PUBLIC LAW BOARD NO. 5950

AWARD NO. 1
NMB CASE NO. 1
UNION CASE NO. T-D-1078-B
COMPANY CASE NO. MWB 96-03-25AA

PARTIES TO THE DISPUTE:

BURLINGTON NORTHERN SANTA FE RAILWAY

- and -

BROTHERHOOD OF MAINTENANCE OF
WAY EMPLOYEES

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. The dismissal of Mr. T. E. Sorman in connection with his alleged'...violation of Rules 1.1 and 1.1.2 of the M/W Operating Rules and safety Working For Us Rule M-21 and Core Safety Rules, Tools & Equipment, Item 7, when you failed to use safe lifting practices and work safely and responsibility resulting in injury to you on September 21, 1995, at Elk River, MN., and your injury proneness...' (emphasis in original) was without just and sufficient cause and on the basis of unproven charges (System File T-D-1078-B/MWB 96-03-25AA BNR).

2. The Claimant shall be reinstated to service with seniority and all other rights and benefits unimpaired, his record shall be cleared of the charges leveled against him and he shall be compensated for all wage loss suffered, including overtime."

OPINION OF BOARD:

Sectionman T. E. Sorman (Claimant) had been employed by Carrier for approximately twenty-one (21) years at the time this claim arose. On the morning of September 21, 1995, Claimant, while lifting a rail saw into the rear of a truck from the ground, suffered what he described as a "pulled groin muscle." As a result of the incident, Carrier sent Claimant the following directive:

> "Attend investigation to be held in the conference room of the Northtown General Office Building, 80 44th Avenue, Northeast, Minneapolis, Minnesota, at 10 a.m., Thursday, October 5, 1995, for the purpose of ascertaining the facts and determining your alleged responsibility in connection with your alleged injury at 8 a.m., Thursday, September 21, 1995, at Elk River, Minnesota, and your alleged injury-proneness.
>
> Arrange for representative and/or witnesses, if desired, in accordance with governing provisions of prevailing schedule rules.
>
> Acknowledge receipt by affixing your signature in space provided on a copy of this letter."

As a result of said investigation, Claimant was informed that:

> "Effective November 8, 1995, you are being

dismissed from the service of Burlington Northern Santa Fe Railroad for violation of Rules 1.1 and 1.1.2 of the M/W Operating Rules and Safety Working For Us, Rule M-21 and Core Safety Rules, Tools & Equipment, Item 7, when you failed to use safe lifting practices and work safely and responsible resulting in injury to you on September 21, 1995, at Elk River, MN., and your injury proneness, as developed in investigation accorded you on October 13 and 17, 1995.

Please relinquish any and all company property, including free transportation, that has been issued to you."

The Organization protested the discipline maintaining Carrier had violated Rules 1, 2, 24, 25, 29, 40, 42 and 78. Specifically, the General Chairman asserted that:

1. Claimant was not apprised regarding the specific Agreement Rules with which he is being charged.

2. Carrier charged Claimant with being "accident prone", and then denied him access to the information which it used to make such a charge.

3. Mr. Sorman followed the Carrier's rules by filing a First Aid Log as a result of feeling "some discomfort" from the injury he allegedly sustained on September 21, 1995.

4. The transcript "clearly" shows that Claimant was performing his duties in the same way manner as he and other Sectionmen have done ever since the Railroad began using a rail saw. Nothing in the transcript shows that

Mr. Sorman disobeyed any of the Rules concerning the loading of the rail saw.

5. Mr. Sorman sustained a groin injury, and Carrier charged, and dismissed Claimant for an allegedly violating rules pertaining to back injuries.

Further, according to the Vice Chairman of the Organization, the statistical comparisons Carrier employed to label Claimant "accident prone" , were flawed. Specifically, the Vice Chairman stated that statistical analysis is a "subjective and imprecise science", and the data can be "easily manipulated to support whatever the user's purpose may be. Finally, the Organization noted that Claimant underwent a performance review with Roadmaster Radika, and received a "Satisfactory-Meets expectations of work requirements" rating in the areas of overall work performance, judgement, responsibility, safety consciousness and reliability.

