Award No. 32
Docket 28
Carrier File: 4(92-31)
Org. File: 57208/631

PUBLIC LAW BOARD NO. 4833

Parties: United Transportation Union
and
CSX Transportation, Inc.

Statement of Claim: Requesting the reinstatement of Mr. E.K. Rinehart (516856) to service with full seniority rights unimpaired, pay for all time lost, including health and welfare expense incurred while dismissed from service, and removal of unfavorable entry from his service record.

Background: The Claimant Conductor, with 14 years seniority, was injured on March 31, 1991, while at his away-from-home terminal in Cumberland. The Claimant was working in the Brunswick-Cumberland Pool. The train arrived at Cumberland at 0450 hours. After the train was yarded the two locomotives were placed on the locomotive lead track. While the Claimant was descending from Unit 8557 at approximately 0515 hours, he asserted he injured his left ankle and knee when he reached the ground.

The Carrier charged the Claimant on April 2, 1991 for being responsible for the March 31, 1991 personal injury and also for being accident prone in that he had sustained 10 personal injuries since November 19, 1978. After a properly convened Investigation, the Carrier notified the Claimant on April 24, 1991 that he had been found at fault on both charges and thereby terminated him from its service.

The facts pertaining to the March 31 injury are that the Claimant dismounted from his engine holding his grip in his left hand and the grab iron with his right. The Claimant

testified that he dismounted, holding his grip in his left had because he could not reach the grip from the engine platform while on the ground.

Road Foreman of Engines Pryor testified that daylight was breaking at the time of the accident and that there was no underfoot obstruction that could have contributed to the accident. The Claimant asserted that when he returned to the area with RFE Pryor in the morning he observed a rusty coke can and piece of tie being in the area where he fell. The Claimant stated it was dark and he could have placed his foot on these obstructions when he descended from the engine. He stated he did not know exactly what caused his left leg to turn when it hit the ground.

As summary of the Claimant's injury record introduced into the record shows:

11/19/78	Stepped in hole while boarding engine. Pulled muscle in left leg and bruised left heel.
01/12/80	Slipped on ice while getting on engine. Hit knee on step of engine.
06/23/80	Tightening nut on train line. Wrench slipped, mashed right ring finger.
02/11/83	Slipped in snow while cleaning snow from switch. Twisted left knee.
07/21/83	Thrown in caboose due to train going into undesired emergency-broke denture and right ring finger.
10/02/83	Missed grab iron while mounting caboose. Pain in left knee and right wrist.
11/04/87	Removing jumper cable from engine, cover came down smashed left index finger.
03/30/88	Operating switch, pulled muscle in left upper arm.

11/29/89 Walking across parking lot. Tripped over concrete bumber block and fell. Bruises and contusion to both knees.

03/31/91 Present injury.

Carrier's Position

The Carrier states with respect to the charge of the Claimant being responsible for the March 31, 1991 personal injury, the evidence clearly shows that while he was dismounting the engine, holding on to his grip, he stepped onto ground that was flat and well lighted, and with no obstruction that could have contributed to his injury. The Carrier states this record shows that the Claimant was responsible for his injury because he failed to use the necessary caution while dismounting the engine. It states that the Claimant should have dismounted holding onto the grabirons with both hands, not carrying luggage and should have been looking where he was placing his feet. The Carrier asserts that the failure of the Claimant to comply with the established safety rules resulted in the injury to his left ankle and knee.

The Carrier asserts it is equally clear that the Claimant was guilty of being accident prone. The record shows that he incurred 10 personal injuries in less than 12 1/2 years. The Carrier adds that after the Claimant had incurred six of these injuries, he was asked to attend a "Safety Repeater Program" in March 1986. However, after the Claimant attended the Program, he incurred three more injuries and so that Carrier requested him in March 1990 to attend a Safety Skills Seminar because he

had these three reported injuries since 1987. The Claimant attended this Seminar on March 30, 1990 in Cumberland. However, notwithstanding the specialized training and counseling, the Claimant incurred the instant injury on March 31, 1991.

