PUBLIC LAW BOARD NO. 5606

PARTIES) BROTHERHOOOD OF MAINTENANCE OF WAY EMPLOYES
TO)
DISPUTE) SPRINGFIELD TERMINAL RAILWAY COMPANY

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The letter of reprimand assessed Loader Operator F. J. Michaud for his alleged violation of the Roadway Worker On-Track Protection Policy on June 21, 2000 at Rigby Yard was without just and sufficient cause, based on an unproven charge and in violation of the Agreement.

2. As a consequence of the violation referred to in Part (1) above, Loader Operator F. J. Michaud shall now have his record cleared of the incident and be compensated for all wage loss suffered. (Carrier File MW-02-39)

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.

On June 27, 2000, Claimant was directed to report for an investigative hearing that was scheduled for July 7, 2000 in a charge that read as follows: "The hearing is being scheduled to develop the facts and to place your responsibility, if any, in connection with violations of the Railway Worker On-Track Protection [RWTP] policy, which occurred on June 21, 2000 at approximately 0930 hours in Rigby Yard."

By letter of July 3, 2000, the Carrier advised that the hearing was rescheduled "due to scheduling conflicts of the participants involved," and that Claimant would be notified when this date has been determined.

Over two months later, by letter dated September 12, 2000, the Carrier advised Claimant that the hearing scheduled for July 7, 2000 was rescheduled to October 10, 2000. The hearing was again rescheduled, and finally held on October 25, 2000.

On November 8, 2000 the Carrier notified Claimant by letter that the discipline here on appeal was assessed.

The Organization subsequently appealed the administration of discipline by both letter and in conferences with the Carrier. The dispute remaining unresolved, it was agreed by the parties to place the issue to this Board.

The Board has listed the chronology of scheduled hearing dates over an almost four-month period since it shows support for Organization argument that the Carrier did not treat the incident giving rise to discipline as a serious offense, and that the Carrier could have again postponed the investigation so as to provide probative proof as to why two witnesses were not present for the company hearing, a Road Foreman and a Yardmaster. The presence of both witnesses had been requested by the Organization prior to the initial hearing date, and the Carrier agreed to have them present. Yet, when the hearing was conducted, the hearing officer offered nothing of record to show why the two witnesses were not present.

In argument to the Board the Carrier says that the Road Foreman had left work on an extended bereavement leave, and that he did not return to work for several months. As concerns the Yardmaster not being present, the Carrier says that he resigned from its service and that it therefore had no authority or obligation to make him attend the hearing. Further, the Carrier says, even if it was to be accepted that the Yardmaster would have testified to the extent of accepting responsibility for not informing the train crew about track work that was being performed on the track on which Claimant was working, that this Yardmaster testimony could not be held to have absolved Claimant from a personal responsibility for track protection under RWTP. The Board finds Carrier argument to come too late, and to also be of questionable merit, especially since nothing of record is shown that any attempt whatever had been made to contact either of the two witnesses.

The importance of the two witnesses is demonstrated in a review of the testimony that they may have provided involving the incident that gave rise to the assessment of discipline against Claimant. The Track Foreman with whom Claimant worked at the time of the incident the subject of appeal, and Claimant, both testified that a job briefing had taken place prior to the start of their tour of duty about the safe performance of their work and the level of protection to be afforded the employees. The Road Foreman was said to have been in contact with the Yardmaster about the tracks on which they would be working being either fully or partially removed from service. There is no question that Track 49, on which ties were to be replaced, was taken out of service, and that Tracks 47 and 51 were spiked on the east end. According to Claimant, the Track Foreman assigned himself the responsibility of providing on-track protection from the west end of Tracks 47 and 51, since it was a

yard practice to permit crews to place cars half way up on those tracks while the track work was being performed. Further, it was offered in defense of Claimant that the Yardmaster, who was also not present for the hearing, neglected to inform the train crews that one-half of Tracks 47 and 51 were out of service. Thus, it was contended that it was the failure of the Yardmaster to perform his duties that resulted in a crew shoving cars onto Track 51 and into the vicinity where Claimant was working on his pay loader in handling ties for Track 49. Fortunately, Claimant noticed that the rail cars were coming at his machine, and although he did not have time to move the pay loader out of the way, he was able to exit his machine in time to avoid any personal injury.

The Conductor of the yard job that had placed cars onto Track 51 testified that the Yardmaster had not notified him that track work was being performed on this or any other track. He said that had he been so informed, he would not have rolled cars onto the track but have instead put the cars to rest on the track or placed them on another track. The Conductor also said that when he subsequently talked with the Yardmaster that the latter said he felt it was his fault for the accident that he would take responsibility for it.

Although the Board finds reason to hold that the aforementioned failure of the Carrier to have the requested witnesses present for the hearing, or to show valid reason as to why they were not, is sufficient to conclude that the claim be sustained, we also find it noteworthy that at the company hearing the Carrier charging officer, in describing the basis for the charge, several times said that the Track Foreman was responsible for on track protection that day, albeit on the one hand he would state on direct examination that Claimant should have challenged the level of protection provided, if he questioned it. On the other hand, in cross examination, the charging officer said: "I did not say he violated the good faith challenge." The charging officer also said, when asked by Claimant why he had been chosen for a violation of the so-called good faith challenge protection when the record admittedly showed that a protection challenge had never been used in the three years that the RWTP was in existence: "I haven't chose that as a violation by you."

A Carrier witness, a Track Supervisor, testified that on initial investigation of the incident he was of a belief that an acceptable level of protection had been provided for by the Track Foreman and Claimant, and that the accident occurred because the Yardmaster had not fulfilled his responsibility to have notified the train crew about the track work that was taking place at the time.

Testimony of several witnesses also reveals that there was general disagreement among a number of Carrier supervisory officials and officials as to the application of the RWTP to the instant case.

Lastly, the Board will also note that it understands further Carrier argument that the imposition of a reprimand is but a minimum form of a penalty. However, it must be recognized that it is nonetheless discipline. A formal reprimand becomes a permanent entry on an employee's record. Moreover, the assessment of discipline, no matter how minor, also serves as cause for an employee not to be entitled to compensation for any time lost in attending a company investigation. In the instant case, not only is there reason to hold that no discipline be assessed, but the record shows that at the time of the incident that gave rise to the company hearing that Claimant had 31 years of unblemished service with the Carrier and that he was described at the hearing as being a cooperative and very safe employee to work with.

AWARD:

Claim sustained.

Robert E. Peterson
Chair & Neutral Member

Timothy W. McNulty
Carrier Member

Stuart A. Hulburt, Jr.
Organization Member

North Billerica, MA
Dated Sept. 30, 2004