B 324-44-94-D
CTA 94-05-06AG

PUBLIC LAW BOARD NO. 5663

CASE NO. 1

AWARD NO. 1

PARTIES	BURLINGTON NORTHERN RAILROAD COMPANY
TO	and
DISPUTE:	UNITED TRANSPORTATION UNION

STATEMENT OF CLAIM: Claim in behalf of Seattle Brakeman Jihad Raheem, that he be reinstated to service of Burlington Northern Railroad and be allowed all earnings lost pending investigation, attending investigation and as a result of his dismissal until such time he again performs service in his craft, and that all mention of this incident be stricken from Claimant's personal record.

FINDINGS:

On January 21, 1994, at about 10 a.m., Claimant injured himself while throwing a switch at Longview Junction. He reported his discomfort to his conductor, but continued to work into his final terminal, Seattle, although the conductor relieved him of switching duties at Tacoma and Seattle. He did not report the incident to a supervisor or file the personal injury form, required by Carrier's rules to be filed before he left the property, until six days later on January 27; he stated on the form that the switch was unusually hard to throw, that there was no one to help him, and that he had injured his lower back. He further stated on the form that he was wearing his back support. He also filed at that time a hospital report to the effect that he was seen on January 21, diagnosed as having back sprain, prescribed medication and instructed to be off work for three days.

Carrier scheduled a formal investigation into Claimant's responsibility for violations of various operating and safety rules and Superintendent's Notice No. 5 of January 1, 1994, in connection with the incident and also into his "alleged accident proneness." The investigation was held on February 1-3, and thereafter, on February 14, Claimant was dismissed for violation of the rules and Notice because of continuing to throw the switch after he felt resistance, failure to report the condition of the switch, failure to promptly report his injury, and his accident proneness as disclosed by the investigation.

There is clearly substantial evidence to support Carrier's finding that Claimant was in violation of the rules requiring prompt reporting of the incident - his injury and the condition of the switch. We do not think there is substantial evidence to support the finding that Claimant was in violation of the various safety rules cited. With respect to Claimant's alleged violation of the Superintendent's Notice by continuing to throw the switch after encountering resistance, which was the violation most emphasized by Carrier, the Notice does not contain absolute prohibitions, but is couched in language which necessarily requires an employee to exercise his judgment in deciding whether or not to throw a switch. Employees are "required not to throw defective switches which offer resistance that could produce personal injury" (Par. 1); and "if undue resistance is met, the throw will be discontinued and no further attempts will be made . . ." (Par. 2). On the other hand, "switches found to be resistant to throw, but which can be thrown without personal injury", may be thrown but must be reported (Par. 3).

Certainly, employees may be held to the standard of exercising their judgment in a reasonable manner, but it does not follow that if an employee throws a switch and suffers an injury, he must have used bad judgment. Carrier's goal of eliminating injuries by requiring employees to exercise care in conformity with Notice No. 5 is certainly a worthy one, and it may be diligent in holding employees to the standards in the Notice; but the Notice must be applied reasonably.

In each case, the particular facts must be examined closely and will generally be the decisive factor in determining whether an employee complied or did not comply with the Notice. In this case, we cannot agree that the facts establish that Claimant had reason to believe before he threw the switch that it was defective and could produce personal injury. His conductor had thrown the switch a few minutes before without difficulty. Claimant's was the only testimony as to the incident, and he testified as follows:

> . . . the only way I knew the switch was too hard, when I pulled the switch up, it was hard to come out where you put the switch down. Once I pulled that switch up, that's when I had felt something pull on me. The switch popped itself up. I grabbed the switch and when I grabbed the switch I walk with the switch in front of me with my body trying to move the switch around. Once the switch went around, the points did not fit, I proceeded to turn around and put my weight with the switch and pull, and the switch flopped down. Once the switch flopped down then I kick the switch in the position it goes down. I proceeded to unlock, to throw the time switch, locked the time switch up and then lock the other

> switch. As I lined the switch up it popped itself and it pulled and I felt something pull itself in my back. . .
>
> Once I had lifted the switch up and had already pulled, probably injured myself then when I felt it pull, I just went on and did the remainder. It was basically closed anyway.