Carrier denied the appeal, premised upon:

"After reviewing the investigation transcript, I cannot concur with your assessment that Mr. Sorman be reinstated to service with Burlington Northern Santa Fe, paid for all time lost (including overtime) made whole for any and all benefits, and his record cleared of any reference to discipline set forth in Mr. G.S. Ploeger's letter of November 7, 1995.

Contrary to your claim that the investigation did not afford the facts to reach any conclusion, I believe that the following reference to exhibits and testimony brought forth during this investigation do in fact support the dismissal and further confirm violation of Rules 1.1 and 1.1.2 of the M/W Operating Rules and Safety Working For Us Rule M-21 Core Safety Rules, Tools & Equipment, Item, 7.

As testified by Mr Greg Wilson, Mr. Sorman has had 19 injuries during his career which puts him in the No. 1 percentile as far as injury occurrence when compared to his peers. This amount of injuries during any time frame is excessive and indicates that Mr. Sorman is not only a potential safety liability to himself but also to his co-workers. When reviewing the records of the transcript, Mr. Sorman's personal record and data presented, it is noted that the majority of these injuries were considered somewhat serious in that nearly 70% (13 of 19 injuries) resulted in lost time. In fact, Mr. Sorman has had a total of 95 lost days and 22 restricted days which are a direct result to his continued pattern of on the job injuries.

The Carrier has continued to train Mr. Sorman in safe working practices in the form of lifting procedures and instructions in order to address tasks that employees are involved in such as the one on September 21, 1995 wherein Mr. Sorman injured himself when he did not lift properly. Mr. Sorman admits attending three back injury prevention classes, but still failed to use the proper techniques on September 21, 1995 by his own admission. If an employee has a history of back problems and continues to put oneself in

> constant risk of injury, the danger of this careless attitude for one's own safety may also subject his peers to those same safety risks.
>
> In addition to the back injury prevention classes and the proper lifting procedures training, Mr. Sorman had a performance review on 3/30/95. This review indicates additional coaching and counseling that Mr. Sorman was required to comply with in order to curtail and eliminate his continuous injury pattern that has been documented throughout his career. This intervention by the carrier appeared to be as futile as the aforementioned training in helping Mr. Sorman to cease this barrage of injuries that he continues to inflict on himself. Mr. Sorman either ignores or is just unable to comprehend that BNSF demands safe work practices and will attain an injury free environment.
>
> For all of the foregoing reasons, your appeal as submitted is without basis."

Finally, with respect to Claimant's alleged culpability for the September 21, 1995 incident, Carrier asserted that there were three (3) "simple alternatives" which would have been safer then the method Mr. Sorman employed:

1. Claimant could have requested assistance form a co-worker (Rule 21-M).

2. Claimant could have used the boom on the truck to lift the rail saw.

3. Claimant could have followed "back

conservation rules", which, in this case would have meant lifting the saw only to the tailgate, entered the truck bed and then moved the rail saw into the bed.

The Rules upon which Carrier based Claimant's dismissal state:

RULE 1.1-SAFETY

Safety is the most important element in performing duties. Obeying the rules is essential to job safety and continued employment.

RULE 1.1.2-ALERT AND ATTENTIVE

Employees must be careful to prevent injuring themselves or others. They must be alert and attentive when performing their duties and plan their work to avoid injury.

CORE SAFETY RULES-PART 7

Tools and Equipment

We must always use safe lifting practices when lifting, carrying, or performing other tasks that might cause back strain.

M-21 LIFTING AND CARRYING

Rules:

a. Use lifting practices recommended in back conservation programs.
b. If load is too heavy to lift safely by yourself, obtain assistance or lighten load.
c. Before lifting, carrying, or lowering objects with two or more people, make sure everyone knows movements to be made. Designate one person to give the lifting instructions.

Recommended Procedures:

* Use lifting and carrying equipment to lift

and move heavy loads.
* Avoid tripping and slipping hazards while lifting or carrying.
* Estimate weight of any object you plan to lift by test-lifting one corner.
* If you are unaccustomed to lifting, use extra caution, get help, or do not lift.

