NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 5015

BROTHERHOOD RAILWAY CARMEN OF
THE UNITED STATES AND CANADA

and

SOUTHERN RAILWAY COMPANY

AWARD NO. 1
DOCKET NO. 3

John C. Fletcher, Chairman & Neutral Member
R. P. Wojtowicz, Organization Member
Shari E. Cohen, Carrier Member

Hearing Date - November 1, 1990

STATEMENT OF CLAIM:

Claim of Carman F. A. Nickels, Andover, Virginia, that he was unjustly dismissed from service on September 5, 1989. Accordingly, that the Southern Railway Company and/or its parent corporation be ordered to restore Carman Nickels to service with pay for all time lost, vacation and seniority rights unimpaired and all health, welfare and retirement premiums paid in full.

FINDINGS:

Public Law Board No. 5015, upon the whole record and all of the evidence, finds and holds that the Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and the Board has jurisdiction over the dispute herein; and, that the parties to the dispute where given due notice of the hearing thereon and did participate therein.

When this matter was heard, on November 1, 1990, the Chairman & Neutral Member issued a Bench Decision providing:

> Upon study of the record and hearing the argument of the parties, it is determined that permanent dismissal of Carman F. A. Nickels, Jr., cannot be upheld. Accordingly, it is ordered that he be restored to service, consistent with Carrier's return to work procedures. In due course a final Award and Order will be issued setting out the reasoning of this decision and additional remedies, if appropriate.

The reasoning behind this Bench Decision and the additional remedies provided are detailed below.

* * * * * *

On September 5, 1989, Claimant was summoned to a preliminary investigation on a charge of "persisting in unsafe work practices." As a result of this investigation Carrier's Mechanical Foreman immediately dismissed Claimant from all services with the Southern Railway Company. A formal investigation was requested and on September 7, 1989, Carrier notified Claimant that:

> "As mutually agreed ... the formal investigation to determine your responsibility in your persisting in unsafe practices when at 8:30 a.m., August 30, 1989, you dropped an empty acetylene tank on your left big toe; also, your persisting in unsafe practices as listed below:
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> | | |
> |---|---|
> | January 12, 1989 - | Stepped on object under water, slipped and fell, striking hand on rail. |
> | May 7, 1986 | Assisting in replacing broken coupler, caught index finger between cross-key head and No. 4 wheel. |
> | August 14, 1984 | Stepped in hole, turned left ankle. |
> | September 9, 1983 | Replacing piston in brake felt pain in upper back. |
> | February 7, 1982 | Moving couplers on material platform, strained muscles right abdomen. |
> | January 24, 1981 | Dirt on bank gave away, spraining left knee. |

February 20, 1980	Disconnecting brake rod to truck, struck left hand with ball peen hammer.
June 24, 1976	Repairing broken train line foreign object in eye.

has been set for September 14, 1989.

At the September 14th investigation a Carrier witness reviewed each of the items noted in the charge and discussed the accident reports submitted at the time of each incident. From this data he offered opinions and conclusions that Claimant persisted in unsafe work practices. Of interest is the summary Carrier's witness made at the conclusion of his direct questioning, which in his own words depicts the entire sense of his remarks:

> Mr. Nickels' career record shows that he has been injured nine times since entering service with the Southern Railway on January 5, 1976. He has injured himself eight times in the last nine years. In each incident, Mr. Nickels clearly injured himself and the company did not have contributory part in the incident. In eight of the last eight injuries, an unsafe act performed by Mr. Nickels contributed most directly to these incidents. Also, during this time period he has been counseled four times concerning the number of his injuries, potential for serious injury, and that he needed to make an improvement on his safety performance. But, he has not shown any sign of improvement and persists in unsafe practices. In fact, twice after receiving a safety counselling, his safety performance declined even further by him injuring himself in less than six months after a counselling session. And, I - as noted on July 6, 1983, he received counselling session then on September 9, 1983, he was injured. On March 2, 1989, he received a counselling session and on August 30, 1989, he injured himself again.
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> ...
>
> Mr. Nickels has a rate of accident frequency that is significantly higher than the rates which is reasonably expected of him. He has been injured 9 times in 13 working years for a career injury rate of .6752 which is .459 over the career injury rate of Andover Shop.

...