The Carrier asserts that on the Baltimore Division for the period between November 14, 1987 and March 31, 1991, the Transportation Department to which the Claimant belonged, had 1855 employees of which 1480 were train and engine service employees. Of the 567 employees who reported injuries, 80.78% reported only one injury. The remaining 19.22% of that group reported multiple injuries. The Claimant was in the highest group that reported four injuries during the period. The individuals that reported four injuries accounted for only 1.23% of the employees who submitted injury reports. The Claimant and the others that reported four injuries represent 0.38% of the total transportation work in that area.

The Carrier notes that the March 31, 1991 accident was caused by the Claimant's failure to use necessary caution in dismounting from the engine. His accident record reveals that almost half of his injuries occurred while attempting to mount/dismount equipment as in the instant case. The Carrier stresses the incident of 11/19/78; 1/12/80; 10/2/81 and the present accident as examples of this.

The Carrier cited several awards in "accident-prone" cases, including First Division Award 20438 (Referee Dougherty). This Award stated in part:

". . . evidence suggesting accident-proneness would include a rate of accident frequency and/or severity that is significantly higher for said employee than the rates which in the light of past experience might reasonably be expected of him."

P.L. Board 542-Award No. 2 (Seidenberg)

". . .The record also supports a reasonable conclusion that the Claimant suffered an inordinate large number of personal injuries in his work career which caused him to be absent a substantial amount of time. It is not necessary for the Carrier to prove that in each and every incident that the Claimant acted negligently. His work record shows a fairly regular and repeated pattern of work injuries . . . and the Carrier properly concludes that such . . . conduct makes it undesirable, if not dangerous, to continue to the Claimant in the employ of the Carrier . . . The Claimant is an accident-prone employee whose continued service makes him a potential hazard to himself, his fellow employees and the Carrier. The Board . . . has no recourse but to deny the claim."

The Carrier states that the record clearly shows that the Claimant's lengthly record of on-duty injuries reveals that the Claimant was an injury prone employee and a serious liability to the Carrier. It adds that dismissal of such employees has been upheld by numerous Boards as being fully justified.

The Carrier adds that even if the instant claim has any merit (which it does not) the claim for health and welfare expenses while dismissed from service, is excessive and not supported by the Agreement. The Carrier asserts that NRAB awards have held that "wage loss" does not comprehend "health and welfare" and other fringe benefits. Moreover, the Carrier states that if the Board requires the Carrier to return the Claimant to service, the it insists that it should be entitled to deduct the total earnings and/or unemployment income received by the Claimant.

In summary, the Carrier states the Claimant was guilty as charged as shown by a fair and impartial Investigation and therefore the Board should deny the claim in its entirety.

Organization's Position

The Organization requests the Board to vacate the Claimant's dismissal and to grant him in full the relief he has requested.

The Organization states that the Carrier has breached the Claimant's contractual right to a fair and impartial hearing thus denying him due process in dismissing him for being "accident prone" without adducing any proof that the Claimant was negligent in the 10 injuries incurred during his railroad career.

The Organization adds that the Carrier also failed to prove that the Claimant was at fault or was in any way responsible for the March 31, 1991 incident.

The Organization stresses that before the Carrier may assess discipline for violating safety rules or causing injuries, the Carrier has the burden of proving by competent evidence that the Claimant was guilty of the charges filed against him.

The Organization asserts with respect to the "accident-prone" charge, the Claimant introduced no evidence that the Claimant violated any safety rule or rules or acted imprudently in any manner. The Carrier's evidence consisted solely of the fact that Claimant incurred an injury on March

31, 1991 and filed 10 injury reports covering a 13 1/2 year period. The Organization states that while the Carrier introduced these 10 accident reports, the Organization did not have the opportunity at the Investigation either to confront or cross examine any witness on the issue of whether the Claimant has been negligent or reckless with regard to these 10 incidents. No formal investigations were convened by the Carrier on these incidents.

The Organization asserts the Carrier's assumption that the Claimant was accident prone based on the 10 accidents since November 19, 1978 is irrational. The Carrier has chosen to ignore or neglect whether the employee was injured because of the negligence of others; whether the equipment used was faulty or whether the work environment was unsafe. The Organization stresses that the Carrier is required to prove that before the injured employee can be disciplined, that this employee was negligent or at fault. The Organization states to accept the Carrier's reasoning would permit it to impose the ultimate sanction of discharge on an employee for being accident prone, who had sustained "x" number of incidents even though the employee was not at fault in any one of the enumerated incidents.