Initially, the Organization protested Claimant's dismissal based upon two (2) procedural issues. First, the Organization asserted that the investigation was not conducted in a fair and impartial manner, in accordance with Rule 40 of the Agreement, because Carrier's notice did not cite a specific charge. That notice stated that the investigation was to "ascertain facts and determine responsibility in connection with the Claimant's alleged injury and his alleged injury proneness." It is well settled that failure to cite specific rules does not necessarily constitute a fatal procedural flaw. The standard for review is whether the notice was sufficient to reasonably inform Claimant and his representative of the nature of the charges, so as to permit an informed response. The notice issued by Carrier in this case, passes that test, and we find no actual harm or prejudice to Claimant or the Organization in that regard. See NRAB Third Division Award #26276 and NRAB Third Division Award #27760.

Secondly, the Organization asserts that there is no rule that

specifically bans the manner in which Claimant lifted the saw. However, the general rules regarding safety and safe lifting practices, supra, explicitly put all employees on notice with respect to their duty to choose the alternative of greatest safety available to them. See NRAB Third Division Award #27760. Further, as discussed below, prior to his latest accident on September 21, 1995, Claimant had the benefit of special instructions on safe lifting practices.

Turning to the merits of this dispute, injury proneness is essentially a determination that, relative to other similarly situated employees, an individual has such a pronounced, and apparently irremediable, tendency toward injury that it is not unreasonable for an employer to remove that employee from service. Arbitrators traditionally are loathe to reach such a conclusion, but have held that, at some point in time, an employer may be relieved of the obligation of continuing to employ such an individual, whether or not the employer can prove "fault" on the part of the employee. See PLB No. 4370, Award #61, PLB No. 3530, Award No. 82, PLB No. 5016, Award #31, PLB No. 4410, Award #17 and PLB No. 5367, Award #2, and PLB No. 4724, Award #4, for example.

An employer seeking to terminate the employment of an employee for irremediable "injury proneness" bears a substantial burden of persuasion by clear and convincing evidence. Since injury proneness is not conditional upon fault and is a concept or relativity by comparison with a norm or standard of reasonableness, statistical analysis often is used to establish the material facts.

The Organization protests over who Carrier should have included, or excluded, from Claimant's comparison group; but, there can be no dispute that Claimant has a poor safety record that is exponentially worse than his fellow employees. Further, the Organization failed to show that Carrier's methodology was an unreasonable or improper method for determining that Claimant, comparatively, had an unacceptable propensity for injury. In fact, Claimant himself admitted that he thought Carrier's statistical analysis was "accurate and fair". This issue does not come without precedence to this Board. See PLB 4724 Award #4, PLB 4291 Award #1 and NRAB Third Division Award # 27760. Additionally, NRAB Third Division Award #30907, states:

> "We do not find persuasive the Awards which require that every injury be the subject of an individual Investigation with specific evidence of the employee's culpability. These Awards fail to recognize that statistical

> evidence may establish a pattern or practice of unsafe conduct in particular cases. Such a pattern or practice may support disciplinary action even though direct evidence of specific rule violations was not presented. On the other hand, we do not agree that every statistical pattern will support an inference of culpable misconduct. Each case must be evaluated on its individual facts."

While no statistical comparison methodology is immune from criticism, we must conclude that Carrier's methodology in this dispute was both reasonable and sound. The comparison groups to which the Claimant was compared were comprised of section Laborers of comparable seniority (i.e. those having seniority dates no more than six (6) months later, and those no more than six months earlier, seniority dates as Claimant). According to a computer analysis, 45% of the 1,947 employees actively employed System-wide in Claimant's position were injury free. It is not disputed that during his tenure of employment, Mr. Sorman experienced no fewer than nineteen (19) injuries on the job, of which fourteen (14) were back injuries.

As an employee having three or more injuries in the previous 10 years, Claimant was selected by Carrier's Personal Review Process for comparison to peers. System-wide (i.e., nationally), of the 164 in-service section Laborers with comparable seniority to

Claimant, Mr. Sorman had, by far, the worst injury rate in that comparison group. In fact, Carrier showed that Claimant was among the 1% of all employees having the worst injury rates for the entire System. In his own Minnesota Division, Claimant had double the rate for the next "worst" employee's rate.

Claimant knew that he was especially vulnerable to injury from improper lifting. Because of his demonstrated propensity for injuring himself while lifting heavy objects on the job, Mr. Sorman had been previously assigned to a special program for the purpose of training in proper lifting techniques and for sensitization to such safety hazards. Despite this special training, and a history of at least 14 prior back injuries, as a result of lifting things at work, on September 21, 1995 Claimant single-handedly tried to hoist a "heavy, awkward, cumbersome and difficult to lift" piece of equipment over the side of a pick-up truck bed. Not surprisingly, he injured himself again.

