AWARD NO. 18
CASE NO. 18

PUBLIC LAW BOARD NO. 5392

PARTIES TO DISPUTE	)	BROTHERHOOD OF LOCOMOTIVE ENGINEERS
	)	CSX TRANSPORTATION, INC.

STATEMENT OF CLAIM

Claim for full reinstatement of dismissed Engineer D. R. Owens (CSXT ID# 173118) to the service of CSXT. Such reinstatement to include removal of all record of discipline of this instance from his personal record (PS-10), full pay for all lost wages beginning on September 1, 1995 to final adjudication, cumulative vacation time undisturbed, seniority standing unimpaired, all Health & Welfare benefits intact and unreduced, and full restoration of all other rights thereto pertaining to his employment with CSXT.

OPINION OF BOARD

Claimant, an Engineer with approximately 17 years of service, was dismissed by letter dated September 1, 1995 for failing to protect himself from injury and for being accident prone.

The two allegations will be separately addressed.

A. Claimant's June 11, 1995 Injury

On May 12, 1995, Superintendent's Notice No. 113 issued stating (Car. Exh. A at 125):

> TO: All Concerned
>
> SUBJECT: Hazardous Walking Conditions
>
> BOYLES TERMINAL
>
> Due to track work underway, all employees should exercise extreme caution while working on an around all tracks from the north end of the receiving yard to location "302" at Boyles Yard, Birmingham, AL.
>
> All concerned must be on the lookout for uneven walkways, loose ballast and other walking hazards within this area.

Claimant was familiar with the notice. Tr. 62, 69. Nevertheless, on June 11, 1995 at 1710 hours, Claimant stepped on a rail anchor laying in loose ballast and twisted his knee. Tr. 16. According to Claimant (Tr. 62):

> [A] We were crossing the north end of the Receiving Yard in Boles, Alabama. I stepped on

> an object beside the rail and twisted my knee.

Further, according to Claimant (Tr. 64-65):

> [Q] Did you note that object when you stepped on it?
>
> [A] No, sir, I didn't see it.

Claimant had surgery on his knee and, as of the date of the investigation (August 11, 1995), Claimant was still under the care of a doctor. Tr. 72.

Substantial evidence supports the Carrier's determination that Claimant did not protect himself from injury as required by the Carrier's rules. The Carrier's Safety Policy Statement states in part that (Tr. 66) "[n]o action should be taken until we are fully aware of the hazards involved and have a plan to avoid injury." The rules generally require employees to work safely. Superintendent's Notice No. 113 issued May 12, 1995 warned employees to be aware of "hazardous walking conditions" and further warned employees that they "must be on the lookout for uneven walkways, loose ballast and other walking hazards within this area". Claimant was aware of that warning. Nevertheless, on June 11, 1995, Claimant stepped on a rail anchor which apparently was in plain view or should have been seen. Substantial evidence therefore supports this portion of the allegations against Claimant.

B. The Accident Prone Allegations

Claimant was also found by the Carrier to be accident prone. The evidence supporting that assertion came from Assistant Division Superintendent J. B. Cato's testimony that Claimant had sustained nine incidents of injuries (including the injury in this case) from November, 1982 through June, 1995. Cato then compared the records of five employees immediately junior to Claimant and five employees immediately senior to Claimant and those 10 employees had an average of 1.6 injuries. Cato made further comparisons concerning safety contacts and salaries and found Claimant had similar factors when compared to those employees. Cato concluded (Tr. 91) "[c]omparing his record to those of his peers, I definitely see that Mr. Owens is an injury prone individual."

With respect to the eight other incidents of injury relied upon by the Carrier, it does not appear from this record that there were investigations and discipline or that Claimant was determined to be re-

sponsible for those other eight injuries.

On this property, the issue of accident proneness as a basis for discipline is not a new issue for the neutral member of this Board. In *PLB 5416, Award 21* the ability of this Carrier to rely upon accident proneness as a basis for discipline where the incidents of injury which were not determined to be the employee's fault was discussed at length. Based upon a review of prior awards involving the Carrier, the relevant portion of *PLB 5416, Award 21* stated as follows (*id.* at 3-5)

> One of the most important functions of the arbitration process is to provide stability to collective bargaining relationships. Where an issue has been decided in the parties' relationship, it is not the function of a Board in a subsequent case to redetermine the matter *de novo* each time the issue is raised. With respect to prior awards, it is well-accepted that when an issue has been decided our function is only to determine if the prior award is palpably erroneous.
>
> From what is before us, then, the issue of whether the Carrier needs to demonstrate responsibility by the employee for the cited instances of injuries to support a disciplinary action based upon allegations that the employee is accident prone is not a question of first impression. The Carrier cites us to one award (which in turn cites another) favoring its position that fault need not be shown and the Organization cites us to five awards with language stating the opposite.

