PUBLIC LAW BOARD NO. 1103

PARTIES TO THE DISPUTE:

Union Pacific Railroad Company — AWARD NO. 1
and
United Transportation Union (T) — CASE NO. 13

STATEMENT OF CLAIM:

Claim of Brakeman A. M. McGann for reinstatement to service as Conductor-Brakeman-Yardman with the Union Pacific Railroad Company, with pay for all time lost since dismissed from service on January 18, 1970, and with all seniority rights and privileges unimpaired.

FINDINGS:

Claimant commenced work for the Carrier on February 14, 1945 as a student brakeman and obtained a seniority date as a brakeman on March 7, 1945.

On January 1, 1970 at approximately 12:50 A.M. Claimant was working as a brakeman on a road switcher at Hood River, Oregon and in the course of his duties stepped on a nail, causing a puncture wound on the sole of his foot. He promptly reported the injury and laid off because of it upon completion of his tour of duty on January 1, 1970. On January 2nd he went to a doctor who gave him a shot but found it unnecessary to bandage the wound or administer any other treatment. At the request of the Carrier he returned to his regular assignment on January 3, 1970 and again laid off because of the injury and did not mark up again until January 7th and returned to service on January 8, 1970.

On January 8, 1970 the Carrier notified the Claimant to appear for an investigation and hearing and the investigation was held on January 12, 1970. On January 18, 1970 the Carrier directed a letter to the Claimant dismissing him from the Company's service. The body of the letter reads as follows:

> "Please refer to notice of investigation and hearing sent to you under date of January 8, 1970.
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> Having carefully considered the evidence adduced at the hearing held at the Union Pacific Depot, The Dalles, Oregon, commencing at 1:00 P.M. on January 12 1970, after having been postponed from 9:00 A.M. January 12, 1970, find that the following charges have been sustained:

That while you were employed as a brakeman you were careless of the safety of yourself and others, you were disloyal and dishonest when you did not report for duty after being treated for alleged injury at about 12:50 A.M. on January 1, 1970, at Cascade Locks Lumber Spur, Cascade Locks, Oregon, and released for service; and your past history with this Company indicates that you have demonstrated in the course of your employment a continued behavioral pattern of susceptibility to injury rendering you unfit and unsafe to further pursue the occupation of trainman in that you have sustained a total of 24 injuries which indicates an accident frequency rate sufficiently higher than those similarly employed.

Also that you have been dismissed from service on six different occasions due to rule violations and unsafe practices, all of which indicates violation of General Rules A and M and Rules 700, 702 702(B) of the Consolidated Code of Operating Rules and Rules 4001 and 4010 of the Safety Instructions, Form 7908, effective July 1, 1954.

Therefore, you are being dismissed from Company service."

The threshold issue to be decided is whether or not the Claimant was guilty of any rules violations or improper conduct between January 1 and January 8 of 1970. The dismissal notice of January 18, 1970 first charged that he was "careless of the safety of himself and others". The employer is responsible for providing safe working conditions and locations, and when an employee working in said locations steps on an upturned nail in the dark there can hardly be a basis for charging the employee with carelessness. The next charge is to the effect that he was "disloyal and dishonest when he did not report for duty after being treated for alleged injury at about 12:50 A.M. on January 1, 1970 at Cascade Locks Lumber Spur, Cascade Locks, Oregon, and released for service." The reference therein to an "alleged

injury" is uncalled for since even the Carrier's evidence established that the doctor did in fact find a puncture wound.

The Claimant further testified without contradiction that his attempt to work on Janury 3, 1970 resulted in pain and necessitated walking on the side of his foot and further that he laid off at the conclusion of this service on that date and soaked the injured foot periodically during the following days and did not feel sufficiently recovered and able to report for duty until January 7th. The Carrier's contention that his absence from duty during this period of time constituted in effect malingering is unsupported by any evidence. The Claimant obtained proper authority prior to laying off because of this injury and the conclusion of the Carrier that the layoff between January 3 and January 8 was unwarranted in the light of the nature of the injury is based upon pure speculation and is insufficient to substantiate the charge of disloyalty and dishonesty.

It must be concluded that the Carrier has failed to carry its burden of proving Claimant guilty of any rules violation or improper conduct between January 1 and January 8, 1970. This being so, the question of the Claimant's prior disciplinary record cannot be reached since it is elementary that his past record could only be considered for purposes of arriving at the degree of discipline to be imposed in the event that guilt of the current charges had been proven.