At the investigation, Claimant admitted as follows:

> Q. Mr. Sorman, on September 21, 1995 did you use all the knowledge and techniques available to you through the Back Injury Prevention Training classes to lift the saw out of the back of the truck?
> A. To the best of my ability, yes.

Q. Was it necessary for you in the process of lifting the saw into the truck to reach out with your arms to set the saw into the truck further?
A. Yes, it was.

Q. Thereby getting the load further from your body; is that correct?
A. That's correct.

Q. In the Back Injury Prevention Training classes it instructs you to keep the load as close to your body as possible, right?
A. Yes, it does

Q. So you were actually putting the load out further than what one should in that process; is that correct?
A. I suppose.

Claimant's disregard of safe lifting practices, with resultant personal injury, was not an isolated incident. Repeated counseling and safety training have failed to change Claimant's attitude toward injury prevention. According to undisputed testimony of Roadmaster Radika, during repeated "coaching conversations", Claimant consistently stated that: "I've got a bad back. I will get hurt again."

An employee who, for whatever reason, is unable or unwilling to work in a safe manner poses a danger, not only to himself, but to those individuals with whom he works. There can be no dispute that Carrier attempted to provide Claimant with appropriate

counseling and training regarding safety and proper lifting techniques. Claimant admitted that his lifting technique on September 21, 1995 was contrary to the training he received during the Back Injury Prevention Training classes. Carrier has persuasively demonstrated that its efforts to re-educate Mr. Sorman regarding appropriate safety precautions have been to no avail, and that he is unable or unwilling to work in a safe manner. In all of the facts presented, Carrier's decision to terminate Claimant was not arbitrary, capricious or otherwise inappropriate.

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AWARD

Claim denied.

Nancy Faircloth Murphy, Chair
Dated at Memphis, New York on March 16, 1998

Mark J. Schappaugh
Union Member

Dated at Chicago, IL
on March 27, 1998

written dissent to follow

William A. Osborn
Company Member

Dated at Fort Worth, Texas
on April 8, 1998

UNION MEMBER DISSENT TO AWARD 1
PUBLIC LAW BOARD NO. 5950
(Referee Nancy Faircloth Murphy)

A strong dissent is required because the reasoning of the Board in this case is both misguided and flawed. In this instance the Board held that the Claimant was guilty of a rule violation on September 21, 1995 when he sustained a slight groin pull while he engaged in the lifting of a rail saw and that he was an "accident prone" individual. We submit that the record developed on the property did not support either finding. Moreover, even assuming that a rule violation was established, the ultimate penalty of dismissal was not warranted.

THE ALLEGED TRIGGERING EVENT

With respect to the September 21, 1995 groin pull incident, the Board, at Page 10, held that:

> "... Claimant single-handedly tried to hoist a 'heavy, awkward, cumbersome and difficult to lift' piece of equipment over the side of a pick-up truck bed."

This determination, which was simply a recitation of the Carrier's position as it was stated in its written submission, was plainly not supported by the record. The Claimant's testimony during the investigation and at the oral hearing clearly emphasized that he did NOT at any time raise the rail saw over the side of the pick-up truck bed. The Claimant explained his actions clearly in the following pertinent testimony:

"1347. Q. Did you use all the knowledge that was--and training that you received during the Back Injury Cons--Back Prevention--Back Injury Prevention Training classes?
A. Yes.

1348. Q. Did you keep the load close to your body while you were lifting it, Mr. Sorman?
1348. A. Yes.

1349. Q. How did you accomplish that by lifting the rail saw into the truck versus setting it on the tailgate?
A. I suppose for that brief second, that if the saw was going from my body to the truck, who knows, maybe, you know, maybe the momentum of lifting and pushing at the same time when loading the saw may have prevented some undue strain to my back. But if we could just reflect for a minute on what led up to the actual lifting the saw into the truck, now as you remember, I did walk out the depot, and in a very calculated manner walked up the steps to the loading dock, unlocked the door, came back out, set the saw on the dock, walked down the steps,"

"went and undid the tailgate, leaving the saw on the dock. Then went over and got the saw, went to the back of the truck, and loaded the saw into the truck.

