NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6402

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES	)
	) Case No. 125
and	)
	) Award No. 102
UNION PACIFIC RAILROAD COMPANY	)
	)

Martin H. Malin, Chairman & Neutral Member
T. W. Kreke, Employee Member
B. W. Hanquist, Carrier Member

Hearing Date: April 22, 2008

STATEMENT OF CLAIM:

1. The dismissal of Truck Driver Albert A. Fox for alleged violation of Rule 1.6(1) Conduct - (Careless of the safety of themselves or others) in connection with a personal injury sustained by him on June 8, 2007 and the alleged charge that he has repeatedly failed to work in a safe manner is unjust, unwarranted based on unproven charges and in violation of the Agreement (System File MW 07-96/1479569).

2. As a consequence of the violation outlined on behalf of Mr. Fox, the Organization requests the removal of the charges for the alleged violation of Rule 1.6 (Conduct - Careless of the safety of themselves or others), the removal of Claimant's assessment of the Level 5 Discipline, removal of his unwarranted and unjustified termination from active service of the Union Pacific Railroad, the removal from his personnel record and the reinstatement of the Claimant back to active service immediately after his release from his physician with all seniority unimpaired and to be paid for all lost time to begin upon release from his physician at his respective straight time rate of pay and any and all overtime at his respective overtime rate of pay performed by the employee working Claimant's position, through and including on a continuous basis until this matter is settled. Also, all time lost to be credited towards Railroad Retirement, vacation, hospitalization, and all expenses paid meals and mileage at the rate of $.485 a mile acquired by the Claimant attending the Formal Investigation on July 2, 2007, at 1:00 P.M., conducted at the La Quinta Inn and Suites, 24868 I 45 North, The Woodlands, Texas from the station nearest to the Claimant's place of residence at 24603 Moorgate, Huffman Texas 97336-2842 to the Holiday Inn and back to the Claimant's place of residence.

FINDINGS:

Public Law Board No. 6402 upon the whole record and all of the evidence, finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and, that the Board has jurisdiction over the dispute herein; and, that the parties to the dispute were given due notice of the hearing thereon and did participate therein.

On June 14, 2007, Claimant was notified to report for a formal investigation on June 18, 2007, concerning his alleged unsafe action and carelessness resulting in his personal injury on June 8, 2007, and his alleged repeated failure to work in a safe manner "in comparison to your fellow employees as indicated by a review of your personal injury record, the safety infractions you have committed and an evaluation of your overall work record." The hearing was postponed to and held on July 2, 2007. On July 19, 2007, Carrier notified Claimant that he had been found guilty of the charges and was dismissed from service.

The critical issue in this case is whether Carrier proved the charges by substantial evidence. Claimant was found guilty of two charges: that he failed to work safely on June 8, 2007, resulting in his sustaining a personal injury and that he repeatedly failed to work in a safe manner as reflected in a comparison of his personal injury record to that of his coworkers. We shall consider each charge in turn.

With respect to the charge of failing to work safely on June 8, 2007, the record reflects that Claimant was picking up a bucket of hydraulic fluid. He was using two hands but the bucket slipped out of one hand and all of the force transferred to his other arm, resulting in a dislocation of his right shoulder. There is no dispute that Claimant was injured, but the fact of an injury along does not establish culpability for that injury, i.e. a failure to work safely.

The case against Claimant turns on the gloves he was wearing when handling the bucket. The Manager Track Programs testified that the rubber gloves that Claimant was wearing were oily, which caused the bucket to slip out of Claimant's grasp, resulting in his injury. The MTP opined that Claimant should not have used the gloves in that condition and should have used leather gloves instead.

Claimant, however, testified without contradiction that after bumping into his position, he noticed that the gloves that were on the truck were worn and that he twice requested a new pair of gloves but was told that new gloves were not available.[1] Claimant further testified without contradiction that he also requested leather gloves but was told that leather gloves were not available for employees working on a fuel truck. Carrier may not assess responsibility for Claimant's failure to use proper equipment when Claimant requested such equipment and it was not provided. Carrier has pointed to no other allegedly unsafe actions of Claimant on June 8,

[1]The MTP testified that he did not know whether Claimant had requested a new pair of gloves.

2007. Accordingly, we are compelled to hold that Carrier failed to prove the first charge by substantial evidence.

With respect to the charge that Claimant repeatedly failed to work in a safe manner, Carrier relied on Claimant's personal injury record as compared to the records of the five employees immediately above him on the seniority list and the four employees immediately below him. Of the comparison group, two employees had one injury and one employee had two. In contrast, Claimant had six injuries, including four in the prior 23 months.

Although this Board has not previously addressed the charge that an employee is culpably accident prone as reflected in a comparison of the employee's record to that of his coworkers, the Chair of this Board has served as Referee on other Boards that have addressed the matter. Of particular relevance to the instant dispute is NRAB, Third Division Award No. 30907. In that case, the Board, with the Chair of this Board serving as Referee, observed the absence of consensus in the Awards concerning how to approach such cases:

> There are numerous and conflicting awards considering charges that employees were accident prone. Among other things, these awards conflict over whether a separate, timely investigation is required for each injury and over the probative value, if any, of statistical comparisons of employee injury records.

The Board then quoted from Third Division Award No. 30747, in which the Chair of this Board also sat as Referee:

> Awards which . . . accept the use of statistical comparisons generally find accompanying evidence of employee culpability in at least some of the prior injuries. . . . A few awards suggest that statistical comparisons standing alone may raise an inference of a pattern of culpable conduct. Other awards suggest that statistical comparisons may never be probative of a pattern of culpable unsafe behavior. A middle ground suggests that where there is evidence of culpable conduct in some of the prior injuries, an injury record which deviates significantly from the norm on the property may establish that the employee is accident-prone.