Mr. Nickels has an injury career rate of 212% over the average career injury rate at Andover Shop. He has a career - he has a ten-year injury 309% over the ten year average at Andover Shop. He has a five-year injury rate of 300% over the average at Andover Shop. And, he has a one-year injury rate of 2,832% over the injury rate average at Andover Shop for one year. As these figures show, Mr. Nickels' safety performance has not gotten any better, but has declined over the years. He has been injured 3.12 times more than his peers at Andover Shop, five people above and five people below him on his seniority roster, he has a career injury rate of 104% of the average of this seniority roster. He has a ten-year injury rate 125% over the average of this seniority roster. A five-year injury rate of 174% over the average of this seniority and a one-year injury rate 1,000% over the average of this seniority roster. If you compare this to the division, Mr. Nickels has a career injury rate 278% over the injury rate for this division. A ten-year injury rate of 702% over the ten-year injury rate average for this division. His five-year injury rate is 687% over the five-year injury rate for the division. And 3,576% over the division injury rate for this year. Norfolk Southern is not being unreasonable when we would expect Mr. Nickels to work at the same injury rate average as his employees, as his peers. We don't expect him to work no safer than what we would expect his peers to work and as these figures demonstrate, he is not working as safe as his peers. Norfolk Southern has an obligation for the safety of its employes and we view it with the utmost seriousness. We consider persisting in unsafe practices a major offense. After reviewing Mr. Nickels' record and considering the seriousness of his offense, persisting in unsafe practices, I, as the Charging Officer, still confirm that Mr. Nickels should be dismissed from services with Southern Railway, Norfolk Southern Corporation.

There are at least seven comments which must be made on the above remarks, but first it is necessary to deal with the original assumption that Claimant, in his employment history, was involved in nine instances where some type of report was made on an injury or suspected injury and this establishes, as fact, that he engaged in unsafe practices. At the outset, it should be noted, that none of the instances were made the subject of an investigation at the time of the occurrence and none resulted in

any type of discipline. Carrier's entire case is based on a tabulation of injury reports taken from its files. This tabulation is then applied to statistical models, of uncertain foundation and of questionable validity, and targeted at a recently injured individual to support a nebulous charge of persisting in unsafe practices simply because an injury incident occurred. This, by any standard, is an inadequate basis to pursue disciplinary action.

Look, for a moment, at the oldest item Carrier cited in support of its "persisting in unsafe practices" charge, the June 24, 1976 "foreign object in eye" matter. On this item Carrier's witness testified from a report completed thirteen years earlier. He stated:

> **In reviewing Exhibit 1, Mr. Nickels was repairing a broken train line on caboose and a foreign object blew in eye while performing this job. Mr. Nickels did not perform his job safely for he was injured.**

The report, from which the above conclusion was drawn, does not indicate, that Mr. Nickels was not performing his job safely. In fact, the report does not even indicate that it was Nickels who was the mechanic making the repair at the time. A more thorough investigation into the incident, one which went beyond tabulation of a report, would have disclosed that a yard crew placed a caboose, with a broken train line, in front of the Carmen's shack. Carman R. J. Wells picked up a hammer and chisel from in front of the shack and started to "chip out a broken nipple." A speck flew off and hit Nickels, who was standing a "good five feet back," in his right eye. At the time safety glasses were not required to be worn at work. Additionally, no time was lost as a result of the incident. Thus, it can be seen from the facts involved in the incident, that on the basis of two incorrect assumptions, Carrier's witness determined that Nickels did not work safely and that this failure was the cause of his injury.

On the second item listed, the February 20, 1980, matter of being struck in the hand with a hammer, Carrier's witness stated:

> **In reviewing that accident report, Mr. Nickels clearly injured himself by striking himself in the hand with a ball peen hammer. In doing this he used poor judgment.**

The double standard followed by the Hearing Officer in

the conduct of the investigation manifests itself in his handling of Claimant's attempts to explain the incident. Notwithstanding that Carrier's witnesses expressed an opinion that Claimant used poor judgment in this incident, which was accepted without comment, the Hearing Officer interrupted Claimant's answers of explanation on how the incident occurred with:

> We don't have opinions. Established fact, -
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> ...
>
> - so, therefore, restate that question because he said in his opinion, well, we want facts.

The third incident is really bizarre. Carrier's witness submitted the accident report. His testimony noted that the "Unsafe Act" box was checked with a notation that Claimant did not secure firm footing. But again, no effort was made to determine what actually occurred in the incident. The "Unsafe Act" box was checked, so the witness assumed that Nickels was guilty of an unsafe act.

The explanation of this matter is that Claimant was sent to St. Charles to work on a derailment. At the time of the incident he had been on duty seven hours. He was in the process of assisting in the rerailment of a car that had both ends off the ground. At one end a machine operator was lifting the car with a payloader "big enough to pick up a loaded coal car." Grievant was assigned to work the other end and hook a chain between the side frame and the payloader. As he was about to go under the car to hook the chain the payloader dropped the car, or it slipped off, and Claimant, "fearing for his life" scrambled into the clear. As he went down the embankment lose gravel or cinders gave way and he slipped and twisted his knee.

