AWARD NO. 212
CASE NO. 299

SPECIAL BOARD OF ADJUSTMENT NO. 280

PARTIES) BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
TO)
DISPUTE) ST. LOUIS SOUTHWESTERN RAILWAY COMPANY

STATEMENT OF CLAIM:

"1. Carrier violated the effective Agreement when Machine Operator J. P. Rogers was unjustly dismissed by letter dated November 21, 1984, and did not receive a fair and impartial hearing.

2. Claimant Rogers shall now be paid for all time lost commencing November 21, 1984 and continuing until such time as he is restored to duty, and with vacation, seniority and all other rights restored intact and unimpaired." (MW-85-21-CB-Rogers; 53-811)

FINDINGS:

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

Claimant was advised by Carrier letter dated November 21, 1984 that he was removed from service pending formal investigation for violation of Rule M801 of Carrier's Rules and Regulations for the Maintenance of Way Department as related to his allegedly being "accident prone" as evidenced by what Carrier states was 19 personal injuries between August 16, 1971 and November 8, 1984.

Rule M801 reads in part as follows:

> "Employes will not be retained in the service who are careless of the safety of themselves . . . ."

Following the company hearing, which was held on February 13, 1985, after having been postponed several times by mutual agreement of the parties, Claimant was advised he was dismissed from all service of the Carrier.

It is the position of the Carrier that the transcript of hearing clearly proves that Claimant was in violation of Rule M801.

In support of its position, Carrier directs particular attention to testimony of its Safety Officer at the company hearing to the effect that Claimant had had more personal injuries than any other individual employee in the Maintenance of Way Department.

In this connection, the Carrier points to those statements of its Safety Officer whereby it was statistically shown that during the period of 1979 through 1984, Maintenance of Way employees on its property averaged 1.8 injuries per employee, with its machine operators, of which Claimant was one, having averaged only 1.1 injuries per employee, whereas Claimant, during this same period of time, had sustained eight injuries notwithstanding Claimant's work environment had reportedly not differed from that of other machine operators.

The Carrier also directs attention to the fact that Claimant had been cautioned in conference and by follow-up letter in September 1976 about the number of on duty injuries (9) which he had experienced since 1971. The closing paragraphs of the letter to Claimant read as follows:

> "Your attention was directed particularly to the number of back injuries experienced by you when lifting. The importance of correct position when lifting and the proper lifting techniques was discussed with you and we earnestly request your cooperation in working safely and preventing future injuries. This is for your benefit as well as your family.
>
> I was encouraged by your attitude toward assisting in this very important matter."

The Carrier thus maintains that in view of Claimant's high propensity for personal injury, it properly determined that he should not be retained in service as it believes him to be a hazard to himself and his fellow employees.

It is the Organization position that review of the statistical data presented by the Safety Officer leaves much to be desired. It says the Safety Officer made judgments without regard to whether or not those individual employees used as a statistical base had in fact worked the same type machinery under the same type work conditions and, further, that the Safety Officer did not determine nor present in evidence the details involved with any of Claimant's past injuries. In this latter regard, the Organization submits that the Safety Officer did not offer any testimony whatsoever relative to the seriousness of the reported injuries, whether an accident was later determined not to have been an accident, or, the extent to which any injuries resulted from being required to operate defective equipment and to otherwise work under unsafe conditions.

The Organization also submits that whereas Claimant was charged with having had 19 personal injuries, the statistical printout listed but 18 reported injuries in the period of approximately 14 years. Further, that three of the reported injuries had concerned insect bites. In this regard, the Organization says: "That would leave 15 injuries that would be an average of ap-

proximately 1 injury per year, which would not be unusual for injuries sustained by [an] employee performing the laborious work required of employees in the Maintenance of Way Department."

As concerns the question of whether there were 18 or 19 injuries, the Board would note that at the company hearing Carrier's Safety Officer made the following response to a question by Claimant's representative for an explanation of the discrepancy:

> "The statistics which show 18 injuries is based on a computer search which is further based on submission of accident reports to San Francisco. The charge letter shows 19 and is based on a search of the personal record. The discrepancy occurred in 1982 in which an injury was claimed which later became known to be an infection and not injury related, and therefore, was not submitted to San Francisco."

There is no doubt from review of the record as developed at the company hearing that Carrier relied solely upon a statistical analysis of reportable injuries and the perceived severity of the reported injury as related to the part of the body alleged to have been injured. The Carrier did not attempt to provide any review or throw any light whatsoever upon such questions as whether the involved or reported injuries were related to acts of carelessness by the Claimant or the extent to which, if any, the injuries were the result of Claimant not having been provided reasonably safe work conditions on the job.

Review of the transcript of hearing also shows that Carrier's principal witness, its Safety Officer, was not prepared to offer comparisons between Claimant's record and records of other employees as to the number of work days lost as a result of accidents, albeit the Safety Officer did state in response to a question by Claimant's representative that 12 of the 19 injuries had not involved the loss of work days by Claimant.

There is no question that Claimant has an inordinate large number of personal injuries on his record, far exceeding the average for his fellow employees. However, and notwithstanding the fact that a fairly regular and repeated pattern of work injuries calls for a review of the circumstances surrounding such injuries and imposition of appropriate disciplinary sanctions, we do not believe there was sufficient evidence adduced at the company hearing to adjudge Claimant as "accident prone" and so negligent in the disregard of safety rules as to call for his permanent dismissal from service.

At the same time, the high number of injuries experienced by Claimant in comparison with other employees suggests Claimant does indeed have a poor safety record. This notwithstanding a belief that certain aspects of the record suggest Claimant is being over cautious of Carrier's rule which require employees to

report all personal injuries, regardless of how slight, such as in reporting an insect or bee bite, which are not always in reality injuries.

In the circumstances of record, and in the light of Claimant's poor safety record, the Board believes that discipline short of discharge would be an appropriate measure of discipline so as to caution Claimant that continued personal injury of himself as a result of his own negligence could result in permanent dismissal from service.

Therefore, it will be the Board's finding that Claimant be reinstated to service with seniority and other benefits unimpaired, but without payment for time lost. The Claimant is admonished, however, to bear in mind the seriousness of safety rules and the importance of his working in a safe manner so as to avoid injury to himself by taking the safe course with respect to the performance of his work and of the need for him to bring to the attention of the Carrier any defective equipment or unsafe working conditions as necessary to any continuing employment relationship with the Carrier.

AWARD:

Claim sustained to the extent set forth in the above Findings.

Robert E. Peterson, Chairman
and Neutral Member

R. O. Naylor
Carrier Member

M. A. Christie
Organization Member

Houston, TX
August 29, 1986