PUBLIC LAW BOARD NO. 5016

Parties to the Dispute	BROTHERHOOD RAILWAY CARMEN - DIVISION OF TCU and NORFOLK AND WESTERN RAILWAY COMPANY	NMB Case No. 31 PLB Case No. 31

STATEMENT OF CLAIM

Claim of Carman Tantarelli that he be reinstated to service with all wages lost, including overtime and all increases and benefits in contracts obtained by the Organization during his dismissal, all seniority rights, vacation rights, health & welfare benefit losses that he has or may incur while he is suspended and interest at the rate of 6% annually.

FINDINGS

By notice dated July 20, 1990, Claimant W.L. Tantarelli, a Carman with a seniority date of October 29, 1969, was called to an investigation into an injury he had sustained to his leg on June 18, 1990. Because he was off

due to the injury, the hearing was postponed and was ultimately held on June 17, 1991. The notice read

> You are hereby notified to report to the Joyce Avenue Yard Office Conference Room, Columbus, Ohio, at 9:00 AM, Tuesday, July 24, 1990, for a formal investigation to determine your responsibility in connection with the charge against you of injuring yourself on June 18, 1990 when you strained your right leg by standing in an awkward position with right foot on floor and left foot raised almost waist high against bulkhead trying to move it instead of requesting additional help, allowing you to keep both feet on floor of car (NW 281133) there by avoiding personal injury.
>
> You are also charged with "persistence in unsafe work practices" as evident from your service record listed below:
>
> INJURIES
>
> | DATE | TYPE OF INJURY |
> |---|---|
> | 11/13/69 | Foreign matter in right eye |
> | 8/5/71 | Bruised chest |
> | 3/17/72 | Spark in right eye |
> | 6/23/72 | Struck right elbow |
> | 5/25/73 | Twisted right ankle |
> | 6/26/73 | Twisted right ankle |
> | 9/11/74 | Twisted right ankle |
> | 2/9/75 | Pain in left arm |
> | 7/28/76 | Pain in chest |
> | 10/5/76 | Twisted right ankle |
> | 11/4/76 | Struck in face and eyes by propane gas |
> | 11/14/77 | Bruised right knee |
> | 4/28/78 | Skinned finger |
> | 12/10/78 | Sprained right ankle |

3/2/79	Burns to both hands and behind right knee
7/18/79	Bruised left foot
6/20/84	Burned left hand
2/20/85	Sprained right ankle
10/9/85	Hurt right elbow
12/15/87	Torn cartilage - left knee
4/29/88	Felt a pop in left knee
6/18/90	Strain to right leg

Following the investigation, the charges against Claimant were sustained and he was terminated from service. The Organization has raised both procedural and substantive objections to that decision.

This Board has reviewed the entire record of this case, including the transcript of the hearing, and finds that there is sufficient evidence to support the charge that Claimant contributed to the injury that he sustained on June 18, 1990. The Organization suggests that Claimant did no more than what any other Carman would have done under similar circumstances and that by singling him out, Carrier displayed bias toward him. Carrier, on the other hand, contends that instead of requesting additional help and/or utilizing other tools that would have aided him in releasing a jammed bulkhead operating lever, Claimant assumed an awkward and unsafe position.

Claimant put his left foot on a release lever, which was 2' 8" off of the floor, and pushed the lever while pulling on a chain with his hands and arms. It is Carrier's contention that in unlocking and operating bulkheads, a Carman must assume a braced position, with both feet on the floor. By his actions, Claimant violated the following rules:

Norfolk Southern Book of Safety
and General Conduct Rules

> GR-3. All employees must follow instructions from proper authority, and must perform all duties efficiently and safely.
>
> 1314. Employees must observe the condition of boxcar doors, bulkheads, and related operating mechanisms prior to opening, closing, or repairing same. When doors or bulkheads are removed or applied, only the prescribed device is to be used.

The record reveals that prior to his most recent injury, the Grievant had twisted or sprained his right ankle on six separate occasions. At least two of these injuries were serious. On the second occasion, he lost six months of work. On the fifth occasion, he lost nine days of work. In addition, he bruised his right knee three times and had difficulty with his left knee popping out of joint on two

occasions. Ultimately, he had to have a knee operation--just a year and a half before the current incident.

Given the serious problems that Claimant had had with his ankles and knees over a long period of time, it is incredible that he would have assumed the position that he did, standing only on his right foot and placing considerable strain on his body in the course of pushing the lever and pulling the chain. Claimant was required to perform his duties safely. He did not do so in this instance.

The Organization has suggested that the charges against Claimant were not precise and that, as a consequence, he was disadvantaged in the preparation of his case. It notes that the rules that Claimant was alleged to have violated were not cited in the Notice of Investigation.

