PUBLIC LAW BOARD NO. 5677

Case No. 9 Award No. 9

PARTIES to DISPUTE: Brotherhood of Railway Carmen
-and-
CSX Transportation, Inc.

STATEMENT OF CLAIM:

1. The Carrier violated Rules 37 and 38 of the Shopcrafts Agreement when, on June 17, 1994, the Carrier removed Carman E. L. Wilson from service after a formal investigation held on July 13 and 14, 1994 and by letter dated August 9, 1994, assessed discipline by dismissal from all services of CSX Transportation.

2. Accordingly, the Carrier should be instructed to restore this employee to service with all seniority rights unimpaired, pay for all time lost, and made whole for all benefits which are a condition of employment, plus six percent annual interest retroactive to July 10, 1994.

FINDINGS: On June 17, 1994, the Claimant, while constructing a box of wood and plexiglass, reported an injury to his right arm which he states occurred while using a screw driver to insert a screw. An investigation was held on July 13, 1994 "to determine the facts and place responsibility in connection with your report on June 17, 1994, of a personal injury which allegedly occurred on June 17, 1994." In addition, the Carrier further charged the Claimant as "being careless and accident-prone, in that you have reported twenty-four (24) personal injuries since 1964." Subsequently, following the hearing, the Claimant was found guilty and he was dismissed from the service.

The Organization's appeal on behalf of the Claimant is founded on procedural and substantive grounds. With respect to the procedural grounds, it argues that the Claimant was improperly held from service pending an investigation; that a Carrier official improperly served in multiple roles during the proceedings; that the charges that brought this hearing about were not timely made and that the hearing itself was not fair or impartial.

The procedural contention that the Claimant was improperly held from service and that a Carrier official served in various roles are

the subject of Case 10 before this Board. Therefore, these will not be addressed here.

The Board finds that clearly this was not a "model hearing." However, on balance, it cannot be said that all of the relevant facts were not brought forward.

With respect to the other procedural arguments, there is no Collective Bargaining Agreement requirement for the Carrier to provide a list of witnesses and the documentation it intends to use at the investigation. The issue has been ruled upon by a number of past Awards. (See, among others, Award No. 19, PLB No. 3265 - Peterson).

With respect to the timeliness of the charges used against the Claimant, this issue has also been settled on numerous occasions. An accident-proneness charge, by its very nature, can only be made after an accumulation of injury reports. Moreover, in most instances, the last injury of record is used as the triggering event that leads to an investigation. In this case, that event occurred on June 17, 1994 when the Claimant reported an injury.

Turning to the merits of this dispute, the Claimant, on his report of personal injury, described his injury as follows: "When using hand screwdriver had a pop in elbow and bad pain and then elbow and hand hurting and swelling." Box 26 of the form used to report his injury asks "Was anyone at fault?" The Claimant filled in the "yes" square and wrote "CSX-Total."

At the hearing, neither the Claimant nor the witnesses that he had called to testify were able to explain how the Carrier could have been at fault. Testimony adduced at the hearing also established that the Claimant had been under a doctor's care for "tennis elbow." A Supervisor who witnessed the Claimant's action offered this opinion "I don't see how he could have possible hurt himself doing what he was doing."

In any event, the Board finds that the Carrier had a reasonable basis to conclude that the Claimant was at fault for the accident of June 17, 1994. Accordingly, the Carrier then had a proper basis to review the Claimant's past injury record. The record shows that the Claimant had been counselled in the past concerning his safety record and that he was disciplined in 1991 when he signed a waiver to plead

guilty in lieu of a formal investigation for accident-proneness. The Board finds that this waiver does not preclude the Carrier referring to or giving weight to the Claimant's past record.

With respect to the Claimant's safety record, it clearly leaves much to be desired. Based on numerous precedential Awards, the Carrier is not required to hold an investigation on each injury to ascertain whether the Claimant acted negligently. For example, Award No. 2, PLB No. 542 (Seidenberg) held in part:

> ...The record also supports a reasonable conclusion that the Claimant had suffered an inordinate large number of personal injuries in his work career which caused him to be absent from work a substantial amount of time. It is not necessary for the Carrier to prove that in each and every incident that Claimant acted negligently. His work record shows a fairly regular and repeated pattern of work injuries,...and the Carrier properly concludes that such...conduct makes it undesirable, if not dangerous, to continue the Claimant in the employ of the Carrier...The Claimant is an accident-prone employee whose continued service makes him potential hazard to himself, his fellow employees and the Carrier. The Board...has no recourse but to deny the claim.

Moreover, Award No. 4, PLB 4724 (Fredenberger) held in part:

> Turning to the merits of the case, we cannot agree with the Organization that an employee is not subject to discipline for accident proneness. Although the Organization cites some arbitral authority in support of its argument, the weight of authority is to the contrary. See NRAB First Div. Award 20438, May 6, 1994 (Daugherty, Referee); NRAB Second Div. Award No. 11577, Aug. 31, 1988 (Fletcher, Referee); Award Nos. 1 and 2 of Public Law Board No. 542, Sept. 22, 1970 (Seidenberg, Neutral); and Award No. 1 of Public Law Board No. 1606, Nov. 6, 1975 (Bergman, Neutral). Additionally, those awards clearly demonstrate that a charge of accident proneness may be proven by comparison of the charged employee's accident record with those of other employees similarly situated or by demonstrating an inordinate number of accidents by a charge employee within a given period. That is precisely what the Carrier did in the instant case. Moreover, the cited awards specifically hold that there is no need to demonstrate that the accidents

> or injuries suffered by the charged employee were the result of negligence or involved a violation of Carrier rules. Accordingly, while Claimant's explanation of each prior accident or injury indicates that no injury was the result of negligence or a violation of Carrier rules, the record nevertheless substantiates the charge particularly when Claimant's record is compared to the relatively low accident or injury record of similarly situated employees.

In summary, the Board finds that the Carrier had a substantial basis to find that the Claimant was accident-prone.

AWARD

The claim is denied.

Karen Daugherty	Eckehard Muessig	Gerald Gray
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Carrier Member	Neutral Member	Organization Member

Dated: 9-30-96