The February 7, 1982, item, "strained muscles right abdomen," is also of interest. Perhaps, it should be stated, "of unique interest." Carrier's witness testified that Grievant used poor judgment in that situation. However, he ignores mentioning that the next day Claimant had an emergency appendectomy. Reasonableness considerations would dictate that the pain Claimant as experiencing at work on February 7th was caused by his appendix and not the result of an unsafe work practice. In must be noted, too, that on the report reviewed in this instance, by Carrier's witness, the the "Unsafe Act" box was not checked "Yes," however, no mention of this was made in mitigation.

On the matter of upper back pain, September 9, 1983, there is mitigating evidence that from time to time Claimant

experienced short lived back spasms. The incident report on this item had the "No" box checked for "Unsafe act."

On the matter of stepping into hole, August 14, 1984 and January 12, 1989, there is evidence that dirt washed away and that Claimant was required to work in an area of enkle deep water to do his job. However, the reports filed on each do not indicate persistence in unsafe work practices.

From the above it can be seen that a fair look at the incidents will not, per se, establish that Claimant engaged in any unsafe work practices in any of the injuries included within the charge. Other Boards, reviewing similar type cases involving component Carriers to the Norfolk Southern system have commented on charges connected with "persisting in unsafe practices." In Award 11, PLB 2333, the Board concluded:

> "The record reflects that no investigations were ever held concerning 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 Award 7, PLB 3452, the Board, after quoting the above from PLB 2333, stated:

> In the instant case, there is likewise no probative showing that charges of negligence or responsibility had been filed against Claimant for the previous 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 of April 1, 1982.

The conclusions reached in Award 11, PLB 2333 and Award 7, PLB 3452 are not inappropriate. When read alongside Award 428-A, PLB 3561, holding:

> Carrier's proof in this instance consisted of documents of previous accidents without details of the accidents or the fault alleged on the part of the employee and a submission

> of General Operating Safety Regulations. This proof was not sufficient to justify a finding that Claimant was accident prone.

they become persuasive authority here.

Before turning to the lengthy testimony quoted at the beginning of this Award and Carrier's statistical concept demonstrating persistence in unsafe practices, one final Award should be mentioned. In Award 8, PLB 4859 it was held:

> Clearly, the mere fact that the Claimant sustained an on duty injury does not automatically infer negligence and/or careless conduct. The Carrier did not offer any evidence which would have supported its conclusion that the Claimant failed to exercise reasonable care on the date of his injury.

which fits our situation four square. This record leaves no doubt that Carrier assumed that because an incident was reported Claimant automatically engaged in careless conduct or was negligent. Carrier did not offer any evidence to support such a conclusion.

On the testimony of Carrier's witness, quoted above, we indicated that we had at least seven points to make. The first concerns the remark:

> In each incident, Mr. Nickels clearly injured himself and the company did not have contributory part in the incident.

This statement is completely false. Take for instance the incident where the car involved in the rerailing operation was dropped by the payloader while Claimant was underneath attempting to hook a chain between the lifting unit and the side frame of the car. Surely the operation of the payloader by someone other than Claimant, (the Company in other words), contributed to the incident.

A second concerns the statement:

> In eight of the last eight injuries, an unsafe act performed by Mr. Nickels contributed most directly to these incidents.

We would ask, "What unsafe act contributed to the emergency

appendectomy incident?" Also, in several the box "Unsafe act" was not checked "Yes" and in some it was checked "No." Thus, the statement of Carrier's witness is just not credible and generates doubts about his entire testimony.

A third concerns the statement that after counselling Claimant's safety performance declined further. This conclusion is based on the fact that within six months after each an incident was reported. The reporting of an incident does not automatically indicate a decline in safety performance. We know of no situation where discipline has been upheld on the misplaced assumption that an injury is an automatic indication that unsafe practices were involved.

The fourth point concerns Carrier witness testimony that Claimant's rate of accident frequency is significantly higher than a rate which is reasonably expected of him. Our problem with this is that nowhere do we find an explanation of what is reasonably expected. Also, the data does not distinguish between incidents at which fault was correctly assessed and incidents in which no fault could be placed, or perhaps more important, was not even attempted because the matter was just to trivial to even consider fault but was required to be reported in any event. And, the seriousness of incidents being compared to others is not shown. On this Carrier every incident, no matter how minor, must be reported. Accordingly, employees who diligently comply with this requirement, will according to Carrier logic, generate a larger number of incidents than employees who, for whatever the reason, ignore or overlook the requirement.

