

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 35081
Docket No. 31047
00-3-93-3-35**

The Third Division consisted of the regular members and in addition Referee Martin F. Scheinman when award was rendered.

**(Brotherhood of Maintenance of Way Employes
PARTIES TO DISPUTE: (
(Consolidated Rail Corporation**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The dismissal of Machine Operator M. A. Lodzinski for allegedly being an unsafe and accident prone employe because of his injuries since April 1, 1976 was arbitrary, capricious, based on unproven charges and in violation of the Agreement (System Docket MW-2252).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant M. A. Lodzinski shall be reinstated in the Carrier’s service with seniority and all other rights unimpaired, he shall have his record cleared of the charges leveled against him and he shall be compensated for all wage loss suffered as a result of the discipline imposed upon him by the Carrier.”**

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.

This case involves a claim by the Organization that the Claimant was unjustly disciplined when he was dismissed for being an unsafe and accident prone employee on account of eight work related personal injuries that occurred between 1976 and 1991. The Organization argues that the Carrier's charge that the Claimant is unsafe lacks a factual foundation. Indeed, the Organization asserts that the Claimant was not charged with any Rule violations in connection with any of his injuries. Moreover, according to the Organization, the Carrier never promulgated any standards under which an employee could be deemed accident prone. Injuries alone, the Organization argues, are not evidence that an employee is unsafe or prone to accidents. That is especially true here, the Organization argues, because the Claimant's injuries were of a minor nature and few actually involved lost time.

The Organization further argues that the Carrier failed to afford the Claimant due process. According to the Organization, the Claimant did not receive written notice from the Carrier of the charges against him. The Organization asserts that the Carrier prejudged him, and that it therefore did not conduct a fair and impartial Investigation of the matter.

The Carrier, on the other hand, asserts that the Claimant has demonstrated an inability to work safety despite numerous prior injuries and ongoing instruction and counseling in personal safety. According to the Carrier, the sole issue is whether it acted arbitrarily and capriciously when it removed him from service after his eighth accident in 15 years, a rate nearly double the industry average. It maintains that the Claimant's accident pattern and violations of Safety Rules support its determination that he is a danger to himself and to his co-workers.

With respect to its procedures, the Carrier asserts that it acted properly. It maintains that the Agreement does not direct it to provide information or documentation in advance of a disciplinary Hearing. With respect to damages, the Carrier asserts that none accrued after May 6, 1992, when the Claimant was offered an opportunity to return to work. Further, even if a violation is found, the Carrier

asserts, there are no damages on account of the fact the Claimant was not medically qualified to work.

After reviewing the record evidence, we have determined that the Organization's claim should be granted. We agree with the Organization that there is no basis in this record to sustain discipline of the Claimant for being unsafe and accident prone. However, the evidence shows that the Claimant was not medically qualified to work from August 28, 1991, the date of his final injury, through May 6, 1992, when he was offered an opportunity and returned to service. Accordingly, insofar as the Claimant was unfit to work during the period following his injury, there is no backpay due.

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 15th day of November, 2000.