

Award No. 17
Case No. 17

PUBLIC LAW BOARD NO. 5691

**UNITED TRANSPORTATION UNION
AND
BURLINGTON NORTHERN RAILROAD**

STATEMENT OF CLAIM: Request that Yardman H. D. Peters, St. Louis Terminal, be immediately reinstated to service with full seniority and vacation rights unimpaired; paid for all time lost beginning September 17, 1994, until reinstated to the service of the Carrier, including the monetary value of Productivity Fund share counts he would have received but for his dismissal; paid for attending investigation conducted on September 16, 1994; that any loss of fringe benefits be restored to him; and that any mention of the incident be removed from his personal record file.

FINDINGS: This Public Law Board No. 5691 (the "Board") finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended. Further, the Board has jurisdiction over the parties and the subject matter involved, and the parties to this dispute were given due notice of the hearing thereon.

In this dispute Yardman H. D. Peters (the "Claimant") was notified to attend a formal investigation on August 26, 1994, concerning an alleged personal injury sustained on August 15, 1994, while working as a crew member of Job 3381, and not working in a safe manner, and being accident prone, having sustained fourteen personal injuries between December 24, 1975, and December 20, 1993, resulting in four hundred and five (405) lost work days. The investigation was postponed and held on September 16, 1994. Pursuant to the investigation, the Carrier determined that the Claimant violated Rules 1.1, 1.1.1, 1.1.2, 1.1.3, 1.2.5 of the General Code of Operating Rules, and he was further advised that he was dismissed from Carrier service.

The record shows that on August 14-15, 1994, the Claimant was working as Foreman on Yard Job No. 3381, Chouteau Yard in St. Louis, Missouri. At approximately 12:30 a.m., while switching cars between Hill 4 track and the Hill Lead track in the yard, the Claimant stepped on a discarded angle bar, twisting

his knee. The Claimant testified at the formal investigation that he did not experience any discomfort in his knee until later in his work shift. The record shows that at approximately 4:00 a.m. on August 15, after receiving instructions concerning a switch move, the Claimant informed Yardmaster A. Drake that he had twisted his knee and that he wanted to go home. Drake immediately advised Terminal Trainmaster William D. Been of the incident.

In summary the Carrier argued to the Board that the evidence of record established conclusively that the Claimant violated the cited rules. The Claimant and other yard employees had received repeated communications advising them of the possibility of hazardous footing conditions in the yard. Notwithstanding the communiqués from the Carrier, he still tripped over the only angle bar in the area where the injury occurred. Moreover, he admitted at the formal investigation that he first notified his supervisors of his injury three and one-half hours after incident.

The Carrier also alleged that despite its continuous efforts to work with the Claimant to improve his safety performance record, he was a safety risk to himself and other employees. The Carrier argued that the Claimant's safety record was statistically disproportionate from other employees. Prior to this incident, the Claimant had experienced 14 personal injuries over the previous 18 years of service. By way of comparison to twelve other employees of similar seniority, he had more lost work days (404) than the total of the other twelve. Of greater significance, the alleged injury in this dispute was the fifth injury caused by slipping or loose footing, resulting in an ankle or knee injury. Notwithstanding the Claimant's required participation in the Carrier's Multiple Injury Review Process, a safety program instituted in 1992, and various performance review safety counseling sessions, the facts confirmed that the Claimant was an accident-prone individual. Accordingly, he was removed from service.

The Organization argued, in summary, that the Carrier failed to meet its burden of proof and the discipline assessed the Claimant was excessive. The Organization also alleged various procedural violations, including a violation of Article 22, Section A (5), and the Carrier's prejudgment of the Claimant. In support of its argument, the Organization alleged that the Carrier issued its letter dated September 17, 1994, removing the Claimant from service before a copy of the transcript of the formal investigation was delivered to the Organization on October 4, 1994.

After reviewing the record and the parties' briefs and arguments, the Board finds that the Claimant alleged on-duty injury on August 15, and reported said injury only after receiving instructions concerning additional switching duties approximately three and one half hours later. In view of the Claimant's personal record and his testimony regarding the incident, his credibility is suspected concerning the circumstances resulting in his injury as well as the timing when it was reported to his supervisors.

Further, although the Claimant sustained fourteen personal injuries between December 24, 1973, and December 20, 1993, the Carrier failed to establish that the Claimant was accident prone and the appropriate remedy was his removal from service. Having reviewed the various awards cited by the parties, it is the Board's opinion that the statistical evidence alone is insufficient in this dispute to establish fault or negligence concerning the issue of "accident proneness". There must be a causal nexus between the accident(s) and the injured employee's conduct, and such evidence was not made part of this record. Moreover, the Board notes that the injuries resulting in 399 lost work days occurred between 1976 and 1985, and three reportable injuries (July 7, 1979, February 11, 1983, and April 29, 1985) accounted for 391 lost work days. Although the Carrier argued that the Claimant continued to be an unsafe employee after his participation in the Multiple Injury Review Process and performance review safety counseling sessions, the Board notes that these programs were initiated in 1992 and no evidence of such training or counseling prior to 1992.


As previously stated, it is the Board's opinion that the Carrier failed to establish by the evidence that the Claimant was accident prone. However, the Board also believes that the Claimant did not comply with the Carrier's instructions and safety and operating rules to the best of his ability. The Claimant must be held accountable for his actions and demonstrated indifference concerning the Carrier's rules. His personal record contains numerous entries involving the Claimant's violation of operating rules resulting in derailment and damage to equipment. He must understand that he has a responsibility to himself, the Carrier and his fellow employees not only to comply with all rules and instructions, but to make every effort to work in a safe and efficient manner as a Carrier employee. Regarding the discipline that was issued the Claimant, this incident does not merit his permanent removal from service. Accordingly, it is the Board's decision to give him the opportunity to return to Carrier service. The Claimant is to be reinstated to service with his seniority and vacation rights unimpaired, but without pay for time lost.

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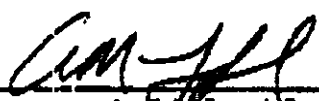
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Last, the Board finds that the Claimant received a fair and impartial investigation, and the Carrier did not commit any procedural violations in its handling of this matter.

AWARD: Claim sustained as set forth above.



Alan J. Fisher
Chairman and Neutral Member



A. W. Lankford
Organization Member



Roger A. Boldra
Carrier Member

Dated: August 29, 1996