ACCIDENT PRONE--CLAIMANT EXPERIENCED 22 PERSONAL INJURIES IN APPROXIMATELY 17 YRS.' SERVICE

Award No. 1
Case No. 1

PUBLIC LAW BOARD NO. 542

Parties: United Transportation Union
and
Pittsburgh, Chartiers and Youghiogheny Railway Company

Statement of Claim:: "Request for reinstatement with full pay for all time lost by claimant S. G. Wisniewski from date of dismissal (September 11, 1968) until restored to service with seniority unimpaired and all vacation, insurance, promotion rights, if any, and pension rights returned to former status."

Discussion: The operative rules in this case are the following which state in part:

"Article 5 - Investigations"

"(a) So far as practicable, Yardmen will be notified to report immediately after having finished work or just prior to reporting for work. Yardmen required to report under above provisions or during layover time to give information at investigations or hearings where they are not at fault, will be paid for time so held..."

"Article 6 - Trial of Yardmen and Switchtenders"

"(a) No Yardman or switchtender will be suspended, reduced, changed from run or discharged without just and sufficient cause and will be given a fair and impartial trial within fifteen (15) days from date of offense.., and if found not guilty, will be paid such wages as he would have earned during time of suspension; and if found guilty and he is suspended or discharged and it is afterwards proven that he is not guilty, he will be reinstated and paid for time lost. Notice of suspension, discharge, etc., shall be in writing, stating time of suspension together with charge. Yardmen and switchtenders will not be held off duty pending minor investigations.

"(b) Trainmen or yardmen, working under the provisions of this agreement, will be notified in writing, the nature of the charge, which will contain full and clear statement of the charges, and may have the assistance of any member or members of the committee, if they so desire.

(c) ...

(d) ...

The Claimant was a trainman with seventeen years seniority at the time of his dismissal from service of carrier. On August 20, 1968 the Claimant suffered an injury to his right shoulder while attempting to operate a cutting lever. An Investigation was held on August 30, 1968 in connection with the August 20th injury. A Trial was held on September 3, 1968 and on September 11, 1968 the Claimant was notified that he was dismissed for: (1) violating General Rule 1 of the Carrier's Book of Rules requiring "Employees must exercise care to avoid injury to themselves and others" and (2) being an unsafe employee as evidenced by twenty-two personal injuries since his employment in 1951. At the September 3, 1968 Trial, the Claimant did not answer any questions or make any statements at the direction of his representative.

Carrier's Position

The Carrier contends that there is sufficient competent evidence to support both charges levelled against the Claimant. It notes that the claimant did not exercise proper care in attempting

to operate the cutting lever. The Claimant had been a Trainman since 1951, and it is a standard and common function for a Trainman to operate cutting levers. He should have been aware that at times cutting levers can be hard to operate and on occasions may be defective. On these occasions extra care has to be taken to avoid injury. The evidence shows that, although the Claimant had difficulty in operating the cutting lever, he, nevertheless, made repeated efforts to operate the lever, resulting in his shoulder injury. The Claimant's personnel record shows that he has sustained six injuries from 1955 to 1967 while attempting to operate cutting levers, opening knuckles, adjusting couplers, releasing hand brakes or throwing switches. This past experience should have put him on notice of the great care that has to be exercised to avoid injury in train operations.

Concerning the second charge, the Carrier states that, while it would not have dismissed the Claimant solely on the first charge, when his total injury record is analyzed, there can be no reasonable doubt that the Claimant was an unsafe employee. He had suffered twenty-two injuries since the initial date of employment. He had lost considerable time away from employment and had received direct or court settlements in seventeen of these injuries. The Carrier was now facing a $50,000.00 court suit for injuries suffered in a June 13, 1967 accident. The Carrier states that the Claimant's conduct shows a repeated pattern of injuries and there has been no improvement in this aspect

throughout his employment career. He has proved himself to be accident prone and bereft of ordinary caution in the performance of his duties. He has acted in such a way as to be a hazard to his fellow employees as well as to himself. His conduct is potentially very costly to the Carrier.