The Organization maintains that the Claimant can be discharged only if his work injuries were caused by carelessness or his failure to observe the requisite safety rules. The Organization states that the Carrier's statement as to the frequency of the Claimant's injury rate was distorted by

the Carrier because it extended the period covered by using the period of time involved in Herbert case (Award 164 of P.L. Board 3741). If the dates in the Herbert case covered the period from October 3, 1983 through March 31, 1991 it would have shown that the Claimant reported four injuries and that rate was lower than his fellow employees.

The Organization also objected at the Investigation to a introduction of the 10 accident reports by Terminal Manager Workman in view of the fact that Mr. Workman testified that he had no personal knowledge of the incidents represented by these 10 reports. The Organization asserts that the Carrier did not hold any investigations on the 10 incidents. It did schedule a formal investigation on November 27, 1978 for the November 18, 1978 injury but cancelled it in lieu of a conference with Superintendent Snyder (Q&A 169).

The Organization states particularly with regard to the March 31, 1991 incident there was no evidence of carelessness or breach of the safety rules on the part of the Claimant. The Claimant dismounted the steps in the only way available to him. He carried his grip in one hand because he could not reach it from the platform when he reached the ground. He dismounted the steps safely but turned his leg or ankle when he reached the ground. The Organization stresses this is no evidence of negligence on the part of the Claimant. The Claimant was not an insurer against all accidents. He was only charged not to be reckless or careless - which he was not in this case.

The Organization maintains there was no competent evidence to support the Carrier's charges against the Claimant and should make him completely whole for any losses suffered. The Organization asserts that the health and welfare premiums paid by the Claimant while out of service should be reimbursed to him, if he has been unjustly held out of service, because the health insurance premium is an integral part of his wages. The Organization states that Health and Welfare costs have been part of the employees wage structure since 1956 and this Carrier and others argued before Emergency Board 219 that Health and Welfare benefits were an integral part of an employees' compensation. The Organization states where it is found that an employee has been unjustly dismissed, and there is a clear showing that the employee has incurred these costs while out of service, then the Board should direct the Carrier to reimburse the Claimant for these costs.

The Organization states that it well established by numerous awards, especially on this property, that the Carrier may not deduct outside earnings from disciplined employees who are returned to service. The Organization asserts that there is no schedule provision that permits deduction of outside earnings. "Wage loss" in the Schedule has been construed by numerous awards not to cover outside earnings. The Organization states the Board should not attempt to set aside or modify a now established rule as to the meaning and intent of outside earnings.

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

Upon review of the entire record, the Board concludes that the Claimant was guilty of the charge of causing the March 31, 1991 injury, but it also finds that this offense does not warrant dismissal. The Board further concludes that the charge of being accident prone does not support the penalty of discharge, based on the record in this case.

Preliminarily, the Board finds that the Hearing Officer committed no procedural errors in the conduct of the Investigation. The Organization was given full opportunity to prevent its defense of the Claimant. Whatever procedural errors were committed were substantive procedural errors and they will be discussed in the course of this Award.

With respect to the March 31, 1991 incident, the Board finds that it was careless and imprudent conduct for the Claimant to dismount from the engine holding his suitcase in one hand and holding on to the grabiron in the other hand and not looking at the ground below. This was a clear breach of Rule S-F78, pertaining to safe work procedures.

The Board does not find credible the Claimant's explanation for his actions, namely, that he would not have been able to reach his suitcase from the engine platform while on the ground. The Claimant should have done what he did after he was

injured. He should have called to the Brakeman who was still on the engine and asked him to hand him his suitcase and box of hams. The Board finds there was no valid reason for the Claimant to engage in unsafe work practices under the facts and circumstances of this situation.

Nevertheless, notwithstanding the Claimant's negligent conduct, the Board finds that this imprudent conduct does not warrant termination from service. The Board concludes that a 90 day suspension is a more appropriate sanction to impose in this case.

The Board finds that the matter of dismissing the Claimant for being accident prone a more vexing problem. The parties are aware that this is a hoary problem in this Industry with rendered awards on both sides of the issue.

