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Decision No. 5784
Case No. 1231
Supplemental List No. 91

SPECIAL ADJUSTMENT BOARD NO. 18
(Train Service Panel)

PARTIES TO DISPUTE: United Transportation Union -
Southern Pacific Transportation Company (Western Lines)

STATEMENT OF CLAIM: "Request of Brakeman Keith N. Karns, Los Angeles Division, for reinstatement to service with seniority unimpaired and for replacement of wage loss and productivity credits resulting from his dismissal from service on March 11, 1987, as well as wage loss while attending investigatinn on February 5, 6, 12, 13 and 20, 1987, because of his alleged violation of Rules I and 607 of the General Code of Operating Rules, which occurred between March 15, 1977 and December 12, 1986."

STATEMENT OF FACTS: On January 6, 1987 the Carrier directed the Claimant to attend an investigation. The notice read in pertinent part as follows:

"You are hereby notified to be present at the office of Terminal Superintendent, 750 Lamar Street, Los Angeles, on Friday, January 16, 1987, at 10:00 am, for formal investigation being held to develop the facts and place responsibility, if any, in connection with your alleged continued failure to work safely and injury free as a Trainman in a railroad environment from 1977 to present, during which time you have reported twelve (12) personal injuries as follows:

3-15-77 - LA - Turned left knee
7-14-77 - Guasti - Strained left knee
7-15-76 - Torrance - Foreign particle, left eye
1-19-79 - Fontana - Bruised right instep
5-22-79 - Buena Park - Sprained ankle
3-14-82 - LA - Strained back
7-19-82 - LA - Punctured finger
7-31-83 - Santa Barbara - Foreign particle, left eye
10-2-83 - Santa Ana - Sprained right thumb
12-14-84- LA - Strained back
3-21-86 - Pomona - Irritation to eyes and throat
12-12-86- Gemco - Strained lower back

"and, additionally, your alleged failure to use proper body mechanics while removing draft gear assembly, which fell between the main track rails at the east end of Gemco Yard from car CO 489951, at approximately 9:30 pm, December 12, 1986, while operating as brakeman on Extra 3428 East, which resulted in an alleged lower back strain.

"For the above occurrence you are hereby charged with responsibility which may involve violation of Rule I, reading:

"'Employees must exercise care to prevent injury to themselves or others. They must be alert and attentive at all times when performing their duties and plan their work to avoid injury.'

"and Rule 607, that part reading:

"'607. CONDUCT: Employes must not be:

"'(1). Careless of the safety of themselves or others.'

"of the general Code of Operating Rules, Southern Pacific Transportation Company."

FINDINGS: The Board finds, after hearing upon the whole record and all evidence that the Parties herein are Carrier and Employe within the meaning of the Railway Labor Act, as amended, that this Board is duly constituted by Agreement and it has jurisdiction of the Parties and the subject matter, and that the parties were given due notice of the hearing held.

DECISION: The letter of discharge cited the Claimant for his responsibility in failing to "work safely and injury free" in connection with twelve instances over his twelve-year career. Viewed broadly, the Carrier has concluded that the Claimant is "accident prone." They contend this is demonstrated by the Claimant's responsibility in each of the incidents, the Claimant's record as a whole and his record compared to other employees. Accordingly, they assert he is an unreasonable risk to the Carrier, himself and other employees.

The basic premise of the Carrier's case is that a series of injuries, which individually wouldn't be a basis for discharge, can be, in certain circumstances, considered together for the purposes of concluding an employee is unsuitable for employment. It is true that other Boards have agreed with this premise. It is also true--strictly speaking as a general matter--that this Board cannot quarrel with this premise.

However, the mere fact that an employee has a series of injuries or that it may exceed some kind of norm is not enough to support a conclusion that an employee is accident prone or an unwarranted risk. The Carrier has the burden of digging deeper. The Carrier must convince the Board that all of the circumstances, not just the mere frequency of injuries, do in fact add up to "accident proneness."