You could tell by the way that I did things this morning and I was being very cautious, and I was very safety mined in my mind, as to lifting procedures and doing things right. It was--I remember it was a beautiful morning and I did have safety in my mind. I was rather meticulous about opening doors and checking things and doing Step A, Step B, Step C.

And I guess in my routine, that I thought was without flaw, maybe my--maybe I--my God-given judgment was not that of your lifting and carrying and who all is here on--I thought the most perfect way I could get the saw into the back of a truck, for me, was how I did it. I don't know how else to explain it. In the things that I was doing I thought were very correct.

In hindsight, I see I could have maybe climbed up in the truck and, you know, maybe I would have pinched my finger moving the plates about in the truck, or you know, there's a lot of different factors in the real world. And just for me to get the saw into the truck, took many different steps. It wasn't as if I just, you know, maybe 20 years ago that truck was close enough to the dock where I could have grabbed it by one hand, and I was 20 years younger, thrown it over into the truck. This wasn't the case, and I thought that I showed pretty good mechanics, as far as the acts leading up to, maybe, the one minute thing that I have never seen done.

1350. Q. The--however, during--in the Back Injury Prevention Training classes, again, the--they---one of the requirements there is to keep the load as close to your body as possible while lifting, correct?

A. Uh-huh. That's is correct.

1351. Q. And this process was not done with the actual lifting the saw into the bed of the truck at that time?

A. Well, now when you say keeping the load as close to your body as possible, I mean, I was keeping that"

> "load as close to my body as possible. You know, of course you have to extend the saw to make that final maneuver into the truck, but I didn't throw it way back in the truck, I put it as close as possible to the edge of the truck and then pushed it back into the truck. In my mind, maybe I interpreted it, you know, I still kept that saw as close as I could to my body while loading it into that truck."

The abovequoted testimony points up the fundamental error in this Board's findings with respect to the manner in which the Claimant conducted his lift on September 21, 1995. The Claimant did not lift the rail over the side of the pick-up truck. He lifted the rail saw to the tailgate and pushed it into the bed of the truck. Moreover, the record established that this type of lifting procedure was common, not only to the Claimant, but to all other employees on this property. The Claimant had performed the same type of lifting procedure many times in the past without incident and without question by his supervisors (Tr.P.131). On this particular date he just happened to sustain a slight groin pull that did not result in any lost work time. Although the Board was apparently persuaded by the Carrier's argument that the Claimant allegedly did not chose the "safest" alternative for loading the rail saw, we submit that such was, at best, nothing more than an exercise in "perfect hindsight". Even then, there is nothing to indicate that any other alternative action would not have resulted in an injury to the Claimant. That is purely speculation. What this particular aspect of the claim boils down to is whether the Claimant's actions were negligent. Considering all of the evidence adduced during the investigation there clearly was nothing substantial presented by the Carrier that would support a finding that the Claimant was negligent in connection with the September 21, 1995 incident. The Carrier had not placed any form of lifting restriction on the Claimant and there was nothing to indicate that the Claimant's decision to lift the rail saw into the back of the pick-up truck was contrary to any stated procedure set up for that particular type of hand equipment. Moreover, the Board's determination that the Claimant admitted his failure to comport with safe lifting practices is obviously a stretch, in light of the testimony cited above. What may not be obvious to one who did not read the transcript is that the short section of the Claimant's testimony cited in the Award, which the Board considered as the Claimant's "admission" of guilt, came at a point where the Claimant had already previously denied violating any Carrier rule. Even after that the Claimant testified that he believed his actions were in compliance with the Carrier's rules. In light of the above, the Carrier did not prove a violation on September 21, 1995.

With respect to the Board's comments regarding the Claimant's alleged poor attitude and unwillingness to work in a safe manner, it must be noted that Roadmaster Radika's statement, which he attributed to the Claimant, was not unchallenged. It was unsupported by any other testimony or evidence and was specifically denied by the Claimant (Tr.PP.126&127). The Claimant's alleged poor work attitude was apparently the result of his decision not to succumb to repeated attempts by his supervisor to extract a promise from him that he would never again suffer an injury while on duty. No person could reasonably be expected to make such a promise and attempts to extract such a promise from the Claimant were clearly inappropriate. Lastly, the evidence of record established that except for the September 21, 1995 incident, *the Claimant had no reported injuries or accidents since the beginning of his remedial training in early 1993*. Obviously the Claimant WAS responding positively to the counseling and remedial actions implemented by the Carrier. This was confirmed only six (6) months prior to the date of the September 21, 1995 incident when the Claimant received a satisfactory work performance review.