The Carrier also denies that there was anything improper in holding both an Investigation and Trial. This procedure is provided for by the collective bargaining agreement and it does not place the Claimant in double jeopardy. The Carrier is entitled to seek to ascertain facts concerning accidents and injuries in order to determine whether the Claimant should stand Trial. The Carrier concedes that it has, in the past, only used the Investigation as the forum to assess culpability and discipline - but its action cannot be construed as a waiver of a clear and unequivocal contract provision.

Organization's Position

The Organization maintains that the disciplinary proceedings were fatally defective because the Carrier placed the Claimant in double jeopardy by subjecting him to two identical proceedings for the same offense. The Carrier, in candor, must admit that the practice on this property was to hold only one proceeding, called an Investigation. An examination of the transcripts of both proceedings will clearly reveal that the Claimant was subject to two trials. There was no other basis or reason for reviewing the Claimant's past service record at the

Investigation, if the sole purpose was to develop facts about the personal injury on August 30, 1968, The Carrier's conduct at this Investigation shows that it had already prejudged the Claimant and was using every possible means to terminate his employment - just cause or not.

Substantively, the Organization states that there is no competent evidence to prove that the Claimant was guilty of any such violation resulting in personal injury. The Claimant had no way of knowing that the cutting lever was defective. He had no "X-ray eyes" to detect the faulty mechanism in its steel housing. All the evidence showed was that there was a defective cutting lever and that the Claimant was injured. This does not establish any violation of Rule 1. The Organization stresses that this Carrier employs no car inspectors and that all car inspections are made by outside carriers.

The Organization further states that employees are "dammed if they do and dammed if they do not." If they fail to report, even a minor injury, they are subject to discipline. If they do comply and report, then they are subject to being charged with being accident prone. A large measure of the accidents which occurred are due to defective equipment which the Carrier has not repaired or replaced, despite repeated protests. Railroading is a hazardous occupation and the Carrier has not cooperated to reduce the inherent risks.

The Organization states one, that there is no evidence of culpability on the part of the Claimant in the incident which

gave rise to the Investigation and Trial, and secondly, many of the incidents reported on the Claimants's service record are incidents which would ordinarily be overlooked except for the fact that the Carrier is now making a determined effort to get rid of the Claimant despite his long years of service.

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

The Board finds that, upon the record of this case, the Carrier had just and sufficient cause to dismiss the Claimant from its service. The Board must admit that the evidence is inconsequential to prove that the Claimant was guilty of failing to act with reasonable care and prudence to avoid the accident on August 20, 1968, resulting in a shoulder injury. Had this been the only charge against the Claimant, it would not have supported the disciplinary sanction of discharge.

But when the Board considers the second charge, namely, that the Claimant has been an unsafe employee since the date of his employment, it must find that the Carrier's determination, that this charge was supported by the employee service record, is not an unreasonable determination, and this total record does not brand the Carrier's finding as capricious or arbitrary. Of necessity, a considerable period of time must pass before a

Carrier can make an effective and meaningful judgment as to whether a given employee has evidenced or displayed a propensity for incurring injuries, which indicates either an inability or a disregard of appropriate operating or safety rules. The Carrier is entitled and even required to determine whether it can permit such an employee to remain it its service in order to protect and safeguard the employee, his fellow employees, its property and the property entrusted to its custody as a common carrier.

When the Board examines the Claimant's service record it finds that he has been involved between 1952 and 1967 in a substantial number of accidents arising from train operations with the exception of the incident on August 16, 1964 when a foreign object flew into his eye while riding cars in McKees Rock Yard. Many of these injuries necessitated prolonged absences from work, such as the injury on June 22, 1955, November 10, 1955, March 20, 1962, December 17, 1964 and June 13, 1967. Other injuries have subjected the Carrier to expensive litigation. The Carrier after fifteen years of this sort of experience can properly determine that an employee, who has been involved in twenty-two incidents resulting in personal injuries, is an accident-prone employee whom it cannot afford to retain in its employ. Without passing judgment on each and every item on the Claimant's service record, the weight of the record indicates that the Carrier's action was not arbitrary or unreasonable.