At first blush, the awards on this issue involving the Carrier are in apparent conflict. However, closer examination shows that the most recent awards directly on point which specifically address the accident prone allegation favor the Organization's argument of the need for the Carrier to make a showing that the employee was determined to be responsible for the cited instances. *PLB 4833, Award 32* was decided in December, 1992 and *PLB 5441, Award 1* was decided in September, 1993. Those awards were decided after *PLB 3741, Award 121* which favored the Carrier's position.

Therefore, it is fair to conclude that although at one time between the parties fault may have been irrelevant in accident prone cases, since 1992 Boards reviewing these kinds of cases have required the Carrier to demonstrate that the employee had been found to be in some way responsible for the prior injuries. Indeed, *PLB 5441, Award 1* specifically relied upon that holding in *PLB 4833, Award 32* ("Without such a finding under the standard set forth [in *PLB 4833, Award 32*], the Carrier has not met its burden of proof to show that a particular individual is injury prone.").

We do not find those most recent awards between the parties relied upon by the Organization to be palpably in error. How we would decide the question on a *de novo* basis is therefore irrelevant. For stability purposes, between these parties and because the most recent awards state that in order to find that an employee is accident prone, there must be a demonstration that the employee was determined to be responsible for the cited instances, we are therefore required to defer to that line of authority. On this property, in order for the Carrier to discipline an employee for being accident prone, the Carrier must demonstrate that responsibility was assessed for

> the cited injuries against the employee for the cited incidents.
>
> Therefore, because 15 of the 18 incidents relied upon the Carrier in this case were instances where no investigations were held and no disciplinary actions were assessed, under the authority developed between these parties, the Carrier could not rely upon those 15 incidents to show that Claimant was accident prone. Under the circumstances, we have no choice but to sustain the claim.

That logic must apply to this case as well. There is no evidence that the eight other incidents resulting in Claimant's prior injuries were his fault. There were no investigations, discipline assessed or other findings that Claimant caused or contributed to those other eight injuries. Based upon *PLB 5416, Award 21*, substantial evidence therefore does not support the Carrier's determination that discipline was also appropriate because Claimant was accident prone.

The Carrier's cited authority in its submission is not persuasive to change the result. *First Division Award 20438; PLB 542, Award 2*; and *PLB 4724, Award 4* did not involve this Carrier.

C. Remedy

The remaining question concerns the remedy.

The Carrier dismissed Claimant for two reasons: (1) failing to protect himself from injury and (2) for being accident prone. As discussed, substantial evidence supports the first ground but not the second. The amount of discipline chosen by the Carrier (*i.e.*, dismissal) therefore cannot stand. Under the circumstances, this Board is of the opinion that a 30 day suspension will serve to get the message through to Claimant that in the future he must protect himself from injury as required by the Carrier's rules.

Our desire is that Claimant be made whole for lost wages and benefits less the consequences of a 30 day suspension. Ordinarily, we would simply require Claimant's reinstatement and would further require that Claimant be made whole for lost wages and benefits less the consequences of the 30 day suspension. However, this Board is uncertain of Claimant's condition and the status of his employment relationship.

The record shows that Claimant had surgery and, at least as of the date of the investigation, was still under a doctor's care. We are also advised that Claimant has instituted litigation against the Carrier. We do not know, however, whether

Claimant is capable of returning to work and further do not know the status of that litigation.

Therefore, in addition to reducing Claimant's monetary entitlement by the consequences of a 30 day suspension, Claimant's backpay and benefit entitlement shall be further reduced by any sum of money he received (or shall receive) for lost wages and benefits from any compensation proceedings or other legal action instituted against the Carrier. Claimant shall be entitled to reinstatement, but only if he has not waived that right (expressly or by implication) in any legal proceedings and further only if he passes the ordinary return to duty examinations. This Board shall retain jurisdiction for any disputes concerning the remedy.

AWARD

Claim sustained in accord with the opinion.

Edwin H. Benn
Neutral Member

Carrier Member

Organization Member

Jacksonville, Florida
Dated: 1/21/98