AWARD NO. 7
CASE NO. 7

PUBLIC LAW BOARD NO. 3452

PARTIES ) UNITED TRANSPORTATION UNION
TO )
DISPUTE ) NORFOLK AND WESTERN RAILWAY COMPANY

STATEMENT OF CLAIM:

"Appealing the discipline case of Brakeman H. A. Andray, who was dismissed as a result of the findings of a hearing held on April 1, 1982, and reinstated after six months." (File: TR-TOL-82-19)

FINDINGS:

The Board, after hearing upon the whole record and all the evidence, finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended; this Board has jurisdiction over the dispute involved herein; and, the parties were given due notice of hearing thereon.

Claimant, a yard brakeman, was switching cars at the Nabisco Mill Company, in Toledo, Ohio, on February 11, 1982, when he slipped on ice and feel, causing him to mark off duty for a total of 19 days as a result of personal injury.

On February 17, 1982, Claimant was directed to report for a hearing to determine whether this injury was the result of his having been in violation of operating and safety rules and, as Carrier stated in its notice, "in addition, your persisting in unsafe practices as evidenced by your safety record from which it will be noted that you sustained personal injuries as follows:" The notice thereafter listed 21 separate dates over an 11-year period (May 18, 1970 to June 29, 1981) on which Claimant had reported personal injuries, the nature of each injury, and the number of days of lost time that resulted from each injury. This listing showed that for 18 of these 21 reported injuries, there was no lost time. The other three injuries showed Claimant lost 1 day (1971), 44 days (1970), and 125 days (1976). The injuries included several instances of foreign objects in an eye; a skinned shin; a cut finger; injury to the heel of a hand; soreness of an arm, an elbow, a leg and the hip; bruises to the knuckles of a hand, an elbow, knee caps, and the chest; and, soreness or pain of back muscles.

The company hearing, twice postponed, was finally held on April 1, 1982. It commenced at 9:25 A.M. and concluded at 7:50 P.M. The hearing record consists of 120 pages of single-spaced testimony and, in addition, exhibits consisting of CT-37-T reports

on each personal injury, a statement of dates on which Claimant had taken Book of Rules examinations and instructions during the years 1973 through 1981, various bulletin notices, dates general safety rule discussions had involved Claimant, and injury ratio comparisons as between Claimant and ten other employees at his work location, i.e., five employees with more seniority and five employees with less seniority than Claimant who work at the Toledo Terminal.

On April 14, 1982, Claimant was notified that he was dismissed from all service as a result of Carrier having determined from its consideration of the hearing record that he was guilty as charged.

After being out of service for about six months, and during appeal of a claim for wrongful discharge, Claimant was notified on October 16, 1982 that he was reinstated to service. Carrier says reinstatement was based on Claimant's length of service (25-1/2 years), a good discipline record, and its belief six months is sufficient to instill more safety awareness in Claimant. This decision by it notwithstanding, Carrier further asserts that the total record supports discipline of termination from service and that its election to reinstate Claimant must be considered the last chance for Claimant to become a safety awareness employee.

The Organization has raised several threshold arguments. It says the Carrier was guilty of prejudgment and denied Claimant benefit of a due process hearing. It especially points to the hearing notice as having signified a presumption of guilt existed prior to the formal hearing. It says the charge was stated as fact or a conclusion drawn by Carrier and not as allegations before the hearing even commenced.

The Organization also maintains Carrier attempted to establish culpability of Claimant with respect to past injuries which had been reported to Carrier but for which no formal investigation had been held at the times in question. In this connection, the Organization says Carrier was in violation of Rule 31, governing time limits for the holding of formal investigations, and that it must be considered to have waived its right to conduct a hearing to determine whether Claimant was indeed responsible for each of the past reported injuries.

The Organization also protests what it terms, "a calculated effort," by Carrier to establish Operating and Safety Rule violations in connection with injuries sustained by Claimant during past years through testimony of officers who had not been responsible for such reports in the first instance. It submits that such action denied Claimant the benefit of timely examination of witnesses responsible for comments placed on the company reports at the time each injury had been sustained.

