

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 5732

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES)	
and)	Case No. 4
)	
DULUTH, MISSABE AND IRON RANGE RAILWAY COMPANY)	Award No. 4
)	

Martin H. Malin, Chairman & Neutral Member
Donald D. Bartholmay, Employee Member
John H. Young, Carrier Member

Hearing Date: January 13, 1997

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The dismissal of Welder J. L. Rowe for his alleged responsibility with the injury he sustained on May 31, 1996 and for his alleged accident proneness was without just and sufficient cause, based on unproven charges and excessive and undue punishment.
3. Welder J. L. Rowe shall now be reinstated with seniority and all other rights unimpaired and he shall be compensated for all wage loss suffered.

FINDINGS:

Public Law Board No. 5732, upon the whole record and all the evidence, finds and holds that Employees and Carrier are employees and carrier within the meaning of the Railway Labor Act, as amended; and, that the Board has jurisdiction over the dispute herein; and, that the parties to the dispute were given due notice of the hearing thereon and did participate therein.

On May 31, 1996, Claimant was cutting out deck plating to install a scraper on a conveyor belt system. During the procedure, he burned through his hose, causing it to flame. He grasped the burning line to pinch it off and sustained second degree burns to his hands.

On June 7, 1996, Carrier notified Claimant to report for an investigation on June 17, 1996. The notice charged Claimant with failing to work in a safe manner on May 31, 1996, and with being injury prone. The hearing was postponed to and held on June 19, 1996. On July 8, 1996, Carrier advised Claimant that he had been found guilty of the charges and that he was dismissed from service.

The Organization contends that Carrier failed to meet its burden of proof with respect to the charges. Regarding the May 31, 1996, incident, the Organization argues that Claimant was the only eye witness and that Carrier's case was based on speculation rather than evidence. With respect to the charge of being accident prone, the Organization argues that Claimant's record of injuries in his twenty-five years of service standing alone cannot sustain the charge. The Organization maintains that most of the injuries were minor, that Claimant was not disciplined previously for them, and that any comparisons between Claimant and other workers must be discounted because Claimant worked an extraordinary amount of overtime. Finally, the Organization contends that dismissal is an excessive penalty for this twenty-five year employee.

Carrier contends that it proved the charges by substantial evidence. Carrier argues that the May 31, 1996, injury resulted from Claimant's failure to wait for his partner before burning, his failure to wear the proper safety gloves, his burning from underneath the plate, his failure to make sure that the area was free of material, his failure to secure his burning hoses, and his running of the hoses overhead. Carrier further contends that Claimant's injury record is attributable to his being overly aggressive and his desire to get the job done as quickly as possible without regard for safety. Carrier maintains that it has previously counselled Claimant concerning the need to give safety his highest priority and that Claimant has persisted in his aggressive ways. In Carrier's view, dismissal was necessary to protect Claimant and his co-workers from future injury.

The Board has reviewed the record carefully. Although Claimant was the only eye witness to his May 31, 1996, injury, the findings made on the property were not the product of speculation. Rather, they were the product of informed analysis of the accident scene and Claimant's own statements concerning how the accident occurred. Accordingly, we find that there is substantial evidence that Claimant worked alone when he should have waited for his partner, failed to wear his burning gloves, burned from underneath, failed to secure his burning hoses, ran the hoses overhead and failed to ensure that the burning area was free of material. We find that Carrier proved that

Claimant violated Rule 2 which provides, "Employees shall not be careless of the safety of themselves or others."

Our review of the record further leads us to find that Carrier established that Claimant's injury was part of a pattern of behavior whereby Claimant works too aggressively and does not give proper attention to safety. Claimant has a tendency to take undue risks in an effort to get the job done as quickly and efficiently as possible.

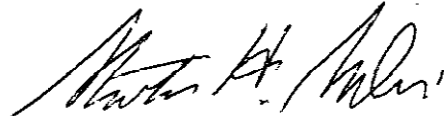
This Board does not review the penalty de novo. We do not disturb the penalty unless it is arbitrary, capricious or excessive. In the instant case, in light of Claimant's twenty-five years of service and other factors apparent in the record, we find that Claimant should be afforded one last chance to demonstrate that he is capable of curbing his aggressiveness and working in a safe and prudent manner. Accordingly, he shall be reinstated with seniority unimpaired, but with no compensation for time out of service. His reinstatement is subject to any reasonable program of counselling that Carrier may require to impress upon him the importance of safety and the need to make safety his highest priority in working.

AWARD

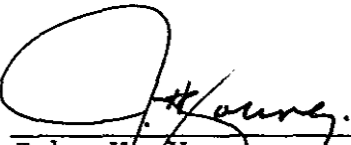

Claim sustained in accordance with the Findings.

ORDER

Carrier is ordered to make this award effective within thirty (30) calendar days of the date two or more members of this Board affix their signatures hereto.



Martin H. Malin, Chairman


John H. Young,
Carrier Member
Donald D. Bartholmay,
Employee Member

Dated at Chicago, Illinois, January 29, 1997.