PUBLIC LAW BOARD NO. 3530

Award Number: 82
Case Number: 82

PARTIES TO DISPUTE

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

AND

NORFOLK AND WESTERN RAILWAY COMPANY

STATEMENT OF CLAIM

Claimant, R. Turner, Jr., P. O. Box 814, Waverly, VA 23890, was dismissed on September 30, 1985 for alleged responsibility in connection with unsafe work practices that resulted in injuries. Claim was handled in accordance with Railway Labor Act and agreement provisions. Employes request he be reinstated to service with pay for all lost time with vacation and seniority rights unimpaired.

FINDINGS

Claimant entered the Carrier's service on July 27, 1981.

By letter dated July 8, 1985, Claimant was directed to attend a formal investigation regarding his unsafe work practices as evidenced by eight injuries since his hiring. The investigation was held on September 13, 1985. By letter dated September 30, 1985, Claimant was dismissed based on the findings of that investigation.

The issue to be resolved in this dispute is whether Claimant was

dismissed for just cause under the Agreement; and if not, what should the remedy be.

Claimant has sustained eight personal injuries during his term of service. The Carrier did not conduct formal investigations of the accidents in which Claimant was involved. He has been cited for eight safety violations and has been counselled three times regarding his unsafe work practices. When compared to the five employes hired immediately before him and the five hired immediately after him, Claimant was found to have a sustained 530% more injuries than the average of those employes and to have lost 3000% more time than the average of that group. Claimant has accumulated ten times the average number of rule violations of each employe in the group and of the group, the majority have not been counselled as Claimant has regarding rule violations.

When an accident occurs, a form CT-37 is completed reporting the accident and the recollection of those involved or with information relative to the accident. If possible, it is completed contemporaneously with the incident.

The position of the Organization is that Claimant was dismissed unjustly citing deficiencies in both procedure and the merits.

As to procedure, the Organization maintains that the Carrier did not proceed against Claimant in a timely fashion (i.e. 30 days from when the Carrier first "had knowledge" of the offense). The Organization contends

that the Carrier "had knowledge" of each accident at the time it occurred (based on the fact that forms CT-37 were filed). Those dates are the point from which the time for bringing the charges should run. Based on those dates, the Organization contends that the Carrier's charges are untimely.

On the merits, the Organization contends that the Carrier has not met its burden of proof. The Organization maintains that since the Carrier neither investigated the accidents in which Claimant was involved when they occurred nor preferred charges, it has never established his responsibility for the accidents. The Organization further asserts that the Carrier has not met its burden of proof because the mere fact that Claimant has injured himself does not prove he was at fault or in any way responsible and to discipline him based on this record is to act on "mere suspicion, assumption and argument."

The position of the Carrier is that Claimant was dismissed based on culpability of the offense charged and that he received a fair investigation within the provisions of the Agreement.

The Carrier maintains that Claimant's offense was ongoing in nature. Thus, the time for filing charges should not have begun to run after any particular accident or event. The "trigger" was the accident of June 27, 1985 and charges were brought within 30 days of that event. Moreover, the Carrier cites Award 47 of this Board to prove that examination of an employe's prior record is "not only relevant, but essential" in a case such as this. In brief, the Carrier contends that only the cumulative set of

circumstances over time can prove the unsafe work practices.

The Carrier also maintains that it has conclusively shown Claimant's guilt as charged. Specifically, the Carrier cites Claimant's "chronic pattern of laxity, carelessness and negligence over a short period of time" as exemplified by his eight injuries, eight safety violations and three instances of counselling. Likewise, the Carrier points to the statistical comparison of Claimant to other employes hired about the same time he was to show that he has been involved in a disproportionate number of accidents. Similarly, the Carrier asserts Claimant admitted he "might be accident prone."

