Public Law Board No. 2720
Case No. 69 **Award No. 69**

Parties to Dispute: International Brotherhood of Firemen and Oilers, AFL-CIO
and
Consolidated Rail Corporation (Conrail)

Statement of Claim: System Docket No. CR-3313
Issue: Termination
Claimant: Bruce N. Huff

Referee: John J. Mikrut, Jr.

Opinion of the Board:

Claimant was employed by Carrier as a Laborer on July 15, 1978, at Carrier's Avon Diesel Terminal, Avon, Indiana; and was so employed at the time of his termination which is the focus of the instant proceeding.

On April 26, 1985, Claimant slipped and fell while walking across the drop table at the Avon Diesel Terminal. Said fall resulted in Claimant bruising his back and straining his neck.

Thereafter, on the following day, Claimant was removed from service and charged with the following:

"1. Violation of Safety Rules 4030 and 4033 [1] at approximately 7:25 P.M., on April 26, 1985, at Avon Diesel Terminal.

2. Being Accident prone.

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[1] According to the parties, said rules read as follow:

"Rule 4030
Employees must walk, not run, keeping hands out of pockets and use established paths or routes when going to or from work locations. They must be alert to avoid tripping and slipping hazards and walk around, not jump across excavations, holes or open pits. If practicable, remove tripping or slipping hazard from path, walkway or work area; otherwise, promptly inform immediate supervisor of its nature and locations."

"Rule 4033
Employees are prohibited from sitting, stepping, standing or walking on rail, frog, switch, interlocking machinery or other such part of track structure unless specifically required to do so in the performance of their duties."

3. Failing to conduct yourself in the performance of your duties in such a manner as to avoid personal injury, thereby establishing yourself as an unsafe and unsatisfactory employee."

A hearing in this matter was conducted on May 16, 1985; and, as a result, although Charge #1 of the original statement of charges was dropped, Claimant was found guilty of the remaining two (2) charges, and he was terminated from Carrier's service effective May 28, 1985.

Carrier's basic argument in this case is that Claimant is an accident prone employee who is a continuing hazard to himself and other employees. As evidence of Claimant's carelessness, Carrier points to five (5) previous accidents wherein Claimant experienced employment related injuries resulting from his own negligence. According to Carrier, after his fifth injury, which occurred on November 2, 1981, Claimant was dismissed from service, but was reinstated approximately six (6) months later "... with time held out of service to apply as discipline."

In addition to Claimant's personal injury record, Carrier also offers statistical evidence which, according to Carrier, indicates that Claimant's injury rate is 213% higher than the average laborer at the Avon Terminal.

As further support for its basic position, Carrier cites the following Public Law Board and National Railroad Adjustment Board Awards: Public Law Board No. 542, Awards No. 1 and 2 (Seidenberg); Public Law Board 2947, Award No. 3 (Brown); Public Law Board No. 2570, Award No. 48 (Moore); Third Division Award No. 25672 (Gaines) and Award No. 26161 (Myers); Public Law Board No. 3514, Award No. 3514, Award No. 99 (Muessig); and Public Law Board No. 2720, Award No. 45 (Mikrut).

Carrier's last significant area of argumentation in this dispute is that, despite Claimant's approximately seven (7) year's of seniority with Carrier, Claimant's actual length of service (because of furloughs, lost time, and his previous dismissal which resulted from the November 2, 1981 accident) was only approximately four (4) years and nine (9) months. According to Carrier, "(W)hen this fact is considered, it makes (Claimant's) accident frequency rate even more appalling."

Organization's initial argument in protest of Claimant's dismissal is that the May 16, 1985 hearing was not fair and impartial as is required by Rule 20(d) of the controlling agreement because "... Carrier failed to charge the Claimant with an exact offense in the notice to appear." Accordingly, Organization contends that the phraseology of Claimant's notice was "... imprecise, vague ... (and contained) ... 'catch all' accusations, thereby making it an impossibility to prepare any kind of a defense." As support for this point, Organization cites

Third Division Award No. 562 and Award No. 4883 as precedential.

Continuing, Organization also argues that in the triggering incident of April 26, 1985, which is the focus of the instant dispute, since Charge #1 of the original statement of charges was dropped, then Claimant, therefore was ".. not guilty of any safety rule violations as originally alleged."

As its last significant area of argumentation, Organization contends that "... Claimant's personal injuries were minor in nature, and very common in the railroad industry ..." and resulted in a total loss of only three (3) days of work. For these reasons, Organization maintains that Claimant's dismissal was excessive and, therefore, improper.

Regarding Organization's procedural arguments in this controversy, the Board has carefully reviewed the complete record in this matter and finds that Claimant was provided with a sufficiently "exact" notice so as to enable him and his Organization to prepare and present a vigorous defense. In this respect, the wording of said Notice of Investigation contained reference to both the specific safety rules alleged to have been violated and also to the date and time of his most recent employment injury under consideration. As to Organization's contention concerning the dropping of Charge #1 in the original statement of charges, suffice it to say that although Claimant was found not to have been directly culpable for the accident which occurred on April 26, 1985 (and, therefore, not in violation of Rule 4030 and/or Rule 4033), Claimant, nonetheless, did receive an injury on the date in question, and under such circumstances, "accident proneness", if proven, is itself a dischargable offense.

Turning next to the merits portion of this controversy, the focus of our analysis centers upon whether Carrier, in its attempt to correct Claimant's repeated carelessness, abused its managerial discretion by terminating Claimant for his April 26, 1985 accident. In this regard, it is undisputed that Carrier has a duty under the Federal Employees Liability Act to insure that its employees enjoy a safe work environment. Additionally, in the performance of that duty, Carrier must also insure that individual employees perform their assigned job tasks in a safe manner. In the instant case, the facts of record indicate that many of Claimant's injuries were minor, and, for the most part, resulted in little lost time (although Claimant's November 2, 1981 accident resulted in a suspension of approximately six (6) months, and the accident which triggered the instant claim resulted in an injury wherein Claimant was not given medical clearance to return to work until August 26, 1986, and Claimant, furthermore, received a settlement of approximately $20,000.00 for said injury). Be that as it may, however, the record also indicates that Claimant suffered several injuries over a period of less than five (5) work years, and that Carrier attempted to deal with Claimant's unsafe behavior by counseling him, warning him, and suspending him -- all without success. Given Carrier's progressive attempts to correct Claimant's propensity to sustain work related injuries and

Carrier's need to promote, encourage and maintain a safe workplace, we hold that Carrier did not abuse its managerial discretion when it terminated Claimant for being a chronically unsafe employee.

Award: Claim denied.

Robert O'Neill
Carrier Member

G. J. Francisco, Jr.
Organization Member 6-12-87

John J. Mikrut, Jr.
Chairman and Neutral Member

Issued at Columbia, Missouri on June 25, 1987.