In this regard attention is directed to NRAB Second Division Award 6306:

> **A conclusion that a person is accident prone is not logical or reasonable. The mathematics of Possibility and Probability enter into this matter. It is possible that nobody in the carrier's service would have an accident for a year, although not probable. It is equally possible that one person in the employ of the carrier at this location would have all of the accidents in one year. This statistical and mathematical concept would not even infer that the person having those accidents had violated the safety rules.**

> Employees can be discharged by the carrier violation of safety rules. The analysis of his injuries by the carrier, will not be considered, as it is opinion, and not evidence. The fact of injuries is admitted, but the cause must be considered and proved.
>
> Claimant was discharged because of statistical information, and not for violation of safety rules.

The sixth point concerns peer comparison. We are not persuaded that drawing five above and five below on a particular seniority roster is a valid peer comparison, or if such comparisons have any value in such situations at all. What is actually being attempted is the creation of a relevant statistical universe. To do this it is necessary to establish that the product of the creation is actually the peer of the subject. An arbitrary measure against ten others on a seniority roster, by itself does not do this. It must be demonstrated that the ten are engaged in the same work. For example, a Carman Foreman could be within five names of a Carman mechanic but his work would not be an appropriate comparison as a peer. The same would be true in the case of a Carman inspector and a Carman mechanic.

Moreover, a pure statistical approach to this matter is, on its face suspect. In Second Division Award 9832 it was held:

> However, that Award [3-20438], among many does not support a purely statistical approach to proving the charge of accident proneness. 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.

which was followed in Award 9, PLB 4859.

Finally we should like to comment on the conclusion stated by Carrier's witness that:

> Norfolk Southern is not being unreasonable when we would expect Mr. Nickels to work at the same injury rate average as his

employees, his peers.

"Average" is the buzz word here. With all of the statistical data this witness developed in preparation for Mr. Nickels' investigation it is a wonder that he failed to recognize an inherent characteristic of "average." Whenever you have an average you have as many above the average as fall below. In this matter then, is each Carman above the average subject to termination because of being above? If this occurs, one at a time, all except the last employee left in the facility would be fired because each time any employee listed above the average left, the average would be lowered. In the process of elimination each remaining Carman would become statistically more accident prone simply through the process that one with above average statistics was deleted from the sample without actually becoming involved in any additional incidents.

Another problem with average is what is included and what is excluded. Why was the line drawn at five? Why not ten or two, twenty or the entire facility? It is a well understood fact of statistical development that measurement parameters can, and often times are, used to slant the result to support a preconceived conclusion. In this regard one is reminded of recent Pickup truck commercial which contended that Chevy out sold Ford in Ford County, Illinois. This was technically correct in one brief 28 sales period, however, for the entire modal year Ford outsold Chevy.

Accordingly, on consideration of the entire record, it is the conclusion of the Board that Claimant was not afforded a fair and impartial investigation. One item of manifest prejudice has been cited above - the conduct of the Hearing Officer in letting Carrier witness express opinion but insisting that the Claimant express no opinion. Another is the testimony of Carrier's principle witness stating as fact certain items which indeed were not fact and entering conclusions which were not supported by any evidence whatsoever. Other prejudicial items could be cited with ease, however, because the Board is not reversing the discipline assessed on technical grounds, they will not be detailed, which would only add to an already overly long decision.

The charge investigated was "persisting in unsafe practices." Carrier was obligated, at the investigation, to develop evidence to support the charge if any discipline was to be assessed. Evidence supporting the charge was not developed to the satisfaction of this Board. What Carrier attempted to do was to list past incidents and from this listing develop an unsupported assumption that Grievant engaged in unsafe practices.

More is required. Considerably more is required. When Carrier charges that a particular incident is within a pattern of an unsafe work practice it must demonstrate this result with evidence. It cannot expect the simple existence of the incident, without more, to support this type of charge.

Carrier's statistical development is also found wanting. More is required than a mere numbers count, which, obviously, seems to be the situation here. Carrier looked at certain raw numbers and developed certain percentages from these numbers. The percentages tell nothing except percentages. As stated in Award 9832, supra, a pure statistical approach is meaningless.

And when that notion is applied her, it does not become anymore meeningful to project percentages out over various periods of time, like Carrier's witness testified about, because all that is really being accomplished is repetition of a fallaciously unsound premise, in an effort to correct a defect.

Accordingly, on the entire record this Board must conclude that Carrier was without a basis to administer discipline of dismissal on the contention that Carman F. A. Nickels, Jr., persisted in unsafe work practices. Carman Nickels has been returned to service as a result of our Bench Decision dated November 1, 1990. In addition he shall now be compensated for all wage losses sustained during the time that he was out of service.

A W A R D

Claim sustained. Payments required under this Award shall be made within 30 days of the date two Members of this Board sign this Award.

John C. Fletcher, Chairman & Neutral Member

Shari E. Cohen, Carrier Member

R. P. Wojtowicz, Organization Member

Signed at Mt. Prospect, IL., this 16th day of April 1991.