PUBLIC LAW BOARD NO 5666

Case No. 8
Award No. 8

Parties to the Dispute	INTERNATIONAL BROTHERHOOD OF FIREMEN AND OILERS and UNION PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM

1. This claim is submitted on behalf of P. E. Whitmer who was dismissed from service on February 4, 1994.

2. We ask that Mr. Whitmer be reinstated immediately and that he be compensated and adjusted from February 4, 1994 on until such time as he is restored back to service, with compensation and other seniority rights restored unimpaired.

FINDINGS

The Claimant, Paul E. Whitmer, entered Carrier's service on March 16, 1992. On January 17, 1994, Carrier issued Notice of Investigation to Claimant to "develop the facts and place your responsibility, if any, on charges of being an unsafe employee, having accrued three personal injuries and one unsafe act on duty, since becoming employed....March 16, 1992." The Notice also identified the date and type of injury for the three injuries and the unsafe act. Investigation was scheduled and held on January 31, 1994. On February 4, 1994, Claimant was advised that the charge of being an unsafe employee was sustained and that he was assessed dismissal from service. Claimant's dismissal was appealed

by the Organization up to and including Carrier's highest designated officer for such appeals. Being unable to resolve the dispute, the parties referred the case to this Board for resolution.

The record before this Board is voluminous. Our extensive study thereof persuades us that the Investigation was fair and impartial and that all witnesses were sequestered. Claimant was present and represented by representative of his choice. Both were permitted to present evidence and cross-examine Carrier witnesses.

The Organization's position that the statement of charge was not precise is without foundation. Our review of the Notice of Investigation reveals that Claimant and the Organization were made aware of the specifics of the charges against Claimant which gave them sufficient information on which to prepare appropriate defense. Likewise, the argument that Claimant was disciplined for violation of rules not cited in the charges cannot serve as grounds for reversal of the discipline assessed. Numerous prior awards of the National Railroad Adjustment Board hold that citation of rules in the statement of charges is not necessary to a precise charge. For example, in Third Division Award 20285, the Board held:

> "...where the notice is sufficient for (a) Claimant to understand what is to be investigated...and precise enough to understand the exact nature of the offense charged...such notice will not be held to vitiate (a) Claimant's rights under (an) agreement for adequate notice...."

See also Third Division Awards 11170, 12898, 13684 and Public Law

Board 3199, Award 32.

Award 32 of PLB 3199 dealt with a comparable dispute between the parties to this dispute and is cited with favor by this Board.

The Organization has argued that Carrier did not follow the terms of its Safety Intervention Policy in dealing with the Claimant's lack of concern for safety of himself and his fellow employees. Such an argument is not supported by the record before this Board. The record indicates that Carrier progressed Claimant through each phase of the Policy up to and including the final phase, discipline, which was invoked on January 17, 1994, following his elbow injury on January 9, 1994. Claimant was counseled and schooled in safety matters, all of which failed to improve his safety performance.

After extensive study of the record before this Board, we conclude that Carrier sustained its charge of "being an unsafe employee." Claimant sustained 3 personal injuries in a little over 1 1/2 years of employment, all because he failed to be alert and exercise care in the performance of his work. For example, injury sustained December 8, 1992, fractured right middle finger when door on diesel unit slammed on his finger. Safety Rule 4002(A), Opening or Closing Doors, states that employees must always use door handle to open or close doors and keep hands clear of door side or edge. Had he done so, he could have avoided injury.

Secondly, the injury sustained April 1, 1993, soap burn on face. The record shows Claimant was not wearing his face shield.

Further, he was not alert to the bubble rising up on the hose. If he had been, he could have taken precautions against it bursting and spewing soap in the direction of his face. In addition, even though he experienced soap burn on April 1, 1993, he was observed again soaping without a face shield on July 1, 1993, just 3 months later. Certainly he was not exercising care.

Finally, on January 9, 1994, Claimant failed to exercise caution and be alert to conditions present when he sustained injury to his left elbow.

Claimant's safety record compared with 4 employees directly above and below him on the seniority roster, which we find to be a reasonable manner in which to approach the question of whether Claimant is an "unsafe employee," reveals that he has experienced significantly more injuries than the others. Only 1 injury in the 4 employees below Claimant and 0 injuries in the 4 employees above Claimant. However, the Organization asserts that the 5th employee above Claimant had experienced 2 injuries, and when compared to Claimant, there is no significant difference to justify finding Claimant an unsafe employee. Such argument overlooks the fact that the 5th employee above claimant has 6 months more service with Carrier than Claimant. We believe this makes a significant difference. Also we note that with 2 injuries the 5th employee has not yet been progressed to the final phase of Carrier's Safety Intervention Policy.

PLB 3199, Award No. 32, in discussing a similar issue stated:

> "Such cannot logically be attributed to actions by the Carrier. The difference in the injury rate can only be attributed to the behavior of the employees involved."

We conclude that when compared to his fellow employees, Claimant is found to be an unsafe employee.

Last but not least, the Organization argues that the fact that Claimant received settlements ranging from $3,500 to $125 for the injuries indicates that Carrier had responsibility for the injuries. This Board cannot subscribe to such argument for the simple reason that it is common knowledge in the railroad industry that payments are made for one purpose, to avoid larger payments to the third parties. Such payments are better known as nuisance payments and do not logically nor legally imply responsibility of the party paying the settlement. In this connection, PLB 3199, in its Award 32, stated:

> "Settlements of injury claims in this manner present no more than modum operandis whereby both parties agree to resolve a pending issue over cause of injury in a monetary manner. Such legally proves nothing one way or the other, nor can application of such procedures be used as evidence of guilt on the part of one party or the other."

For the reasons discussed herein, we are persuaded that the claim must be denied.

AWARD

Claim denied.

Adopted at Dania, Florida, this 30 day of March, 1995.

James E. Yost

James E. Yost, Neutral Member

D. A. Moresette

D. A. Moresette
Carrier Member

Michael H. Williams

M. H. Williams
Organization Member