his "propensity for work in an unsafe manner", in light of a review of his "personal injury record." In *Third Division Award 28917*, the Board concluded that where "accident-proneness" is "the basis for disciplinary action, two elementary conditions" must be satisfied:

". . . First, culpability on the part of the employee must be established on the triggering event and, second contributory responsibility (or a demonstrable rule violation) for the historical incidents within the charge must be conclusive. . . ."

A review of the record in this case establishes that on April 4, 1995 there was no culpability on the part of the Claimant. Clearly, the injuries that were sustained by the Claimant resulted from the unprovoked attack by Mitchum. Thus, the first condition for establishing "accident proneness" as the basis for disciplinary action was not satisfied by the Carrier.

The Carrier also failed to prove the second condition in order to establish disciplinary action for "accident proneness." The Carrier failed to prove the Claimant's "contributory responsibility (or a demonstrable rule violation)" for the previous incidents in which the Claimant sustained personal injuries.

During his 21 years of employment with the Carrier the Claimant suffered ten personal injuries, including the injuries on April 4, 1995. It would be useful to consider these injuries in determining whether the Claimant is accident prone.

On two of the occasions, April 25, 1975 and May 7, 1978, the Claimant was injured while he was off duty. Thus, these incidents do not establish that the Claimant "has a propensity for work in an unsafe manner."

Before the off duty injury which occurred on May 7, 1978, the Claimant suffered an insect bite on October 26, 1976 while on duty. This injury cannot reasonably be said to have been caused by any action of the Claimant.

There followed two injuries to the Claimant's fingers, on January 1, 1980 and September 27, 1982, respectively. No lost time resulted from the injuries. Although the Claimant had sustained five injuries by September 27, 1982 the Carrier did not counsel him about his ability to work in a safe manner.

On August 29, 1984, the Claimant suffered a lower back sprain when his "digging bar" broke while "picking through a layer of . . . coral rock." No evidence was

presented by the Carrier to establish that the injury was caused by the Claimant; nor did the Carrier establish that the Claimant violated any Rules which led to his injury.

Some seven years later on June 11, 1991 the Claimant suffered an injury because he inhaled fumes while working in a boxcar that contained defective batteries. Before beginning work to clean out the boxcar, the Claimant and another employee informed the Supervisor that the car was contaminated by "broken batteries." Despite such warning, the Supervisor instructed them to perform the assigned work. No fault can be attributed to the Claimant for his injury due to the inhalation of fumes.

On November 19, 1991, the Claimant said that he suffered a groin injury rather than a pulled muscle in his lower back, which the Carrier had set forth in its report. There was no evidence that the Claimant was performing work in an unsafe manner when he suffered the injury.

On June 11, 1992, the incident before the events giving rise to the discipline in this case, the Claimant suffered a personal injury which occurred from a work requirement that he stand on a pole for six straight hours. The Claimant sought but failed to obtain permission to be relieved of his assignment during the period of time that he was on the pole. After standing on the pole for six hours, the Claimant complained of numbness in his feet. He did not lose any time because of this ninth minor injury.

Between April 25, 1975 and June 11, 1992, a period of roughly 17 years during which the Claimant sustained nine personal injuries, two of which occurred off duty, he never received any counseling from the Carrier with respect to his failure to perform work in a safe manner. During that period of time the Carrier never charged him with violating a Rule which caused him to sustain an injury. Moreover, there is nothing in the record which establishes that the Carrier even suggested that the Claimant may be responsible for the injuries which he sustained over the years.

The Carrier compared the Claimant's injury record to the records of 20 other Signalmen hired at approximately the same time as the Claimant and performing similar work on the same seniority district. Based on such records, according to the Carrier, the Claimant sustained significantly more injuries. Thus, the Carrier asserts that the evidence substantiates its charge that the Claimant is accident prone.

Whether it is merely sufficient to prove that an employee is accident prone because the employee has sustained more injuries than similarly situated employees over a particular period of time has been previously addressed by this Board. In *Third Division Award 28917*, the Carrier contended that the claimant had sustained 14 personal injuries within 19 years. Because the claimant's "injury rate was extraordinarily high when compared to his peers", the Carrier argued that the claimant was accident prone.

The Board rejected the Carrier's contention, and stated:

> ". . . the Board is of the firm opinion that use of statistical data for the express purpose of establishing a conclusion that an employee is accident-prone, without more, is fraught with fundamental problems which cannot be overcome. Statistical analysis is subjective and at best an inexact science. A host of variables, the choice of which is controlled by the statistician, are available to dictate support for, and direct the result toward, a preordained notion. The opportunity for manipulation is ever present. . . ."

Moreover, *Second Division Award 9832* which reinforces the conclusion that a statistical approach, alone, to support a charge that an employee is accident prone is inadequate, stated:

> ". . . the serious nature and consequences of such a charge requires an analysis of all aspects of each and every injury. Factors, such as physical condition, fault, the severity and nature of the injuries as well as the effects upon fellow employees, must also be taken into consideration."

The record in this case establishes that the factors referred to in *Second Division Award 9832* were not "taken into consideration" by the Carrier to support its charge that the Claimant was accident prone.

Taking all evidence into consideration, the Board concludes that the Carrier failed to prove by substantial evidence that the Claimant is accident prone.

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 21st day of January 1998.