With regard to the procedural objections interposed by

the Organization, the Board must find that while in some instances they have merit, they, nevertheless, do not constitute reversible error. In the first place, the Carrier cannot be held to have committed material error when it followed clearly outlined and delineated contractual provisions providing for both an Investigation and Trial. It would be a strange holding to state that adherring to provisions set forth in a voluntarily agreed-upon contract, was a fatal procedural error. Conceeding that the Carrier did not always hold both an Investigation and Trial, such intermittent Carrier action cannot be held to be a forfeiture or an abolishment of clear and unequivocal contract provisions. The practice is not that prolonged and extended so as to constitute the repudiation or waiver by the Carrier of these relevant contractual provisions. The Carrier would be well advised hereafter to confine the Investigation solely to determining facts concerning the causes of the incident under investigation and omit such matters as the introduction of the Claimant's service record - but this introduction of the record was not a material error - even though irrelevant at this proceeding.

The Board must conclude, after reviewing both the substantive and procedural objections interposed by the Organization

that they do not constitute a valid basis for setting aside the discipline imposed against the Claimant.

AWARD: Claim denied.

Jacob Seidenberg

Jacob Seidenberg, Chairman and Neutral Member

G. W. Legge, Employee Member

W. J. Petrie, Carrier Member

September 21, 1970

PUBLIC LAW BOARD NO. 542

Parties: United Transportation Union and
Stanley G. Wisniewski

and

Pittsburgh, Chartiers and Youghiogheny RR Co.

This Public Law Board was reconstituted on November 21, 1973, by the National Mediation Board and the Chairman was authorized to be the Third and Merits Neutral Member of this Public Law Board, by the N. M. B.

The chronology of events both antedating and subsequent to November 21, 1973, is as follows:

August 20, 1968 - Claimant Wisniewski, a trainman then with 17 years seniority, suffered an injury to his right shoulder attempting to operate a cutting lever.

September 3, 1968 - Carrier held a duly noticed trial as a result of this incident.

September 11, 1968 - Carrier dismissed Mr. Wisniewski for having violated General Rule I of Carrier's Book of Rules, failure to exercise care to avoid personal injury on August 20, 1968, and for being an unsafe employee as evidenced by 22 personal injuries since his initial date of employment, May 10, 1951.

January 9, 1969 - Carrier's highest officer designated to hear appeals denied Organization's appeal, seeking to have Claimant restored to service.

March 10, 1970 - Parties established Public Law Board No. 542 and selected Jacob Seidenberg, Esquire, to be the third and neutral member of Board.

April 22, 1970 - National Mediation Board issued official certificate of appointment to Jacob Seidenberg, Esquire, to be the third and merits Neutral Member of the Board.

July 1, 1970 - Public Law Board convened and heard argument on the claim of Mr. Wisniewski.

September 22, 1970 - The Board, by a 2-1 vote, denied the claim, on the ground that while the charge that the Claimant had failed to act with reasonable care and prudence was not conclusively proved, the other charge,

i.e., that the Claimant had been an unsafe employee since the date of his employment, was supported by the employee's service record. It held that the Carrier had therefore not acted arbitrarily when it removed the Claimant from service on the basis that he had incurred 22 injuries between 1952 and 1967.

July 5, 1972 - The Claimant filed an appeal from this Award in the Federal Court, Western District of Pennsylvania, requesting that the Court reverse the Public Law Board and reinstate the Claimant.

February 20, 1973 - The Federal District Court remanded the case to the Public Law Board "so that the Board might receive evidence related to the accidents in which the petitioner was involved, refuting or establishing whether he is an unsafe employee."

Subsequently, the Claimant re-petitioned the Federal District to reconsider its February 20, 1973, Order and instead order the Carrier to re-instate the Claimant because the Award of the Public Law Board "lacked foundation in reason and fact and exceeds the jurisdiction of said Board."