The Board realizes that there are "accident prone" people. It is difficult to set forth a standard which precisely defines what constitutes accident proneness. Yet it is recognizable. We know it when we see it. It is possible only--because of the nature of the subject and the infinite variety of imponderables in individual cases--to set forth a guideline to the relevant factors. Some of the factors are (1) the demonstrated degree to which an employee has been responsible for various injuries, (2) the frequency of occurrences, (3) whether there is truly any demonstrable difference between the Claimant and the record of others, (4) efforts at counseling, training and progressive discipline, (5) the attitude of the employee toward safety, (6) whether efforts have been made prior to discharge to offer--without prejudice--alternative employment, (7) the period of time involved, (8) the nature of the injury and (9) medical evidence as noted in Decision No. 4714.

One of the most important of all these factors is the first, to wit, the degree of the Claimant's negligence in each case. The difficulty presented by this case and others like it is the fact that the various cases relied on by Management can fall within several categories of negligence. Or in other words, the past cases may represent a whole range of negligence from anywhere from little or no negligence to gross negligence and any combination in between.

Several categories of injuries can be identified which constitute the range of negligence in such cases. One class of past injury--which in fact exists in this case--is a situation where the evidence affirmatively demonstrates that the Claimant had no responsibility. For the sake of discussion, let's call this Class I. The next class of case in degree would be where the evidence doesn't show that the Grievant was at fault but it doesn't show they weren't at fault either. In other words, that there would be a basis to be suspicious of carelessness.

The third class would be an injury situation where there was demonstrable but limited negligence on the part of an employee. The last class would be where the evidence would satisfactorily show that the employee was fully responsible for the injury.

Obviously, as the combination of the various cases tend toward the lesser classes (Class I and II), the Carrier's burden becomes more difficult and the various injuries tend toward the categories of greater negligence, their burden is lesser. In this case, several of the past injuries fall in the Class I category. The Grievant had no or deminimus responsibility in the 7-14-77, 3-14-82, 7-19-82, 7-31-83, 10-2-83 and 12-14-84 incidents. On July 14, 1977, he strained his knee fleeing from the first unit to the second unit for protection as a collision with a gravel truck at a grade crossing was imminent. The Claimant was cleared of responsibility of the 3-14-82 incident in Decision 5606 which was caused by severe slack action in spite of his being properly braced. On July 19, 1982 a nail was protruding from a chair he was moving which caused the puncture. On July 31, 1983 a vandal threw a beer bottle through the window of the Claimant's caboose and on December 14, 1984 the Claimant was riding in the rear seat of a three-seat taxicab, facing the rear, when the taxi rounded a curve and struck a vehicle standing with its lights out. Clearly, all of these incidents were situations over which the Claimant had no control nor is there any credible evidence that he contributed to the injuries. Thus, they can be given no weight in the overall picture of accident proneness.

This leaves only six injuries in the Grievant's twelve-year tenure of any possible consequence concerning accident proneness. Only the last injury could be considered more than the Class II type of injury. The Grievant clearly had some responsibility in the last incident since he didn't even bother to alert the Conductor to his back problems before trying to move the extremely heavy draft gear assembly. This was careless and imprudent. At least this much caution should have been exhibited.

The question remains, weighing all the circumstances against the relevant criteria, whether discharge is appropriate. In the Board's opinion, it is not. The six incidents evidenced in this record in a twelve-year period are not a basis for discipline when viewed in light of the other relevant factors. However, given the Claimant's responsibility in the December 12, 1986 incident, some discipline would have been appropriate. Accordingly, the discharge is reduced to a 30-day suspension. The Claimant is entitled to reinstatement and back pay beyond a 30-day suspension.

The claim is sustained to the extent indicated above.

Gilbert H. Vernon
Chairman and Neutral Member

P. G. Sears
Carrier Member

Glynn Gallagher
Employe Member

Dated this 6 day of April, 1988.
San Francisco, California

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