PUBLIC LAW BOARD NO. 5606

PARTIES) BROTHERHOOOD OF MAINTENANCE OF WAY EMPLOYES
) DIVISION OF THE INT'L BROTHERHOOD OF TEAMSTERS
TO)
DISPUTE) SPRINGFIELD TERMINAL RAILWAY COMPANY

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The thirty (30) day suspension assessed B&B Mechanic R. A. Buckman for his alleged violation of his duties when he sustained an injury on February 9, 2004 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, B&B Mechanic R. A. Buckman shall now have his record cleared of this incident and be compensated for all wage loss suffered. (Carrier File MW-04-11)

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.

The claim here at issue calls for a determination as to whether an injury sustained by Claimant on February 9, 2004 to his right index finger was due to personal negligence in violation of established Safety Rules. The Claimant was taken to the emergency room of a local hospital, where the injured finger was sutured with five stitches. Claimant was then off duty account personal injury for three work days.

A B&B Mechanic with 32 years service, Claimant had been sent by his supervisor to retrieve a propane torch and tank from the roof of the Paint Shop. In order to perform this work activity it was necessary Claimant climb a metal ladder mounted to a wall in the grit room of the Paint Shop; open and climb through a hatchway to the attic; and, go out onto the roof through an attic window. After proceeding to the roof, Claimant lowered the propane torch and tank to the ground from the roof ledge by rope. The latter being performed in accordance with Safety Rule 411-G,

which reads: "Employees must not carry tools or materials which prevent secure handhold or interfere with safe movement while climbing or descending ladder."

Proceeding down the ladder, it was necessary Claimant stop about half-way to pull the hatch cover back into position and secure it with a hook lock. In doing so, Claimant removed a glove that was covering his right hand so as to position the hook lock that behind the last rung of the ladder with his bare fingers because he was unable to do so with his glove on.

Extensive argument is made as to what Claimant did with the glove from his right hand. It is the position of the Carrier that testimony of supervisory officials is that in pre-hearing investigation Claimant had told them he took the glove off his right hand and held it in his left hand. Claimant denies having made such a statement; he says he shook the glove off and let it fall to the shop floor or platform.

While the Carrier asserts that Claimant told the investigators that he had placed the glove of his right hand into his left hand, the Board finds it noteworthy that it was testimony of one Carrier investigating officer, namely the charging officer, when asked by the hearing officer if in the course of investigation he had come up with a conclusion as to "what he felt may have happened" that conflicts with what Claimant said had happened, offered a rather speculative response, saying:

> Well, he didn't really tell me exactly what happened. He was unsure of ... of what happened. But I would say probably that, you know, if he was holding the glove in his left hand that he possibly could have lost the handhold, or he could have lost footing. I really don't ... I don't know, exactly.

The Manager of Safety testified that when he asked Claimant if he was holding onto a glove of had dropped it, Claimant had told him he "was unsure if he dropped it or was holding onto it."

Notwithstanding argument as to what Claimant did with the glove from his right hand, when the charging officer was asked to describe the way in which Claimant was negligent in the performance of his duties, the charging officer said:

> By having his glove in his hand up there by not being able to have hold on the ladder, not having three point contact on it at any given time.

"Three point contact" when using a ladder is described by the Carrier as intending that both hands and at least one foot always be in direct contact with the ladder, citing, above mentioned Safety Rule 411-G, and Safety Rule 410-b ("Use both hands, making sure of firm grip and safe foothold.") in a contention that Claimant had the

glove from his right hand in his left hand. The Carrier does not, however, offer how Claimant was to close the hatchway without taking at least one hand off the ladder while maintaining both feet on a rung of the ladder, or basically maintaining a form of three point contact with the ladder.

Asked if he had any conclusions as to how he believed the injury may have occurred, the charging officer again offered but a speculative response, saying:

> Well I believe he was proceeding down the ladder at the ... down towards the last rung, he either ... his hand slipped off the ladder, lost his handhold, or when he stepped down to that last step from the ladder to the platform, he misjudged that ... that step and then fell backwards onto the platform.

In this same respect, it was testimony of the Manager of Safety that he could not say for sure what had happened to cause Claimant to fall, stating:

> And after assessing what Ron had told me and after ... it appears that Ron either slipped off the ladder or misjudged the last step, got off balance, and fell backwards. I can't say for sure if that's what happened, but something did happen to cause him to fall."

As concerns the manner in which he says he came to be injured, it was testimony of Claimant that he misjudged the last step of the ladder; he put his right hand out as he was falling backwards; and, his right index finger got caught in the toe-board of the catwalk.

In overall study of the record, the Board finds it significant that the Manager of Safety acknowledged in cross examination at the hearing that the ladder was found not to meet OSHA regulations concerning spacing between rungs and being free of perpendicular obstructions closer than seven inches of the ladder.

While the Carrier says the matter of OSHA regulations is irrelevant to the dispute, the Board does not agree with this contention. We say this in particular note that the injury occurred while Claimant was stepping off the ladder, and whereas four rungs of the ladder were measured as being 17-1/2 inches apart, the bottom rung of the ladder was 16 inches from the floor. Moreover, the ladder was taken out of service following the company hearing.

It also concerns the Board that although the hearing was conducted in an open and fair manner, as evidenced by the non-prejudicial, albeit speculative, testimony of Carrier witnesses, that the company hearing officer had been an active participant in the Carrier's pre-hearing investigation of the incident and the interviewing of Claimant. That the hearing officer would offer that he only asked "a few questions .

. . of a very minimal nature" of Claimant; he "did not make any written conclusions or did not participate in any [pre-hearing] written documentation" of the pre-hearing investigation; and, at the time he was unaware that he was going to be assigned as the hearing officer, do not serve to overcome the fact that he should have recused himself from conducting the formal hearing.

Lastly, the Board finds it significant that we have before us an employee with long years of service and an almost unblemished record of service, save for two past minor infractions, who was said by Carrier witnesses to have always been a safe and conscientious worker.

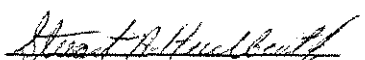
In the light of all the above considerations, the Board is not persuaded that the Carrier has met a necessary burden of proof to establish that Claimant was deserving of blame or censure account having sustained an on-the-job personal injury. Certainly, as held in a number of past decisions of boards such as this, the fact an employee suffers an injury does not in and of itself substantiate that it was due to a failure to be fully observant of safety rules or to have performed a work task in a negligent or careless manner. Accordingly, the claim will be sustained.

AWARD:

Claim sustained.

Robert E. Peterson
Chair & Neutral Member

Anthony F. Lomanto
Carrier Member



Stuart A. Hulburt, Jr.
Organization Member

North Billerica, MA
Dated 3/9/06