April 13, 1973 - The Federal District Court denied the Claimant's request and ordered that the Board be reactivated for "the purpose of considering all pertinent matters bearing on the plaintiff's dismissal. A full and complete opportunity shall be afforded the parties to offer testimony related to the issue of his dismissal based on his involvement in twenty-two accidents."

October 30, 1973 - The United States Court of Appeals for the Third District denied appellant's appeal because the District Court's Order was not a final, and therefore not an appealable order.

November 29, 1973 - pursuant to the National Mediation Board's Letter of November 21, 1973, reactivating Public Law Board, the Neutral Member wrote to the partisan members suggesting that the Board reconvene on January 24-25 1974. The partisan members agreed to these suggested dates.

January 3, 1974 - The Neutral Member wrote the partisan members to send him their respective submissions, on or before January 19, 1974, which request the parties complied with.

January 24, 1974 - The Public Law Board convened and heard argument based on the respective Submissions and facts of the case. The Organization argued that the Award should be set aside because the original trial of the Claimant violated Article 6 of the then applicable Agreement in that said Trial was held more than 15 days after the last of the previous 22 accidents. The Organization also objected to the Board considering matter on the 22 accidents as being extraneous to the record upon which the discipline was based. It also contended that it was not able to analyze at this time all the data on the 22 accidents submitted. It also raised a question as to whether it was being furnished all the statements contained in the records dealing with the 22 accidents. After hearing the Organization's position, the Board issued an Interim Order granting the parties the privilege of submitting written replies by March 1, 1974, to the Submissions presented to the Board at the January 24, 1974, Hearing, with the further privilege of filing, by March 15, 1974, written answers to said written replies.

February 28, 1974 - The Carrier wrote the Neutral Member of the Board that it did not wish to file any written reply to the Organization's Re-submission.

March 1, 1974 - The Organization filed a written Answer to the Carrier's Re-submission.

March 15, 1974 - The Carrier filed its Reply to the Organization's Answer to the Carrier's Re-submission.

Carrier's Position

The Carrier contended that the Organization was in error in its procedural contentions. It stated that pursuant to the Court Orders of February 20 and April 13, 1973, it set forth additional documentation to prove that its dismissal of the Claimant was not arbitrary or unreasonable, and that the record shows its justification for dismissing the Claimant as an unsafe employee.

By way of preliminary statement, the Carrier stated that the very number of accidents in which the Claimant was involved was significant in

and of itself. The Claimant had 23 personal injuries in 17 years of employment. The nearest employee in terms of injuries had 12, which were spread out over 22 years of employment. The Carrier noted that there were 12 men hired prior to May 10, 1951 (Claimant's hiring date), with an aggregate of 396 years of service, who collectively suffered 63 accidents. These 12 employees had an average of 5.15 per man over a 33-year span, or .16 of an accident per man per year, or one accident every six years.

The Carrier further noted that 26 men were hired subsequent to May 10, 1951. Collectively they sustained 78 accidents. The average length of service for these employees was 12.2 years. Using the same averaging data, the average was approximately one accident every two years.

The Claimant averaged 1.3 accident each year.

Turning to the specifics of the Claimant's accident record as disclosed by its files, the Carrier stated that two or three of the Claimant's injuries could be properly classified as true "accidents" such as foreign objects flying into one's eyes, but the balance of the 23 accidents demonstrate carelessness, lack of concentration, and sloppy work. The Carrier summarizes the Claimant's accident record in the following manner:

(a) July 2, 1953 - sprained left foot when he stepped on ladder lying on ground during daylight hours.

(b) June 22, 1955 - strained right shoulder while operating a cutting lever, which Wisniewski alleged was defective.

(c) November 10, 1955 - contused left hip on cabin car railing while attempting to get off after observing two cars which had been cut off coming toward him.

(d) February 19, 1957 - strained right shoulder while operating cutting levers, which Wisniewski alleged were defective.

(e) July 1, 1959 - while alighting from moving locomotive, he stepped on stone and bruised bottom of right foot.

(f) March 7, 1960 - sprained neck muscles and contused right shoulder when slipped and fell on ice and snow during daylight hours.

(g) June 8, 1960 - sprained left forearm and elbow while operating cutting lever, which Wisniewski alleged was defective.