The dismissal notice of January 18, 1970 also indicated a reliance by the Carrier upon the alleged fact that Claimant had

"demonstrated in the course of his employment a continued behavioral pattern of susceptibility to injury rendering him unfit and unsafe to further pursue the occupation of trainman***" This is quite clearly a charge of what is commonly referred to as "accident proneness". At the investigation the Carrier presented evidence to indicate that the Claimant had sustained 24 injuries in the course of his employment between 1945 and 1970. Many of the injuries referred to were minor in nature and involved no loss of time. Negligence or responsibility of the Claimant for those 24 injuries was never proved by the Carrier, and in connection with this charge the Carrier rests its case solely on the proposition that Claimant's accident frequency rate is higher than those similarly employed. This neutral has previously dealt with the problem of "accident proneness" under closely similar facts and circumstances in Decision No. 4714 of Special Adjustment Board No. 18. The findings in that case are equally applicable here and read as follows:

> "Ordinarily an employe may be discharged under certain circumstances for negligent involvement in a serious accident or for negligent involvement in two or more less serious accidents. In such cases the employe is entitled to a hearing in which the employer must carry the burden of proving that the accident occurred under circumstances such that the employe could have prevented or avoided the accident if he had performed and reacted in the manner expected of an average, reasonable and prudent individual. In the present case, the employer seeks to avoid that burden of proof and to establish a different ground for discharge--discharge without fault for involvement in unexplained accidents more numerous than average.

> "After a careful study of the subject or concept of 'accident-proneness' this arbitrator cannot concur with the idea, loosely articulated in some awards cited by the carrier, to the effect that raw statistics are a satisfactory basis for termination of any individual's employment rights in the absence of any specific proof of fault or negligence.
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> "The fact of the matter is that accident proneness is a rather complex problem. The Lawyer's Medical Cyclopedia Revised Volume 3 has an entire chapter of 54 pages devoted to the subject and points out that there are physiological, emotional and psychiatric bases for the condition which may be detected and treated by competent medical personnel.
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> "The complicated nature of the problem is well illustrated in a lengthy arbitration decision by an experienced and respected arbitrator in a reported case designated as Northrup Aircraft, Inc., 24 LA 732. In that case, the discharge was properly handled by the employer as a medical discharge, and the decision was based on the informed opinion of a physician experienced in industrial medicine. There was medical evidence for both parties and the arbitrator's opinion refers to the fact that the dispute involved 'a highly specialized aspect of industrial psychology.'
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> "The claim as asserted in the present case asks for a ruling that the carrier violated the Agreement by preferring a charge of accident proneness. It must be concluded that when the carrier elects to discharge for 'accident proneness' as distinguished from negligent responsibility for an accident or accidents, it must handle the matter as a medical discharge based upon competent medical evidence and allow the employe the contractual rights provided to contest any medical discharge."

Under the facts and circumstances of this case it must be concluded that the discharge cannot be sustained and the Grievant should be reinstated to service and made whole for loss of earnings. Ordinarily under the usual rules and practices applicable to

operating employees in the railroad industry, back pay when awarded includes no allowances in favor of the employer based upon outside earnings of the employee in question during the discharge period. In the present case, however, certain procedural problems and considerations lead the Neutral to a different result on that particular aspect of the case.

The grievant was discharged on January 18, 1970. On February 16, 1970 the Claimant's representative wrote a letter requesting reinstatement. The request was denied by the Carrier by letter dated February 25, 1970. Eight months later a conference was requested and again on October 29, 1970 the Carrier declined to reinstate the Claimant. On November 30, 1970 the Claimant obtained personal counsel and filed suit in the United States District Court for the District of Oregon, seeking punitive damages based upon the alleged wrongful discharge. On July 27, 1971 the Court granted the Carrier's motion to dismiss the action on the ground that Claimant had failed to exhaust his administrative remedies as provided under the Railway Labor Act. No further action was taken by the Claimant or his representatives until February 6, 1973, at which time the case was listed on the docket of cases to be heard by this Public Law Board.

The Railway Labor Act was amended to allow the establishment of Public Law Boards for the primary purpose of expediting the handling of cases of this nature. This claim could have and should have been referred to a Public Law Board possibly as early as the written denial of the demand for reinstatement on February 25, 1970. In fact, the referral of the case to a Public Law Board

did not occur until three years later. A substantial factor in the delay was the Claimant's erroneous election to attempt court action without exhausting his administrative remedies.

Under these praticular facts and circumstances it is the conclusion of the Neutral that it is proper and appropriate in this case to provide that the award for lost wages shall be reduced by the amount of any wages and earnings which the claimant has received from other sources during the period from January 18, 1970 to date of reinstatement.

AWARD

Claimant shall be reinstated forthwith without loss of seniority and shall be compensated for loss of earnings from January 18, 1970 until date of reinstatement. In computing the loss of earnings Carrier shall be entitled to deduct any and all wages and earnings which Claimant has received from any source during the period of his discharge. The parties are directed to attempt to arrive at the monetary figure to which Claimant is entitled and in furtherance of that objective Claimant shall produce and deliver to the Carrier copies of income tax returns and all details as to the names and addresses of employers and other sources of wages or earnings during the relevant period, together with all facts and figures as to the total amounts earned.

The Board retains jurisdiction to arrive at an exact monetary award in the event that the parties are unable to reach agreement thereon and at the request of either party will reconvene and

receive further evidence and decide that issue.

Paul D. Hanlon
Chairman and Neutral Member

F. D. Tuffley
Organization Member

J. E. Cook
Carrier Member

Portland, Oregon

July 27, 1973