

PUBLIC LAW BOARD NO. 1760

Award No. 132

Case No. 132

Docket No. MW-DECR-89-65

Parties Brotherhood of Maintenance of Way Employees
to and
Dispute Norfolk and Western Railway Company
(Former Wabash)

Statement

of Claim: Claim on J. E. Beck, Jr., for reinstatement as a result of investigation held December 16, 1990, relative to violation of Safety Rule 1202, rule instructions, and persistent unsafe working practices.

Findings: The Board has jurisdiction of the of this case by reason of the parties Agreement establishing this Board therefor.

The Claimant, on December 20, 1989, was working as a laborer in Extra Gang 103, on the Car Street line, Granite City, Illinois. He was assigned to straight rail a switch.

While attempting to remove the turn out rail and the curve closure rail from the switch, the Claimant pinched the rail up with a claw bar. However, the claw bar slipped, caught his left middle finger and mashed said finger against the opposite rail.

The Claimant promptly reported the incident of the fracture to his Foreman. He lost 33 days as a result of fracturing his left middle finger.

Track Supervisor W. L. Jackson notified the Claimant of a formal investigation under date of January 3, 1990 to determine his responsibility:

"... in connection with your persistent unsafe work practices, as evidenced by your following injuries (then cited 8 of them over a 7 year period) and, also for violation of Safety Rule 1202 and instructions of the meeting of October 17, 1989 concerning your December 20, 1989 injury. You are being held out of service pending the results of this investigation..."

The Carrier, as a result of the investigation held, concluded therefrom that the Claimant was culpable of the charges. He was dismissed from service as discipline therefor. The investigation was held January 16 and he was dismissed December 20, 1989.

The Claimant, as the notice of investigation indicated, suffered 7 injuries in less than 8 years. He had lost time of 113 days. The Claimant required medical attention in all but 2 of the injuries. He was disabled and lost time in 4 incidents of said 113 days. There were three incidents in which the Claimant lost no time.

As pointed out Third Division Award 28356 involving this Organization and another Carrier:

"The standard applied by Line of Awards on the property and in the industry and utilized by the Board in Award 25895 was to determine if Mr. Gray was accident prone by a statistical analysis (of his injury record over the years when compared to other employees with similar seniority). This standard is not one where the Carrier has to demonstrate that the Claimant was responsible or at fault for the injuries in question. Please refer to pages 38 and 39 of the Transcript for a comparison of Mr. Gray's injury record with that of comparable employees. Mr. Gray had 6 injuries as of March 25, 1983, as set forth in Award 25895. It is on this record set forth on page 39, as corrected, that we found Mr. Gray to be accident prone. The Carrier had counseled Mr. Gray on March 25, 1983. Major discipline was appropriate as a result of the June 1, 1983 investigation." (underscoring added)

As also pointed out in Award No. 38 of PLB 2908 on this property:

"Additionally, Carrier points out that it did not cavalierly arrive at the conclusion that Claimant was guilty of persistent unsafe work practices. They underscore the testimony in the transcript which indicates that the Carrier chose a representative random sampling of all like employees in the Shop, examined their work records compared to Claimant and concluded therefrom that Claimant had 4 times as many reportable injuries as any comparable group of employees. Accordingly they contend, the record clearly supports the conclusion that Claimant was an unsafe employee and one that the Carrier could not continue to have in his rank of employees because he presented potential danger to himself and/or fellow employees.

...Carrier had reasonable grounds to conclude that Claimant was a persistent and unsafe employee."

In the instant case, the Carrier followed that method. It compared 5 employees performing the same work, who stood above the Claimant in seniority and 5 who stood below the Claimant in seniority. The Carrier then ran an analysis on

the number of injuries they had during that period of time. The Superintendent of Safety, on the Decatur Division, F. L. Reynolds, testified and compared such records to the Claimants' injury record.

The Carrier referred to that comparison as a "Persistent Unsafe Work Practice Inquiry." In essence said comparison reflected that the 10 employees, 5 above and 5 below, had suffered 18 injuries, 9 injuries above and 9 injuries below. Only 1 of an employee had 5 injuries and all the rest were 1, 2 and 3 or none injuries. The average per person suffered was 1.8 injuries. The Claimant had 8 injuries which represented 444% worse, a ratio of 444% worse than his peers.

As to the time lost, the total of the 10 other employees was 1. Only one person lost time. The average of that 10 would be .1. Whereas the Claimant lost time in 4 injuries or 4000% ratio worse for time lost. Of the 10 compared employees it was necessary to discuss their injury or work pattern with only 4 employees. Whereas, with the Claimant injuries were discussed 4 times, which represented a 571% ratio more than the others. The Carrier consulted with only 2 of the other employees. Whereas it consulted 3 times with Claimant or 1500% ratio.

The Board concludes from this comparison that the Claimant does not work like an average employee. Notwithstanding that he has a good work attitude, the pattern of his record indicates an apparent laxity, carelessness, and/or negligence. This must be true as he had been counseled on several occasions and had attended 17 safety meetings.

Only 2 of the 8 incidents were a matter of record insofar as an investigation was concerned.

The Board finds that the Claimant was accorded the due process to which entitled under the discipline rule.

There was sufficient evidence adduced to support Carrier's conclusion as to his culpability of the charges against him.

The Board, in light of the Claimant's service record, will as in Third Division Award 28356 modify the discipline and reinstate the Claimant on a last chance opportunity with all rights unimpaired but without time for pay lost. The Claimant after successfully passing the necessary and required physical examination will be placed in a probationary status for one year and be talked to, with his Local Chairman in attendance, be again counseled as to his

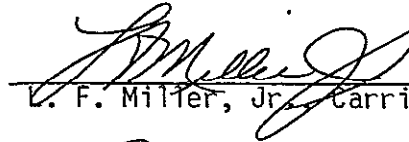
work record. He will then be on record that he has his last chance opportunity to demonstrate that he can work "smarter and safer." Claimant must not fail to recognize that safety is of paramount interest both to the individual employee and his fellow employees, as well to the welfare of Carrier's operation and that all work practices are designed to perform the required work in a safe manner in order to avoid injury to the individual employee and his fellow employees. The Claimant should be ever mindful of the fact that the Carrier need not tolerate an employee who cannot reasonably meet that kind of a standard.

Award: Claim disposed of as per findings.

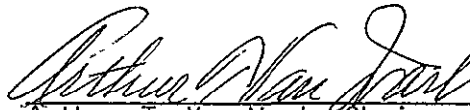
Order: Carrier is directed to make this Award effective within thirty days of date of issuance shown below.



S. Hammons, Jr. Employee Member



L. F. Miller, Jr. Carrier Member



Arthur T. Van Wart, Chairman
and Neutral Member

Issued December 31, 1991.