The Carrier also examines each of Claimant's accidents and compares his testimony to the description of the accident in the CT-37. In each instance, the Carrier argues that Claimant's testimony is an embellishment or falsification because it is inconsistent with the CT-37. Based on this, the Carrier rejects Claimant's explanation that his numerous accidents and injuries were the result of the negligence or carelessness of someone other than himself. Further, the Carrier notes that the version of the facts in the CT-37s is more reliable than Claimant's testimony at the investigation because the CT-37s were made at the time of the incident and, indeed, were reviewed by Claimant at the time.

Finally, the Carrier maintains that it was not arbitrary or capricious in disciplining Claimant and that the dismissal is fully warranted because of its obligation to both employes and the public to maintain a safe

operation. The Carrier contends that Claimant either cannot or will not work safely.

After review of the entire record, the Board finds that Claimant was dismissed for just cause under the Agreement and that this claim must be denied.

Turning first to the procedural aspects of this matter, the Board finds that the charges were brought in a timely fashion and that the Organization's allegations that the charges were barred by the running of the 30 days is without merit. The Carrier is correct in its assertion that the Claimant's offense is ongoing; more precisely, the Claimant's offense is the chain of events, not the individual incidents. Indeed, to have brought the charges based on one event might not have been sufficient. The charge dictates this type of long-term evidence. This Board has held that "A continuous record of accidents and unsafe work practices need not be tolerated by Carrier."

In Award No. 1 of P.L.B. 542, Arbitrator Seidenberg held:

> Of necessity, a considerable period of time must pass before a Carrier can make an effective and meaningful judgment as to whether a given employe has evidenced or displayed a propensity for incurring injuries, which indicates either an inability or a disregard to appropriate operating or safety rules. The Carrier is entitled and even required to determine whether it can permit such an employe to remain in its service in order to protect and safeguard the employe, his fellow employes, its property and the property entrusted to its custody as a common carrier.
>
> The Carrier after fifteen years of this sort of experience can properly determine that an employe, who has been involved in

> twenty-two incidents resulting in personal injuries, is an accident-prone employe whom it cannot afford to retain in its employ.

Not only has Claimant been the subject of numerous accidents and injuries, but his rate of accidents and injuries has been far in excess of the average for his type of work. The statistical evidence introduced by the Carrier is admissible and persuasive on this point. As Referee Daugherty stated in First Division Award 20438:

> Evidence suggesting accident-proneness would include a rate of accident frequency and/or severity that is significantly higher for said employe than the rates which in the light of past experience might reasonably be expected of him.

As to the question of Claimant's responsibility in the incidents, the Carrier has established by substantial credible evidence in the record that Claimant's explanations for his various accidents are not as credible as those in the CT-37s and that Claimant's negligence or carelessness led to his frequent injury. Claimant was counselled repeatedly on this point but was either unwilling or unable to alter his behavior. The simple fact is that Claimant continued to injure himself and to exhibit unsafe work practices.

It is well settled that the cumulative record of unsafe conduct can serve as the basis of dismissal. Claimant's pattern of performance is similar to that which led Neutral Yagoda to conclude in Award No. 100 of P.L.B. 550:

The nature of the infraction in itself merits a serious disciplinary reaction by Carrier. However, Carrier adds a second charge--that of cumulative record of unsafe conduct, contending that the total record justifies a conclusion that Claimant is an unsafe employe who has consequently forfeited the right to any further employment. In support thereof, Carrier submits a record of sixteen personal injuries reported by Claimant over a period of his employment, in two of which he was penalized for unsafe behavior and an additional eleven instances in which he was found by Carrier to have violated safety rules and penalties applied thereunder.

Considering the record as a whole, we believe that Carrier had substantial grounds for reaching its conclusion that a pattern of recurring unsafe behavior was present which posed great risks to this employe, to others and to operations, if Claimant were to be retained in service.

This is the pattern the Board finds here. The whole record shows that Claimant worked in an unsafe fashion. The Carrier demonstrated a reasonable attempt to counsel Claimant on this subject, but he did not change his work habits. The Carrier cannot ignore its obligation to the public or its employes and was therefore fully warranted in dismissing Claimant.

AWARD

Claim denied.

Nicholas H. Zumas, Neutral Member

Carrier Member

Organization Member

Date: JUNE 12, 1989