Upon reflection and on the basis of past experience, the Board finds that it violates due process as well as th contractual prescription for the Carrier to dismiss an employee involved in a number of accidents without convening a fair and impartial investigation(s) to determine whether the affected employee was guilty of reckless or negligent conduct. It is noteworthy that in the case at hand, the Carrier did not hold even one investigation on any of the 10 reported injury incidents. There was never a finding in any one of these 10 incidents that the Claimant acted in a negligent manner and failed to act as a reasonably prudent employee. It is equally noteworthy that in this Industry employees are required to report in writing all injuries, no matter how slight. Consequently, an active employee who worked

any length of time, could amass a long paper record of injury incidents, and absent a formal investigation, there would be no probative evidence to indicate whether the employee was or was not at fault in these incidents.

This Referee has to be strongly persuaded by his experience as the Referee in P.L. Board 542, Award No. 1, a case cited by the Carrier. However, in its citation of this case, the Carrier did not enumerate the complete record.

In that case, P.L. Board 542 rendered its Award on September 22, 1970, upholding the Carrier's dismissal of the employee on the charge that he was accident prone because he had 22 personal injuries between 1951 and September 1968. The Organization filed an appeal to this Award in July 1972 to the requisite Federal District Court, requesting the Award be reversed and the employee restored to service.

In February 1973, the Federal District Court rejected the employee's plea to reverse the Award and remanded the case to P.L. Board 542, stating:

> "so that the Board might review all pertinent evidence bearing on the Petitioner's discharge from employment."

Pursuant to the Court Order the Board reconvened in January 1974 and reviewed all the records and documentation of the employee's 22 injuries. On May 25, 1974, the Board issued its Award reaffirming its original award and sustaining the employee's dismissal. This action was ultimately sustained by the Third Circuit Court of Appeals.

This Board has to be persuaded by the fact that in this litigation the Courts did not accept the concept of "accident

prone" and insisted that before an employee could be discharged on such a charge, there had to be a review of all the evidence and documentation surrounding the employee's accident record.

The Board finds that there was no such review in this case. The Carrier official who introduced the summary of the Claimant's accident record at the Investigation testified he had no personal knowledge of the reported incidents.

With regard to remedy aspects of this case, the Board must hold that the principle of "no deduction of outside earnings" is too well established and entrenched in this Industry, so that the only way the Carrier can obtain the relief it seeks, is by negotiations or by litigation, but not by arbitration.

With regard to Health and Welfare premiums, the Board finds that these benefits are now an integral part of employees compensation. Therefore any employee, who while out of service and paid the premiums, upon being restored to service, is entitled to be reimbursed for these premiums covering the period that he was improperly removed from service.

In summary, the Board finds that, except for the 90 day period of suspension, the Claimant is entitled to be made whole for the period he was withheld from service.

Award: Claim disposed of in accordance with the Findings.

Order: The Carrier is directed to comply with the Award, on or before January 10, 1993.

Jacob Seidenberg, Chairman and
Neutral Member

L.F. Kell, Carrier Member
Dissent Attached
December 9, 1992

J.L. Mateer, Employee Member

CARRIER MEMBER'S DISSENT
TO
AWARD 32 OF PUBLIC LAW BOARD 4833
(Referee Jacob Seidenberg)

The decision rendered by the Majority contained errors concerning both health and welfare benefits and outside earnings deductions.

1. The Referee has overturned Carrier's decision to terminate claimant from service for the conduct at issue in this case, ruling instead that claimant should receive a 90 day suspension. Rule 17(d) of the applicable Schedule Agreement explicitly defines claimant's exclusive remedy in these circumstances:

> *If it is found employee has been unjustly suspended or dismissed from the service, such employee shall be reinstated with his seniority rights unimpaired and compensated for the wage loss, if any, resulting from said suspension or dismissal.* (emphasis added)

As part of his demand, claimant sought reimbursement for "health and welfare expense incurred while dismissed from service." No support whatsoever was cited, however, for the contention that "wage loss" was intended to encompass such expenses. Carrier responded by pointing out that this demand was inconsistent with the explicit language of the rule and had no support in actual practice on the property. In addition, Carrier cited numerous arbitral precedents holding that the term "wage loss" does not comprehend health and welfare expenses or other fringe benefits. In fact, the Organization's Submission included two (2) separate

Awards (involving the same Parties to the Dispute), viz., Public Law Board 1312, Award 790 (Arthur T. Van Wart) and Public Law Board 3741, Award 107 (Jack Warshaw) (Organization's Exhibits "T" and "2" respectively) in which health and welfare benefits were denied due to no contractual basis or entitlement.