Third Division Award No. 30907 followed the middle ground. The Board reasoned:

> A statistical analysis of an employee's injury pattern begins with the identification of a peer group of similarly situated employees. Based on the peer group's record, one may calculate an expected injury rate. When a particular employee's observed injury rate deviates from the expected rate, one must inquire whether the deviation is the result of chance. If the deviation is not likely to be the result of chance, it is likely to have been caused by something specific. In the absence of another explanation, one may infer that its cause was the employee's inadequate care or foresight.
>
> Statisticians have developed several techniques to calculate the probability that

the deviation between the observed injury rate and the expected injury rate was the result of chance. The awards dealing with charges of being accident prone, however, do not employ standard deviations, Chi Squares, or other sophisticated techniques. Rather, they rely on raw data. Considerable caution must be exercised when relying on raw data that has not been refined with the level of precision that might otherwise be available.

The primary factor to consider when evaluating raw data is the magnitude of the disparity between the employee's observed injury rate and the expected value. The greater the magnitude, the more confident we can be that the deviation is not the result of chance, even in the absence of more sophisticated analysis. Also significant is the size of the peer group from which the expected value was derived. Consideration must also be given to the seriousness of the injuries. If all of the injuries were minor, resulting in no time lost, it is possible that the disparity between the employee's injury rate and the peer group resulted because the employee was more meticulous than his co-workers about reporting his injuries. Finally, specific evidence of employee culpability in some of his injuries, particularly where the evidence is contemporaneous with the injuries themselves, may reinforce an inference that the employee is accident prone.

We adopt the method of analysis of Award No. 30907. Applying it to the instant case, we find the following. Claimant was hired on March 31, 1997. On September 8, 1997, he sustained a right ankle sprain. There is no evidence of the severity of ths injury or of whether Claimant lost any time as a result of it. There is no evidence that he was disciplined or counseled, nor is there any other contemporaneous evidence that Carrier believed that Claimant was culpable in whatever incident led to the injury.

On July 23, 2001, Claimant sustained a contusion on his upper left arm. There is no evidence as to how severe the bruise was or how it came about. There is no evidence that Claimant was disciplined or counseled, nor is there any other contemporaneous evidence that Carrier believed that Claimant was culpable in whatever incident led to the injury.

For July 18, 2005, Claimant's record notes, "Wright Wrist, Carpal Tunnel." No further information is provided, except that a claim (presumably under FELA, but that is not stated) resulting from this injury was settled on October 4, 2005. Carpal tunnel is an occupational disease that builds up over time as a result of repetitive motion. People vary greatly in their susceptibility to Carpal Tunnel. Here too, there is no evidence that Claimant was disciplined or counseled, nor is there any other contemporaneous evidence that Carrier believed that Claimant's culpable conduct led to his carpal tunnel syndrome.

Claimant's record for September 16, 2006, reflects, "Nose Hemorrhage. No further information is provided. There is no evidence as to how severe a nose bleed Claimant suffered or how it came about. There is no evidence that Claimant was disciplined or counseled, nor is there any other contemporaneous evidence that Carrier believed that Claimant was culpable in whatever incident led to the injury.

On January 16, 2006, Claimant sustained a left knee strain. Claimant received an UPGRADE Level 3 suspension for this injury and the Organization filed a claim on his behalf which came before this Board in Case No. 89, Award No. 63. We dismissed the claim as moot because Claimant had entered into a settlement (presumably under FELA) under which he released Carrier from all claims related to his injury.

The final injury on Claimant's record is the June 8, 2007, injury for which we have found above, Carrier has failed to prove Claimant's culpability. The details of the incidents on which Carrier relies to establish a pattern of repeatedly failing to work safely are thus quite sparse. The absence of such details substantially undermines any inference of repeated unsafe behavior. For example, a nose bleed and a bruise can be severe or they can be trivial. We have no way of telling from this record what they were. Similarly, there is absolutely no evidence that with respect to the first four injuries, that Carrier believed at the time that they were the result of a failure to work safely.

The June 8, 2007, injury was one that Carrier did believe resulted from Claimant's failure to work safely, However, we have held that Carrier failed to prove that charge by substantial evidence. In Third Division Award No. 30747, with the Chair of this Board sitting as Referee, the Board observed:

> [T]he injury which triggered the review of Claimant's prior record occurred on March 17, 1992. We have found that Carrier failed to establish Claimant's responsibility for that injury. It is impossible to say that the March 17, 1992, injury represented the culmination of an ongoing course of conduct exhibiting lack of caution and lack of regard for safety.

That observation applies with equal force to the instant case. We conclude that Carrier failed to prove the charge of repeatedly failing to work safely by substantial evidence. Accordingly the claim must be sustained and Claimant must be reinstated to service with seniority and all other rights unimpaired and his record must be cleared of the discipline. Reinstatement is conditioned on Claimant passing such reasonable physical exam as Carrier may require. Claimant's entitlement to back pay shall run from the date that Claimant was physically able to perform service, as documented by his physician, through the date of his reinstatement. The claim also seeks reimbursement of expenses incurred in attending the investigation, but as this Board has held on numerous occasions, the Agreement does not support such reimbursement. Accordingly, that portion of the claim is denied.

AWARD

Claim sustained in accordance with the Findings

ORDER

The Board, having determined that an award favorable to Claimant be made, hereby orders the Carrier to make the award effective within thirty (30) days following the date two members of the Board affix their signatures hereto

Martin H. Malin, Chairman

B. W. Hanquist
Carrier Member Sept 17, 2008

T. W. Kreke
Employee Member Sept. 17, 2008.

Dated at Chicago, Illinois, August 31, 2008