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 fourteen (14) day suspension assessed Foreman Wayne Cates for alleged negligence in the performance of his duties on October 16, 2003 was without just and sufficient cause and based on unproven and disproven charges.

2. Foreman Wayne Cates shall now have his record cleared of the incident and be compensated for all wage loss suffered. (Carrier File MW-04-19)

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.

Claimant, a Track Foreman, was assessed the 14-day suspension here on appeal in a Carrier determination that he was personally negligent in the performance of his duties while assisting welders in the unloading of a profile grinder off the back of a Hy-Rail pickup truck on October 16, 2003 in Orono, Maine, resulting in claimed injury to his right shoulder and back. Claimant remained off work account the injury for just over seven months. During this period of time Claimant underwent surgery for repair of a torn right shoulder rotator cuff.

The profile grinder was described at the company hearing as a cumbersome piece of equipment, weighing between 150 to 200 pounds, about four feet long, with one handle on each end for lifting, and one end being heavier than the other. The injury occurred while Claimant and two other employees were in the process of taking the profile grinder off the back of a company pickup truck.

As concerns the actions taken by Claimant and two employees in unloading the profile grinder from the truck, it was described to have occurred in the following manner. One employee was up on the body of the truck, guiding it up and over a four-inch lip or toe board on the back of the truck with the help of Claimant and another employee, who were standing on the ground in back of the truck. The employee on the truck helped to lift and lower it to the extent he could bend over the back of the truck while each of the other employees took hold of a handle so as to lower the machine to the ground. It was as the machine was being lowered that Claimant, holding the heavier end of the machine, says that he felt a burning sensation in his right shoulder and pain in the middle of his back.

The position of the Carrier is basically as it set forth in an October 5, 2004 letter to the Organization in denial of the claim, the Carrier having said in part:

> The fact of the matter is that Claimant was in charge of this operation. He was responsible for assuring that the proper safety precautions were being taken into consideration while unloading this machine. If he or one of the other men believed that it was unsafe to unload the machine, for whatever reason, it was the Claimant's responsibility to halt the procedure until proper precautions were taken. The manner by which the men actually unloaded the machine was not their only alternative. Safety must always come first, while performing any task. All three men testified to various problems that they took issue with, while trying to unload this machine. Nonetheless, the Claimant (who was in command) ordered Mr. Halloran to hand him the motor end of the grinder, thereby causing an injury to himself. Given his experience, knowledge and level of responsibility, he was negligent in performing his duty at the time of the incident.

The Board finds no substantial support of record for the contentions of the Carrier. As brought out at the hearing, Claimant and his fellow employees had loaded the profile grinder onto the truck without incident. It was also said that Claimant had assisted with the loading and unloading of a profile grinder off the back of a welding truck on numerous past occasions, including four to five times on some days. It was agreed that there were no other reasonable or acceptable alternatives, and that a truck with a tailgate lift was out of service and not available. Claimant did not "order" Mr. Halloran to hand him the motor end. As Mr. Halloran testified, he said to Claimant that he was only going to be able to help hold the machine for a certain distance in bending over the back of the truck, and that Claimant said, "go ahead, I've got it."

Moreover, in study of the record the Board finds nothing to show what the Carrier alleges to have been a "possible" failure on the part of Claimant to have handled

this job function in compliance with certain safety rules, i.e., Safety Rule GR-D and Rule 40, part "E." These rules read:

> GR-D. Employees must exercise care to prevent injury to themselves or others. They must be alert and attentive at all times when performing their duties and plan their work to avoid injury.
>
> Rule 40. When necessary for two or more persons to handle heavy or bulk material or objects, the following precautions must be taken: A. . . . E. In team lifting the efforts of the various workers must be completely coordinated, with directions being given by only one member of the team. Lift or make other movements only on command, and when practicable, team leader must be placed at end of object.

It was testimony of Carrier witnesses at the company hearing that Claimant used the safest possible route available to him and the other employees in unloading the machine from the truck. When Claimant's immediate supervisor, who was also the charging officer, was questioned as to whether there was anything that Claimant might have done differently to possibly prevent this injury, his response was: "Not with what he had to work with there, probably, no."

An employee of the Carrier for nine years at the time of the incident, Claimant has a past unblemished record. He was said by the Carrier witnesses to be a conscientious and good employee.

In view of the above considerations and overall study of the record the Board does not find support for the Carrier conclusion that it was negligence or a failure to follow safety rules on the part of Claimant that caused him to sustain the on-the-job injury at issue for which he was disciplined. As held in numerous awards, the mere fact that an employee injures himself in the course of the performance of his or her duties does not prove that it was a failure on the part of the employee to obey safety rules, negligence, or misconduct that caused the injury. The fact that an injury occurred and a number of possibilities are offered as to how the injury might have been avoided is not in and of itself sufficiently controlling to establish culpability. See, for example, the following excerpt from Second Division Award No. 1969:

> As we said in Award 1769, discipline must be based upon something more than a mere suspicion or possibility that an employee failed in his duties. Courts have frequently stated in weighing the proof offered by a plaintiff in tort actions that no number of possibilities makes a probability. Such is the case before us and we are compelled to sustain the claim upon the grounds that the penalty was wholly unwarranted for want of proof of the charge made. The action of the

carrier under the record made was arbitrary and the charge should not be considered in derogation of grievant's service record.

The Board will accordingly sustain the claim as presented in directing that Claimant be compensated for all wage loss suffered for the 14-day suspension and that his record be cleared of reference to this incident.

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