Claimant had no reason to believe the switch was defective before he threw it. It was not until he pulled the switch that it "popped itself up" and something pulled in his back. At that point, he had to decide if there was "undue" resistance which required him to desist under Paragraph 2. His testimony does not indicate that he felt resistance at that point, and he judged that he could continue to throw the switch without further injury, which he did. In fact, it does not appear that he suffered further injury by doing so. Under these circumstances, we cannot find that there is substantial evidence to support Carrier's conclusion that he violated the Superintendent's Order.

Claimant's failure to report his injury and the defective switch in accordance with Carrier rules justified discipline in this case; and the fact that he was disciplined by a thirty-day suspension two months prior to this incident for failure to wear safety glasses (discipline upheld by Award No. 5 of PLB No. 5516) could properly be considered by Carrier in assessing the appropriate amount of discipline. But Carrier does not assert that those two incidents justified Claimant's dismissal. Rather, Carrier asserts that dismissal was justified on the ground that an examination of Claimant's whole past record demonstrates that he was "accident prone", and was a hazard to himself, his fellow employees and the Carrier.

The evidence submitted by Carrier on the issue of accident-proneness was two-pronged: statistical evidence of the number of prior personal injuries and the time lost from work as a result; and evidence as to training, treatment and counselling received by Claimant and his attitude and response to such programs.

The statistical evidence consisted of Claimant's personal record and of a printout from Carrier's injury data base system. Although the two are not entirely consistent, it appears that Claimant had suffered some ten injuries during his 15 years of service, resulting in a loss of 531 work days, some of which resulted from aggravation of former injuries. The injuries are described as to the knee, head, ankle, eye, wrist, inhaling fumes and back, in the form of cuts, bruises, sprains, irritation and foreign substance in eye, which occurred on or beside rail equipment while Claimant was working, getting on or off, climbing etc. There is no indication that any of the injuries were caused by Claimant's negligence or that he was disciplined in connection with any of them. There is no evidence as to how Claimant's record of injuries and time lost compares with the records of other employees during the same or any other time period. By far the longest loss of work resulted from a back injury on November 15, 1990, as a result of which Claimant lost 229 days. He lost 123 days beginning February 27, 1980 as the result of an aggravation of a knee injury which occurred in November, 1979, and 120 days beginning September 30, 1988, as the result of a sprained knee. His five injuries during the eight years between those dates resulted in a total of 52 lost days.

Ms. Gambrell, Carrier's Manager of Rehabilitation Services, testified that after Claimant had failed to recover from his back injury of November, 1990, by May, 1991, he was referred to a physical and occupational therapy work-hardening and conditioning program called "Back in Action", which he attended from May 20 to July 2, 1991. Again in connection with the same back problem, he was referred to a similar program at Virginia Mason Physical Medicine and Rehab Department, beginning on February 24, 1992. This was an eight week program, but Claimant completed only three weeks. Ms. Gambrell testified that her file showed that Claimant was canceled out of the program because two physicians in the program felt that Claimant was sabotaging the program. When asked whether she had documentation of instances of sabotage, she replied that she did, but refused to produce it on the grounds of confidentiality of the information.

Ms. Gambrell and Ms. Weber, Carrier's Manager of Safety, testified that in February, 1993, they were present with Claimant at a multiple injury review process (MIRP) interview. This is a program begun at the end of 1992 under which Carrier scheduled such interviews with all employees who had suffered five or more injuries since 1986, to review their problems and discuss what could be done to prevent injuries in the future. At the interview, the subject of throwing switches was specifically discussed and Claimant was instructed not to attempt to throw a hard switch. Claimant raised fears that if he refused to do what his conductor told him, he would get fired. He was assured that no one would fire him for following the safety principles.