Contrary to Carrier argument that it had not prejudged Claimant

as being accident prone, this Board believes it may be concluded from the manner the notice of charge had been prepared and served that Carrier had made a predetermination of Claimant's guilt as concerned at least a part of the charge. As indicated above, the notice of charge stated Claimant was "persisting" in unsafe practices as "evidenced" by Claimant's "safety record." The notice must be considered to have thereby shown that it had already been determined that a given number of reported injuries represented sufficient cause to find an employee as being accident prone.

It would seem to the Board that any statistical correlation between numbers of injuries reported and an individual being determined accident prone must be weighed in the light of requirements that an employee report every case of personal injury and, more importantly, culpability. That an employee would elect to report what might be termed minor or inconsequential injury may not be held alone to establish accident proneness. As indicated above, a vast number of the past injuries reported by Claimant appear to have been minor in nature, with no lost time whatever in 86 percent of the incidents, and may well have been of a nature that a number of employees would not even report as an injury.

This Board also believes study of the transcript of hearing supports the conclusion urged by the Organization that Carrier was not intent upon review of Claimant's record at the hearing, but was seeking in an untimely manner to establish that Claimant had a personal or negligent responsibility for each past injury. As held in Award No. 11 of PLB No. 2333, involving the same parties here in dispute, with Referee Arthur T. VanWart assisting, such action reflected "a prejudicial attitude" on the part of Carrier.

This Board does not find, as Carrier asserts, that it may be concluded from the Findings in Award No. 11 of PLB No. 2333: "The fatal defect [in the case before PLB No. 2333] occurred when the Carrier included the current injury to be investigated on the bottom of the long list of injuries alleged to be the result of unsafe practices." PLB No. 2333 in its Award No. 11 does not appear to have expressed specific concern about the manner a current injury was listed. It found fatal what it determined to be an untimely investigation of previous reports of injuries. In overturning discipline of a 30-day suspension, PLB No. 2333 said:

> "The record reflects that no investigations were ever held concerning the fifteen (15) previous recorded injuries. Hence, an untimely investigation and not a review took place. No one could reasonably be expected to remember the details of incidents spread over a 25 year span. This fact speaks for itself. Carrier's right to review does not give it a right to harass. Such action reflected a prejudicial attitude."

In the instant case, there is likewise no probative showing that charges of negligence or responsibility had been filed against

Claimant for the previously reported injuries. Accordingly, this Board finds no reason not to follow PLB No. 2333 in holding it untimely and improper for Carrier to have investigated these past incidents at a later date or, namely, the hearing on April 1, 1982.

Contrary to Carrier contentions that the hearing officer provided only for a review of circumstances related to each past injury, the Board finds that the transcript evidences that the hearing went far beyond a review of the Claimant's record. For example, a Terminal Trainmaster, Mr. Robert J. Cooper, was questioned by the hearing officer as to what knowledge he had relative to Claimant's reported injury of August 1, 1970, i.e., that when Claimant could not gain entry to a caboose as a result of his key not fitting the door lock and in attempting to open the cupola window to gain entry to the caboose he sprained a muscle in his lower back. Terminal Trainmaster Cooper, in addition to reciting the contents of a CT-37-T report dated August 4, 1970, was permitted to offer testimony that he was a Yardmaster on the date of such injury. He said that new locks had been applied to cabooses and that while Claimant did subsequently obtain a new key fro him that he did not know of any reason as to why Claimant did no seek to obtain the key prior to attempting to open the cupola window of the caboose.

There is no indication on the CT-37-T to show that Mr. Cooper had been involved in the incident as a Yardmaster. The CT-37-T also does not show that there had been a change in locks or keys for caboose doors. The CT-37-T report, as concerns the question of keys, simply says: "Andray's key would not fit door of his caboose and he sprained back as he attempted to open locked cupola window." Moreover, the CT-37-T, which had been prepared over the signature of then Superintendent R. E. Beltz, identified Claimant's supervisor as General Yardmaster R. W. Onnenga. It made no mention of Yardmaster, here Terminal Trainmaster Cooper, as being Claimant's supervisor.