Notwithstanding the Organization's failure to cite any substantive support for its demand (except for a belated supplemental submission furnished by the Organization after the exchange of submissions and just prior to the Board date), the Referee has concluded that claimant is entitled to reimbursement for any health and welfare premiums that he paid for coverage during the period that he was improperly removed from service because "these benefits are now an integral part of employees compensation." (emphasis added)

That conclusory statement, unaccompanied by any further explanation by the Referee, is baffling. As noted above, the Schedule Agreement limits claimant's monetary remedy here to payment "for the wage loss, if any, resulting from said . . . dismissal." Under settled precedent, the term "wage loss" limits recovery to payments that the employee would have received for services performed during the time not worked. Under that definition, claimant clearly would not be entitled to reimbursement for health care premiums because Carrier does not make payments to him (or any other employee) with respect to health and welfare.

In common railroad industry usage, an employee's "compensation" is broader than "wages" and means wages plus the cost to the carrier of the employee's fringe benefits (of which health and welfare is a part), railroad retirement taxes, and the like. Through sheer linguistic legerdemain and without support under the agreement or practice, the Referee has simply substituted "compensation" for "wage loss" which results in providing claimant (and others) with a windfall benefit that was neither bargained for nor contemplated by the parties.

Nor does the Referee explain the basis for his conclusion that health and welfare premiums "are now an integral part of employees compensation." (emphasis added) It appears that he may have simply accepted at face value the Organization's contention that "this Carrier and others argued before Emergency Board 219 that Health and Welfare benefits were an integral part of an employees' compensation" (see **Award, p. 9**).

First of all, that is simply not true. While the railroads did contend before PEB 219 that containment of their health care costs was critical to the industry's financial health, at no time did they characterize health and welfare benefits as an integral part of an employee's compensation (see **Carrier's Exhibit 1, p. 6; 2, p. 16**...the subsequent exhibits mentioned are in consecutive order as read). Rather, the cost of such benefits was merely identified as one of the elements of the fringe benefits that, along with wages, railroad retirement taxes and the like,

constituted the employees' overall compensation (see **Carrier's Ex. 24, pp. 2-3**).

Moreover, the railroads consistently drew a substantive distinction between wages and overall compensation, e.g., **Carrier's Ex. 20 (Introduction to Carriers' General Wage Case)**. Thus, the Referee's attempt to treat the two synonymously cannot be said to rest on any position taken by the carriers before PEB 219.

Finally, PEB 219 was not the first emergency board to grapple with health and welfare issues and consider evidence from the carriers with respect to the costs of the program and the impact on the industry's financial vitality. See, e.g., **Reports of Emergency Board Nos. 130 (pp. 11-13); 161-3 (pp. 24-25); 211 (pp. 16-17)**. Accordingly, we fail to discern the basis for the Referee's apparent conclusion that the carriers' PEB 219 presentation, in contrast to prior board presentations on similar matters, somehow transformed health and welfare premiums into an "integral part of employees compensation."

2. The Referee also erred by not allowing Carrier to deduct "outside earnings" by stating that this principle "is too well established and intrenched in this industry." Carrier differs with the Referee's conclusion and it cited numerous arbitral precedents, viz., Public Law Board 976, Award 3 (Weston), First Division Award 22997 (Zumas) and Public Law Board 1547, Award 13 (Weston) (attached in consecutive order as Exhibits to this Dissent) holding

that claimants were to be paid for time lost "less outside earnings" and/or "outside earnings may be deducted in computing pay for time lost" and/or "any back pay due Claimant under this Award will be reduced by earnings he has received during the claim period." In addition, Carrier cites a Special Arbitration Award (Marx), dated December 23, 1991 (involving these same Parties to Dispute), in which it was held:

> ***The Claimant shall promptly be offered reinstatement with seniority unimpaired and with reimbursement for lost straight-time earnings from March 22, 1989 until the date of offer of reinstatement, less any compensation received during this period.*** (emphasis added)

This Award is also attached as an Exhibit to this Dissent.

For the reasons herein stated, Carrier dissents to those parts of this Award regarding health and welfare premiums and deduction of outside earnings.

L. F. Kell, Jr.
Carrier Member
Public Law Board 4833

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February 1993
Jacksonville, Florida