THE INJURY PRONE ISSUE

Even assuming, arguendo, that a bonafide triggering event occurred here (which we do not in any manner concede) the Board's determination that claimant was accident prone was faulty. In this regard this Award represents the minority view on the issue of "accident proneness" in the railroad industry in general and it conflicts with at least three (3) other on-property awards involving the issue.

One glaring problem with this Award is its finding that the Claimant was guilty of being accident prone without the benefit of his being proven negligent or responsible for any of his prior injuries. The "no fault" injury/accident prone theory itself is not accepted by the overwhelming arbitral decisions in this industry. For example, recent Third Division Award 32430 held:

> "The Carrier also failed to prove the second condition in order to establish disciplinary action for 'accident proneness'. The Carrier failed to prove the Claimant's 'contributory responsibility (or a demonstrable rule violation)' for the previous incidents in which the Claimant sustained personal injuries.
>
> * * *"

"Whether it is merely sufficient to prove that an employee is accident prone because the employee has sustained more injuries that similarly situated employees over a particular period of time has been previously addressed by this Board. In *Third Division Award 28917*, the Carrier contended that the claimant has sustained 14 personal injuries within 19 years. Because the claimant's 'injury rate was extraordinarily high when compared to his peers', the Carrier argued that the claimant was accident prone.

The Board rejected the Carrier's contention, and stated:

> '...the Board is of the firm opinion that use of statistical data for the express purpose of establishing a conclusion that an employee is accident-prone, without more, is fraught with fundamental problems which cannot be overcome. Statistical analysis is subjective and at best and inexact science. A host of variables, the choice of which is controlled by the statistician, are available to dictate support for, and direct the result toward, a preordained notion. The opportunity for manipulation is ever present.....'

Moreover, *Second Division Award 9832* which reinforces the conclusion that a statistical approach, alone, to support a charge that an employee is accident prone is inadequate, stated:

> '...the serious nature and consequences of such a charge requires an analysis of all aspects of each and every injury. Factors, such as physical condition, fault, the severity and nature of the injuries as well as the effects upon fellow employees, must also be taken into consideration."

In addition, Award 1 of PLB No. 5786, involving this Carrier, held:

"Numerous Board awards have spoken to the issue of 'accident proneness' as a basis for dismissal of railroad employees, and both parties have submitted awards purporting to support their respective positions. Without attempting a detailed discussion and analysis of those awards, we can state that the better reasoned of them in our opinion reject the idea that statistics alone - proof that an employee has suffered a large number of personal injuries without evidence"

"that the injuries occurred because of fault or failure on the part of the employee - provide support for dismissal. See e.g., Award No. 1 of PLB 1103 and NRAB Third Division Award No. 28917. As stated in the latter Award, when accident-proneness is the basis for disciplinary action, 'contributory responsibility, (or a demonstrable rule violation), for the historical incidents within the charge must be conclusive. Statistical analyses of accident records which do not contain a causal nexus between the accident and the injured employee are insufficient proof to support such a charge."

In this dispute there was no evidence that the Claimant had ever been disciplined or even investigated for alleged negligence in any of the previous incidents he reported. In addition, this record failed to show that the Claimant was ever cited for any safety rule violations in connection with the earlier injuries.

