PUBLIC LAW BOARD NO. 5606

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

STATEMENT OF CLAIM:

1. Claim of the System Committee of the Brotherhood that the entry of the Letter of Reprimand plus five (5) days actual suspension assessed Foreman Eric L. Hayward for alleged involvement with the injury Mr. Reinsborough sustained on May 2, 1997 was excessive and was without just and sufficient cause, based on unproven charges and in violation of the Agreement.

2. Foreman Hayward shall now be completely compensated for all wage loss suffered and have his record cleared of the incident. (Claim No. MW-98-3)

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 May 7, 1997 the Claimant was instructed to report for a hearing on May 20, 1997, with the purpose of the hearing being described in the following manner:

> To develop the facts and place your responsibility, if any, in connection with an incident on May 2, 1997 at approximately 1415 hours at CPF 199 while taking your hard hat out of the cross box on track car 3504, you closed the top of the cross box on Mr. Reinsborough's wrist causing injury to both his wrist and foreman.

Contrary to contentions of the Organization that the notice was not sufficiently precise, it is obvious in study of Article 26.1 of the Schedule Agreement that the notice met the contractual requirements of such rule. Pursuant to the language of Article 26.1, the notice contained "information sufficient to apprise the employee of the act or occurrence to be investigated" and it included the "date, time, location, assignment and occupation of employee at the time of the incident." That is all that is required. Article 26.1 does not prescribe that the hearing notice identify specific rules as having been allegedly violated.

Further, the hearing was postponed on a number of occasions. It was not held until January 13, 1998. Eight months thus existed for any inquiry to have been made of the Carrier for any needed clarification of the charge. Moreover, the Claimant testified that he had received a proper notice and was ready to proceed with the investigation.

It does however concern the Board that after having only introduced at the hearing that Safety Rule GR-D had allegedly been violated, that in its subsequent notice of discipline the Carrier would additionally cite Safety Rules GR-A, GR-B and GR-J as having likewise been violated. In the opinion of the Board, since the Carrier determined at the hearing that there was reason to believe that the actions of the Claimant constituted a violation of but one specific rule it thereby foreclosed a right to subsequently determine if support of record existed to conclude that there was a violation of other rules. This, notwithstanding that the three additional rules cited for the first time in the notice of discipline do appear to have a direct relationship to Rule GR-D, i.e.: (1) safety being of the first importance in the discharge of duty, (2) in case of doubt or uncertainly, the safe course must be taken, and (3) employees must be observant and use common sense at all times. Safety Rule GR-D reads: "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 planning their work to avoid injury."

The Board also finds lacking in merit the Organization contention that it prejudiced the Claimant's right to a fair and impartial hearing because the hearing officer, upon discovering that the tape recorder had ceased functioning in a proper manner, decided to regenerate the record by redoing the hearing from that point of time that the tape recorder failed to properly record testimony. Nothing of record shows that in taking such action that the hearing officer either sought or permitted a change or embellishment of testimony as it had been previously presented. Thus, there is no basis to hold that the actions of the hearing officer constituted the subjecting of the Claimant to a second hearing for the same offense. The hearing officer had a responsibility to assure the production of an accurate and complete transcript of the proceedings and, under the circumstances, took appropriate action to do so.

There is no question that when both the Claimant and another Trackman were getting their hard hats out of a tool box on a track car, that the Claimant closed the lid to the box on the right hand of this other employee, causing a bruise to the wrist. Although the notice of charge also stated that there was a bruise to the forearm, we find nothing of record to substantiate such a contention. The Trackman reported, after examination by a doctor, that x-rays were negative and only that his right wrist was bruised. No medication was prescribed, with the Trackman being told to take Advil for pain. The injury did not result in any lost work time.

The tool box was said to be the full width of the pickup truck, or body of the track car, and said to measure six or seven feet across and to be two feet wide. It was asserted, without objection, that when the tool box lid is opened with the track car on the hi-rails

that it obstructs the visibility of persons standing on opposite sides of the vehicle. Thus, the Organization urges that this condition be viewed as a mitigating and contributing circumstance to the injury of the Trackman. The Board does not agree. Certainly, such a condition would dictate increased caution when opening and closing the tool box lid, and not less attentive care, so as to prevent injury.

At the time of the incident the Claimant had an unblemished discipline and safety record. This was his first offense in 27 years of service. He acknowledged certain responsibility for the injury, and was said to be willing to participate in an off the record discussion as to how such an incident might be avoided in the future. Clearly, this past record, the demeanor displayed at the hearing, and the relative minor nature of the incident, all call for the discipline to be set aside as harsh and unreasonable. This is not to say that we do not recognize there are instances where it has been held that because of the nature of the offense that long service does not shield an employee against discipline or even dismissal from service for a first time dereliction of duty. That is not, however, the case here. Accordingly, the Board will direct that the discipline be set aside, the Claimant be compensated for all time lost, and his discipline record be cleared of the charge.

AWARD:

Claim sustained.

Robert E. Peterson
Chair & Neutral Member

Timothy W. McNulty
Carrier Member

Stuart A. Hulburt, Jr.
Organization Member

North Billerica, MA
Dated 10-12-99