PUBLIC LAW BOARD NO. 5606

PARTIES TO DISPUTE) **BROTHERHOOOD OF MAINTENANCE OF WAY EMPLOYES**

SPRINGFIELD TERMINAL RAILWAY COMPANY

STATEMENT OF CLAIM:

1. Claim that the dismissal of I&R Track Foreman N. L. Deprey was without just and sufficient cause and excessive punishment.

2. I&R Track Foreman N. L. Deprey shall now be reinstated to service and compensated for all wage loss suffered prior to the hearing. (Claim No. MW-98-16)

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.

Basically, the Board is here called upon to determine whether discipline administered the Claimant, dismissal from service, is appropriate for his admitted exercise of poor judgment in having, without authority, taken or borrowed a bucket loader from the Carrier's maintenance yard, where he regularly worked, to remove snow and ice from the end of his driveway and then driving the loader to likewise clear the driveways of two friends. The Claimant resided some 300 yards distance from the Carrier yard.

The matter was brought to the attention of the Carrier when a woman who lived across the street from the two friends of the Claimant went to the Carrier offices the morning after the above mentioned incident to reportedly inquire as to who had operated the bucket loader in front of her house and who had left snow and chunks of ice on her lawn. The complainant said that she had traced the location of the loader by means of following a trail of hydraulic fluid from her house to the Carrier yard.

At the time of the incident, Sunday, February 1, 1998, the State of Maine was recovering from several weeks of a catastrophic snow and ice storm. The storm had prompted the Governor of Maine to declare a state of emergency and to summon help from the National Guard. The emergency order had stated, among things: "A severe winter storm is battering Maine, causing extensive electrical power outages and dangerous

transportation conditions that threaten public health and safety, and endanger public property."

When confronted, the Claimant readily admitted to having taken and used the bucket loader in the manner described above. Although it is evident that the Claimant came to subsequently recognize the inappropriateness of his conduct in using the loader without permission, it was offered in a defense for his actions that he was of the belief that there would be no objection to his use of the loader because he had been working an excess amount of overtime and clearing the four or five feet of snow and ice from his driveway would ensure that he would continue to be readily available for extra duty. It was also urged as concerns the Claimant having cleared the driveways of two friends, that this was done as an act of kindness and not for any personal or monetary gain. It was estimated that the Claimant used the loader for about three hours before returning it to the yard.

The Claimant gave the following response when asked at the hearing if he realized at the time that his taking and using the loader was against company policy and rules:

> No. I did not. All I had on my mind was to just get the snow out of my yard and that was it. If for one instant I had thought that I would get into trouble, I would never had done it. If I could back up time, I would. But, I can't. I'm very sorry I did it. I put myself through hell through it. I have thought about it every day. I've had an anxiety attack. I haven't had a free time. It's been on my mind constantly. There's not much I can say other than it will never happen again.

The notice of charge also indicated that the purpose of the hearing would be to develop facts as to whether the Claimant was responsible for the theft of company assets, i.e., fuel, fluids, oil and salt. At the company investigation the charging officer, and principal witness for the Carrier, stated that the only fluids under discussion was hydraulic fluid. In this regard, it is noted that this witness stated that the Claimant readily acknowledged that he was aware that the loader had a hydraulic leak and that he had to put about five gallons of fluid into the loader so as to get it back to its normal storage spot, and that the fluid he used was from the Carrier yard. Further, the Claimant presented into evidence copy of a January 13, 1998 receipt from a local hardware store showing the purchase of five bags of salt. The Claimant offered that he had not kept the original receipt and that the hardware store thus issued him a duplicate copy of the original sales receipt. No evidence was produced by the Carrier to show that any ice melting salt had been taken from the yard by the Claimant.

In review of the case, the Board recognizes that by his improper actions that the Claimant is deserving of stringent discipline. Clearly an employee does not have the right to unilaterally appropriate or borrow company equipment for a personal use. Further, there is no question that in this case, by his unthinking and impulsive actions, that the Claimant subjected the Carrier to risk and liability had the loader become involved in an accident

or property damage. Fortunately, nothing happened. There were no injuries or property damage; no citations issued for the loader operating on public roadways; and, no compensatory demands were made by the complainant.

At the time of the incident the Claimant was an employee of the Carrier for 17 years, with no discipline having ever been assessed to him. He had 12 years experience as an I&R Track Foreman in Old Town, Maine, and he was said by supervisors to have been a conscientious and faithful employee who was well liked by fellow employees as the so-called "spark plug" of his maintenance crew. It is also evident, as indicated above, that the Claimant was most forthright in admitting to his inappropriate conduct involving this incident. In the circumstances, the Board finds the penalty of dismissal to be excessive. A more appropriate penalty would be that period of time that the Claimant will have been out of service from the time of the incident to the date of implementation of this Board's findings and award. Accordingly, the Board will direct that the penalty of dismissal from service be modified to time held out of service and that the Claimant be restored to service with seniority and other benefits unimpaired, but without payment for time lost.

AWARD:

Claim disposed of as set forth in the above Findings.

Robert E. Peterson
Chair & Neutral Member

Timothy W. McNulty
Carrier Member

Stuart A. Hulburt, Jr.
Organization Member

North Billerica, MA
Dated 10-12-99