With respect to the five (5) arbitration awards cited within the Award regarding the "no fault" aspect of the injury prone theory, we would point out that only Award 61 of Public Law Board No. 4370 (Marx) was an on-property award. The problem with that award is that the decision fails to provide any substantial discussion of the issues involved in that dispute. It merely denied the claim with a two (2) paragraph opinion. On the other hand, Award 1 of Public Law Board No. 5663 (BN-Cluster), Award 17 of Public Law Board No. 5691 (BN-Fischer) and Award 393 of Public Law Board No. 3304 (BN-O'Brien) each held to the opposite effect. Hence, on this property it has been held that there must be a demonstration that an employe was negligent relative to past injuries/accidents, in connection with any alleged accident/injury proneness charge. Each of these Awards was presented to the Board in this case. In light of the fact that the Carrier never established that the Claimant was negligent in connection with any of his alleged past injuries the Board should have followed on-property precedent and sustained the claim. With respect to Awards 82 of Public Law Board No. 3530 (NW)(Zumas) and Award 31 of Public Law Board No. 5016 (NW)(Gold) we must point out that those awards were distinguishable from the instant claim on the basis of their respective fact patterns. They too certainly do not represent the sole view of the issue on the Norfolk Western. Award 34 of Public Law Board No. 3195 and Awards 14 and 15 of Public Law Board No. 4769 (Fletcher) held to the opposite effect. Award 17 of Public Law Board No. 4410(Conrail) and Award 2 of Public Law Board No. 5367 (IC) were similarly distinguishable from the instant claim. For example, in the dispute decided by Award 2 of Public Law Board No. 5367 the evidence established that the charged employe had incurred numerous previous injuries that had resulted in monetary settlements and that two (2) settlements were pending at the time

of the award. Moreover, that individual had received letters of caution, safety audits, numerous warnings, substantial training and also had a poor disciplinary record. He also had lost over 1800 days of work. Nothing like that was involved in the instant case.

With respect to the issue of using "statistics" to support an injury/accident proneness charge we are impelled to point out that the use of statistics to support a finding that an employe is accident prone is fraught with serious flaws. Our position in this regard was argued extensively on the property and in our written submission. Second Division Award 6303, Third Division Award 30907, Award 13 of Public Law Board No. 1922, Award 11 of Public Law Board No. 2333, Award 7 of Public Law Board No. 3452, Award 482-A of Public Law Board No. 3561, Award 2 of Public Law Board No. 4108, Award 5 of Public Law Board No. 4219, Award 1 of Public Law Board No. 5015, Award 4714 of Special Board of Adjustment No. 18, Award 3 of Special Board of Adjustment No. 716 and Award 125 of Special Board of Adjustment No. 976 are supportive of our position in this regard. In this claim the problem of using statistics was specifically addressed at length by the General Chairman in his appeal letter dated December 5, 1995; particularly as it pertained to the Carrier's change in policies regarding the reporting of injuries/accidents in 1992. In this instance many of the incidents included as part of the Claimant's total of eighteen (18) prior injuries would NOT have been recorded as injuries after 1992. Hence, at the very least, the Claimant was clearly the victim of the Carrier's implementation of a new accident reporting policy.

Finally, this Award upholds the dismissal of an employe with over twenty-three (23) years of nearly blemish free service. The leap from minimal prior discipline (with NO prior discipline in connection with any prior injuries) to permanent dismissal was wholly unwarranted and unjustified. The well established concept of progressive discipline was certainly not followed here. This is particularly troublesome in light of the substantial arbitral precedent cited on the property, in our written submission and in oral argument upholding this principle in similar cases. Even in instances where the involved Board held that discipline was warranted, dismissal was found to be excessive. First Division Award 23921, Third Division Award 30907, Award 665 of SBA 910 and Decision No. 5784 of SBA No. 18. For example, Third Division Award 30907 held:

> "The next issue is the severity of the discipline imposed. Under the circumstances of this case, we find that the penalty of discharge was excessive. In particular, we find significant Claimant's long record of service to Carrier (22 years) and the absence of any

"formal discipline imposed on Claimant despite Carrier" determinations that Claimant failed to work safely. We find that progressive discipline was warranted prior to imposing the industrial capital punishment of discharge. See Second Division Award 10395; Third Division Award 25895.

Accordingly, we will reduce the discipline from dismissal to a suspension equal to time held out of service. Claimant shall be reinstated to service, conditioned on passing a reasonable physical exam, with seniority and benefits unimpaired, but without backpay."

For the reasons discussed above it is clear that this award is erroneous and that its precedential value is nil. Moreover, that a long term, faithful employee was terminated without just cause and without any form of progressive discipline is a travesty. Therefore I dissent.

Respectfully submitted,

Mark J. Schappaugh

Mark J. Schappaugh
Union Member PLB 5950
May 8, 1998