(h) February 3, 1961 - contused right knee when struck it against guard rail on locomotive.

(i) March 3, 1961 - brushburn on head when bumped head against plate above knuckle while attempting to couple air hose.

(j) January 21, 1962 - twisted hip when he slipped on snow while stepping over Main track #2.

(k) March 20, 1962 - injured back while attempting to adjust knuckles on two cars.

(l) June 20, 1963 - injured left forearm while attempting to release hand brake.

(m) January 10, 1964 - injured left knee while walking on slag which broke loose causing fall on left knee.

(n) November 16, 1964 - injured right knee while riding a car when he stepped down, missed stirrup and bumped knee on side of car.

(o) December 17, 1964 - sprained left shoulder and right knee while in cabin car during a shifting operation.

(p) March 1, 1966 - contused upper left arm when sideswiped by moving car while standing too close to adjacent track.

(q) July 18, 1966 - aggravated neck and shoulder when he stumbled and fell while coupling and opening angle cocks.

(r) November 19, 1966 - turned right ankle when he stepped on a tin can during night hours.

(s) June 13, 1967 - strained right shoulder while attempting to throw a spiked switch.

(t) August 20, 1968 - strained right shoulder while operating cutting lever, which Wisniewski alleges was defective.

In addition the Carrier reproduced and attached to its Re-submission copies of the pertinent papers in each accident file of the Claimant.

These records represented information developed at the time of each event and were records kept in the regular course of the Carrier's business.

The Carrier also stressed the Claimant's service record showing the discipline administered to him between the years 1951 and 1968. He received five suspensions ranging from five days to 60 days, one reprimand, and a dismissal for the offense here in issue. Three of the last suspensions and reprimands were for violations of safety rules.

The Carrier contends that the records it has submitted to this Board, pursuant to the Federal Court's Orders, make it clear that this Board's original Award was proper and just and should not be disturbed.

Organization's Position

The Organization reiterated its procedural argument that since the Claimant was not tried within 15 days of any possible offense, his prior accident was not admissible for the purpose of determining the extent of discipline to be imposed, and therefore it is improper to introduce additional evidence at the Board level.

The Organization further stated the Carrier's data and information introduced at this subsequent Board proceeding consists primarily of statements and formal accident investigations. It naturally contains no material favorable to the Claimant. The accidents now relied upon by the Carrier to show Claimant's guilt occurred 21 to 27 years ago. It is unreasonable to expect the Claimant to have retained records relative to these accidents or to be able to produce witnesses to disprove the self-serving documents produced by the Carrier.

The Organization emphasizes that an award sustaining the

Carrier's position would make a mockery out of the contractual requirement that the trial be held within 15 days of the offense.

Findings: The Board has been charged with an important but limited function by the remand of this case to it by the Federal District Court. The Court took issue with the Award because the Board did not "have before it specific information relating to any of the mishaps in which the petitioner was involved....The Court said that the Board, therefore, had no evidence or basis from which it could conclude petitioner was negligent or personally responsible for accidents."

The Board was not directed by the Court to consider any evidence other than the Carrier's records pertaining to the work-connected accidents or injuries suffered by the Claimant. It is, therefore, inappropriate for the Board now to entertain the procedural objections being interposed by the Organization for the first time.

The Carrier has now submitted its records pertaining to the accidents in which the Claimant was involved. These records contain the accident reports (Form CT-93) signed by the Claimant and the medical reports furnished by a physician where one was seen. Some of these reports contain statements by fellow employees regarding the facts of the accident.

The first Report is dated July 2, 1953, and the last report covers the August 20, 1968, accident. There are 20 accidents involving the Claimant.

An examination of these 20 accident reports shows that on four occasions he injured himself while trying to operate defective cutting levers. The records indicate that the Claimant did not comply with Safety

Rule 1005 by failing to use proper methods to lift the pins when the cutting lever was not operating properly. The records show that for the June 22, 1955, accident he was absent 19 days; for the February 19, 1957, accident he lost three days; for the June 8, 1960, accident, four days, and no days for the August 20, 1968, accident.