Finally, Ms. Weber testified that she assumed that Claimant had attended the 1993 system-wide-one-full-day training program for all employees, which covered, among other things, back-injury prevention.

Numerous Board awards have spoken to the issue of "accident proneness" as a basis for dismissal of railroad employees, and both parties have submitted awards purporting to support their respective positions. Without attempting a detailed discussion and analysis of those awards, we can state that the better reasoned of them in our opinion reject the idea that statistics alone - proof that an employee has suffered a large number of personal injuries without evidence that the injuries occurred because of fault or failure on the part of the employee - provide support for dismissal. See e.g., Award No. 1 of PLB 1103 and NRAB Third Division Award No. 28917. As stated in the latter Award, when accident-proneness is the basis for disciplinary action, "contributory responsibility, (or a demonstrable rule violation), for the historical incidents within the charge must be conclusive. Statistical analyses of accident records which do not contain a causal nexus between the accident and the injured employee are insufficient proof to support such a charge."

Further, it must be pointed out that in most of the awards which take the view that statistical evidence is sufficient without evidence of fault, the records contained proof beyond mere assertion that the employee involved had a greater incidence of injuries than the norm of other employees engaged in similar work. This is true in several of the awards cited by Carrier which upheld dismissals for accident proneness. For example, in Award 31 of PLB 5016, "Carrier undertook a comprehensive analysis of claimant's injury record, comparing him to five

carmen ahead of him on the seniority list and five behind him. . .He [Claimant] has sustained more injuries and lost more time than any of his coworkers." And in Award 6 of PLB 4780, "Carrier produced evidence indicating that Claimant's personal injury record far exceeds the average number of injuries in all other categories. In one area regarding employees with similar longevity, his rate is triple the average of other employees."

In this case, Carrier produced no evidence of fault on the part of Claimant in any of his prior injuries, or of any discipline imposed upon him in connection with any of them. Carrier likewise produced no evidence beyond its mere assertion that Claimant's record of personal injuries over his fifteen years of service exceeded the records of other employees similarly situated.

With respect to Carrier's contention that Claimant has not responded to training and counselling designed to improve his performance and lessen or prevent injuries, it must be pointed out that there is no evidence of such training or counselling prior to November, 1990, when Claimant injured his back, although eight of his ten injuries occurred before that time. When his back injury continued to prevent him from working, he attended and completed the course of therapy to which Carrier referred him. Since that time, Carrier's printout shows only one injury on October 27, 1992, when he was struck in the eye by a foreign object and lost six days of work. It would appear, therefore, that he responded positively to the therapy on that occasion. Because Ms. Gambrell would not produce the documentary evidence, it is not possible for the Board to know the circumstances under which Claimant failed to complete the therapy he began in February, 1992; however, that failure does not appear from the record to have adversely affected his performance. As to his alleged failure to heed the advice given him about throwing switches in the MIRP interview, we have already held that the evidence does not support a finding that he failed to comply with Order No. 5 in throwing the switch in this case.

Based on the discussion above, we conclude that Carrier has not presented substantial evidence to support Claimant's dismissal on the ground that he was accident prone.

There remains the question of what discipline was justified by his failure to file the required reports, on top of his thirty-day suspension just two months before for failing to wear protective glasses. Two such violations in a short period indicate a too casual attitude on the part of Claimant toward important safety rules, and merit substantial discipline to impress on him the necessity to comply with the rules if he is to continue in Carrier's employment. Under the circumstances, we think that a suspension of 90 days was justified. Our disposition of the claim therefore is to order that Claimant be reinstated to service with pay for time lost in excess of 90 days.

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Award: Claimant reinstated to service with pay for time lost in excess of 90 days.

H. Raymond Cluster
Neutral Member

Gene L. Shire
Carrier Member

R. L. Marceau
Organization Member

September 7, 1995