In this same connection, when Terminal Trainmaster Cooper was asked by the hearing officer whether there are any Operating Rules which were in effect at the time of this August 1, 1970 incident that were applicable under the circumstances involved, he proceeded to quote into the record the context of Safety Rules A, B, C, D, G, H, and 1051, and General Rules A, B, M, 108, and 448 as rules that he found applicable. Again, the CT-37-T report of the August 1, 1970 injury included no mention whatsoever of any Safety or Operating Rules having been applicable or, for that matter, violated by Claimant.

Although the hearing officer would assert that it was not the purpose of having the company witness place various Operating and Safety Rules into the record so as to establish that Claimant had violated such rules at the times in question, such a contention by the hearing officer is disproved by the manner he thereafter

proceeded to examine Claimant. For instance, in questioning Claimant rather extensively about the manner he came to sustain injury on August 1, 1970, the hearing officer referred to the numerous rules cited into the record by the Terminal Trainmaster and asked Claimant: "If you were exercising appropriate care to avoid injury to yourself when you were trying to open this cupola window, can you explain for the transcript how you managed to get injured in this operation?" We think this line of questioning went beyond a review of the record and into an investigation of culpability, or a matter that should have been considered by the Carrier at the time of the incident and not some 12 years later. This is even more evident in view of the Claimant here asserting that it was his Conductor at the time who had suggested he climb to the cupola after their keys were not found to fit the caboose door and that he was not aware of any notice having been posted that there had been a change of keys or locks on caboose doors.

The Board's observations as above are not intended in any way to imply that testimony of Terminal Trainmaster Cooper or Claimant is other than creditable; these comments are only to show that the hearing officer had permitted the introduction of evidence that went beyond the review of past records so as to lend support for the Carrier contention following the April 1, 1982 hearing that 19 of the injuries were avoidable and that Claimant be recognized as a hazard to himself, his fellow employees and a liability to the Carrier.

We think it also worthy of note here that the referenced CT-37-T reports are internal company documents. They are unlike reports of personal injury which are required of an employee and whereby the contents of such report are reviewed with a carrier supervisor or officer. Here, no probative support has been shown to hold Claimant had been fully aware of the nature of the comments placed on the CT-37-T reports. As one Carrier witness stated at the company hearing: "[Form CT-37-T] is a company memo for the purpose of reporting from one department to another, or one location to another."

As concerns that part of the charge related to the most recent injury of February 11, 1982, this Board finds that the hearing officer, as protested by the Organization, used numerous leading questions to have company witnesses respond in a desired manner. This was prejudicial to a fair hearing. It had the hearing officer become a prosecutor instead of a trier of facts both for and against Claimant.

The Board is also not persuaded from the record that there was sufficient just cause to hold that the injury could have been avoided had Claimant exercised greater caution or made a decision to use ice creepers. There is conflicting testimony as to the ground surface, lighting, and walking conditions at the time of the incident. Moreover, as concerns Carrier's argument that had Claimant worn ice creepers that they may have prevented the slip

and subsequent injury, it was developed at the hearing that use of ice creepers is not a mandatory requirement, but subject to an employee's personal judgment. In this respect, since the Trainmaster who investigated the site of the injury admitted that he had not found it necessary to wear ice creepers, it is difficult to comprehend it being an exercise of poor judgment for Claimant to have determined that existent conditions did not call for the use of ice creepers.

Under the circumstances of record, the claim will be sustained and the Carrier directed to compensate Claimant for time he had been held out of service.

AWARD:

Claim sustained.

Robert E. Peterson, Chairman
and Neutral Member

Arthur R. Lane, Jr. DISSENT
Arthur R. Lane, Jr.
Carrier Member

Peter L. Patsouras
Organization Member

Roanoke, VA
July 29, 1988