Another example of the Claimant's lack of observance of safety rules may be gleaned by the accident report of March 1, 1966, wherein he reported that he was sideswiped by a westbound car as he was switching cars to the eastbound track. Safety Rule 1280 requires trainmen to keep a safe distance from passing cars and an experienced trainman such as the Claimant should have known the necessity for standing clear of an adjacent track that had moving equipment on it. He lost two days on account of this accident.

On June 13, 1967, the Claimant lost 124 days from work when he pulled his shoulder attempting to throw a spiked switch. His own testimony showed he made many attempts to throw this switch by the exercise of force which resulted in his pulled muscle. He breached Safety Rule 1094, and if he had only looked to see what was wrong with the switch when it did not respond to his exercise of force, he would have seen that the switch was spiked. The Carrier imposed a 30-day suspended sentence on the Claimant, which sanction the Organization did not appeal to a higher body when the initial appeal was denied.

The accident records further show that the Claimant was injured while alighting from a locomotive not wearing proper footgear (July 1, 1959) and thus bruised the ball of his right foot, causing him to lose five days from work. These records also reveal that he injured his back while

adjusting knuckles on cars (March 20, 1963), by force and "muscle," instead of using care in adjusting the drawbar. This accident caused the Claimant to lose 126 days from work. He also injured his left forearm on June 20, 1963, while attempting to release a handbrake that was hard to release. Safety Rule 1074 mandates the employee releasing the brake to use "care to keep clear of the wheel." Other accidents suffered by the Claimant suggest that he did not use proper care in avoiding slippery conditions on the ground during daylight (July 2, 1953; March 7, 1960; January 10, 1964; and November 19, 1966).

Upon a detailed review of the records maintained by the Carrier with regard to the accidents and injuries suffered by the Claimant, covering his period of employment, namely from 1951 to 1968, the Board finds that there is adequate competent probative evidence in these records to support the Carrier's decision that the Claimant was not a safe employee and whose services it could terminate without being guilty of arbitrary or capricious conduct toward the Claimant.

Having thus evaluated all the relevant data regarding the Claimant's accident record, pursuant to the Court's Orders, the Board hereby reaffirms the Award it originally rendered on September 22, 1970, and upholds the Carrier's dismissal of the Claimant.

AWARD: Claim denied and original award reaffirmed.

Jacob Seidenberg

JACOB SEIDENBERG, Chairman and Neutral Member of Board

P. N. Mansfield

P. N. Mansfield, Carrier Member

May 25, 1974

G. W. Legge (Dissent)

G. W. Legge, Employee Member

(Dissenting opinion attached)

PLB 542
Award 1

PUBLIC LAW BOARD NO. 542

Parties: United Transportation Union and Stanley G. Wisniewski
and
Pittsburgh, Chartiers and Youghiogheny Railroad Company

DISSENTING OPINION

Since my first experience in arbitration proceedings as a labor representative in the year of 1946, I have never written a dissenting opinion. This situation demands a dissenting opinion.

The District Court of the United States for the Western District of Pennsylvania in remanding this discipline case for rehearing before this Board has clearly exceeded its jurisdiction. The district court had before it a petition for review of an award sustaining discipline of dismissal imposed on the employee on the basis of a verdict in a trial conducted by the employer. The district court had a limited right of review to determine whether this Board exceeded its jurisdiction and found that it had done so. It therefore became the duty of the district court to sustain the appeal and order the employee reinstated. Instead of doing that, the district court required the employee to stand trial again on appeal and has made a shambles of the firmly established procedure in discipline cases which for reasons of fundamental fairness forbids the consideration on review of any matter not introduced at the trial itself.

The procedure adopted in this case also violates the carrier's collective bargaining agreement rules which required that charges be brought against the employee within 15 days of the offense. But here the employee was specifically acquitted of fault in connection with the August 20, 1968 episode which was the basis for the charges against him and he has in fact been dismissed for "offenses" some of which occurred more than 24 years ago. I dissent.

G. W. Legge

G. W. Legge, Employee Member