

NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 4769

**BROTHERHOOD RAILWAY CARMEN OF
THE UNITED STATES AND CANADA**

and

NORFOLK AND WESTERN RAILWAY COMPANY

AWARD NO. 14
DOCKET NO. 14

John C. Fletcher, Chairman & Neutral Member
R. P. Wojtowicz, Organization Member
T. R. Malloy, Carrier Member

Hearing Date - April 25, 1990

Statement of Claim:

1. That the N & W Railway Company violated the controlling Agreement of September 1, 1949, as subsequently amended when on November 10, 1989, Carman D. R. Mitchell was given a formal investigation which resulted in his dismissal on December 6, 1988.
2. That the investigation was improperly arrived at and represents unjust treatment within the meaning and intent of Rule 37 of the current controlling Agreement.
3. That because of such violation and unjust action, the Norfolk and Western Railway Company be ordered to reinstate and delete discipline assessed in its entirety from the service record of Carman D. R. Mitchell and that he also be compensated for all lost wages and benefits, as a result of his dismissal, from December 6, 1988 until he is reinstated.

Findings:

Public Law Board No. 4769, upon the whole record and all of the evidence, finds and holds that the Employee and the Carrier are employee and carrier within the meaning of the

Railway Labor Act, as amended; and, that this Board has jurisdiction over the dispute herein; and, that the parties were given due notice of the hearing thereon and did participate therein.

On October 13, 1988, Car Repairer Dwight R. Mitchell was given notice to attend an investigation on charges that he was in violation of Rule M as a result of carelessness and negligence when, on Monday, September 19, 1988, he injured his right index finger while working on SOU 76115. The investigation notice also alleged a persistence in unsafe work practices and listed twelve previously reported injuries dating back to November 7, 1975.

At the November 10, 1988, investigation Carrier witnesses testified about the nature of the injury sustained on September 19, 1988. Testimony was also accepted on Claimant's previous injury experience as well as the injury experience of the five employees above and below Mr. Mitchell on the seniority list. This evidence, Carrier argued, demonstrated that Claimant was negligent and careless and had a 388 % greater probability of sustaining an injury than his peers.

Carmen Mitchell offered testimony that he was not responsible for the injury sustained on September 19, 1988. He also questioned the validity of the peer group with which his injury history was being compared - some were supervisors and others worked in the yards where injuries occur less frequently because of differences in work. Mitchell offered mitigating explanations on several of the injuries listed in his service record, indicating also that most were minor bumps or bruises and some resulted from unsafe work practices of others, over which he had no control.

On December 6, 1988, Mr. Mitchell was notified that he was dismissed from service. A timely grievance was filed seeking reinstatement and compensation for time lost. Efforts to adjust the matter on the property were not successful.

This Board, after careful examination of the transcript of the investigation, and after consideration of the arguments advanced at out hearing, is of the opinion that Carrier has failed to demonstrate that Carmen Mitchell was careless and negligent on Monday, September 19, 1988, when he sustained an injury to his right index finger.

At the time of the injury Mitchell was working with a Student Car Repairer. He asked the Student to remove a crane which was not hooked up to the car which they were repairing. As the Student was attempting clear the crane from the area its

bottom hook caught the bottom of the knuckle and pulled the drawhead out as Mitchell, located on the other side of the car, was placing a cross key washer on a cross key. The movement of the drawhead caught Mitchell's finger between the washer and the back of the striker gasket.

From these facts it is difficult, if not impossible to conclude, that:

"Mr. Mitchell was negligent in that he did not make sure that Mr. Jurgaitis understood his instructions in moving the crane, ..."

or that he:

"... was careless to proceed and to initiate any work in that area until he was sure that the crane was moved away from the area he was working in."

Common sense suggests that if a student is told to remove an unconnected crane from a work area that the movement should take place in a manner so that its hook will not swing and disturb cars or components which other employees may be working on. We have no showing that the student did not fully understand Mr. Mitchell's instructions as to exactly what was intended in the request. No evidence has been offered which would suggest that Jurgaitis did not understand Mitchell's instructions. Accordingly, Mitchell cannot be judged to be negligent in a failure to "make sure" his instructions were understood if it is not demonstrated that the instructions were in fact not understood.

Search as we may, we are unable to find a proper basis for the assessment of a charge of negligence or carelessness on the part of Mr. Mitchell. Without adequate proof of negligence or carelessness, Carrier had no basis to discipline Claimant for the September 19, 1988 incident.

— The September 19, 1988, injury was the triggering event for the aspect of the charge suggesting that Mr. Mitchell was "accident prone." Our finding that Carrier had no basis to administer discipline on this incident removes the triggering event and requires that the "accident prone" issue be dismissed, which we will do without addressing the contentions of the parties as to appropriateness and merits.

The claim will be sustained. Mr. Mitchell is to be returned to service, within thirty days of the date of this Award, with seniority and other rights unimpaired. He shall also be compensated for all wage losses incurred during the time out

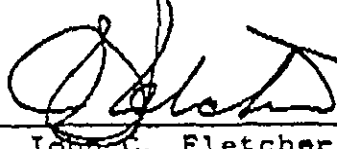
of service, less deductions for any outside earnings received during that time.

A W A R D

Claim Sustained. Mr. Dwight R. Mitchell shall be returned to service within thirty days of the date of this Award, with full seniority and other rights unimpaired. He shall also be compensated for all wage losses incurred during the time out of service. Carrier may deduct from the payments due an amount equal to that of any outside earnings Claimant received while out of service. Claimant's service record shall be cleared of the charge.

O R D E R

Carrier shall comply with this Award within thirty days of the date indicated below.



John C. Fletcher, Chairman & Neutral Member



R. P. Wojtowicz, Employee Member



A. R. Malloy, Carrier Member

Dated at Mt. Prospect, IL., this 21st day of August 1990