A review of the notice reveals considerable precision, both in regard to the June 18, 1990 incident and the history of injuries that were going to be reviewed. Numerous Boards in the industry have held that where incidents to be investigated are described with sufficient precision, the failure to cite a specific rule or rules is not violative of the Agreement's intent.

There is also no basis for concluding that Carrier erred in failing to grant a request for an additional postponement, since Claimant was present at the investigation and was amply represented by the Organization.

As to the charge of persistence in unsafe work practices, the record reveals that during the 21 years that Claimant was employed by Carrier, he actually worked approximately 14 1/2 years due to layoffs and injuries. During the 14 1/2 years, he had 21 injuries. The record also indicates that he participated in fifty-two safety training sessions and was counselled on four occasions for safety rule violations. (Three of these counsellings occurred since 1985.) Additionally, he was issued a fifteen-day deferred suspension for a safety rule violation in 1986.

Carrier undertook a comprehensive analysis of Claimant's injury record, comparing him to five Carmen ahead of him on the seniority list and five behind him. This is a reasonable comparison to make, since it takes into account the safety history of other employes performing the same work within approximately the same period. At the same time, it is reasonable to assume that each employe's record will have a mix of injuries.

By any measure, Claimant's injury record stands out from the rest. He has sustained more injuries and lost more time than any of his coworkers. The five employes below him on the roster have had no lost time, while the five above who did the same work had an average of .6 per person. Claimant had six lost time injuries. The five below him had an average of 1.8 injuries per person; the five above doing the same work 9.2. Claimant has 21 injuries. As to the question of fault, those above and below him averaged 2.6 safety rule violations. Claimant had six of these violations. Claimant has also been counselled more than these other employes.

The picture that emerges is that of an employe who has, for whatever reason, found it difficult to work in a safe manner. There can be no doubt that Carmen's work is potentially hazardous when compared with many other forms of employment and that it is essential that those performing this work exercise caution in carrying out their responsibilities. The presence of an employe who persists in unsafe practices poses a danger to himself and to others. At the same time, it subjects an employer to an extensive financial liability. Under these circumstances, it is not unreasonable, after proper efforts to counsel and train an employe

have been undertaken, for an employer to sever the employment relationship where no improvement is forthcoming.

Carrier appears to have made a reasonable effort to correct the problem that is evident here. Under all the facts of this case, the decision to terminate Claimant is not inappropriate.

AWARD

Claim denied.

C.H. Gold, Neutral Chairman

I Dissent - see attached
G.G. Gray, Employe Member

T.R. Malloy, Carrier Member

Aug. 13, 1993
Date of Approval

LABOR MEMBER'S DISSENT
TO
AWARD RENDERED IN
PLB 5016 CASE NO. 31

By a close review of the record and the Award, it becomes very clear that the Neutral either did not understand or ignored the facts surrounding this case and based her decision on issues that were not germain nor relevant to the case.

Claimant was charged with ...."standing in an awkward position with right foot on floor and left foot raised almost waist high against a bulkhead trying to move it...." and "persistence in unsafe work practices".

During the hearing, it was clearly pointed out by both the Organization and the Carrier that Claimant had his left foot on the bulkhead and not the "release lever" as was inferred by the Neutral.

Regardless of his past injury record, it was incumbent upon the carrier to prove that Claimant was at fault for the injury for which he was charged in this particular case, before any discipline was warranted. Otherwise, there would not have been anything to trigger a charge of persistence in unsafe work practices.

Notwithstanding the above, there have been numerous prior Awards by the various tribunals established for settling such issues that it is not proper to compare the safety record of an individual employee with that of a number above and/or below him on a seniority roster for the purpose of arriving at a decision as to whether or not that individual is persistent in unsafe work

practices (accident prone).

In her Award, the Neutral commented that;

> "...it is reasonable to assume that each employe's record will have a mix of injuries."

But, it is just as reasonable to assume that each employe's physical status and ability is also different. Some individuals might perform certain tasks without any physical difficulties, whatsoever, while at the same time others might be injured while performing the same task in the very same manner.

The record shows that the Claimant did have a mix of injuries, although there was a number of injuries to his right ankle. However, this should have indicated to the carrier, long before these charges were brought against him, that he might have had a specific problem with that ankle. But, no action was taken by the carrier to make such a determination, nor to correct it if such was the case.

All of this was pointed out during the hearing, and the Neutral chose not to give any consideration to these facts. Therefore, for all of the above reasons, we believe that she erred when rendering her decision, and we believe that this Award has no precedential value in the handling or disposition of any future like case.

Gerald Gray

Labor Member