NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 5735

JOHN C. FLETCHER, CHAIRMAN & NEUTRAL MEMBER
JOSEPH A. MARKASE, CARRIER MEMBER
D. D. BARTHOLOMAY, ORGANIZATION MEMBER

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

INDIANA HARBOR BELT RAILROAD COMPANY

Award No. 3
Case No. 3

Date of Hearing - October 6, 1997
Date of Award - February 13, 1998

Statement of Claim:

Claim of the System Committee of the Brotherhood that:

1. The five (5) day suspension assessed Trackman David P. Estrada for his alleged responsibility in connection with the injury sustained on April13, 1995 was without just and sufficient cause and based on an unproved charge. (Carrier's File MW-95-035.)

2. As a consequence of the violation referred to in Part 1 above, Trackman D. Estrada shall now be compensated for all wage loss suffered, credits and benefits denied him because of the incident.

FINDINGS:

Public Law Board No. 5735, upon the whole record and all of the evidence, finds and holds that the Employee(s) and the Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and, that the Board has jurisdiction over the dispute(s) herein; and, that the parties to the dispute(s) were given due notice of the hearing thereon and did participate therein.

On April 13, 1995, Claimant David P. Estrada, while working as a Trackman at Carrier's yard in East Chicago, Indiana, was pulling spikes when the bar slipped, resulting in a laceration to his right shin. Claimant was taken to a medical facility for treatment, but did not lose any other work as a result of the injury. Claimant was cited to attend an investigation on the incident. Following the investigation Claimant was disciplined with a five day actual suspension.

The Organization has appealed the suspension on the grounds that the hearing was merely a formality, with Claimant's guilt being predetermined. It contended that no evidence was introduced into the hearing record to suggest inappropriate conduct on the part of Claimant, or that he was indeed in violation of any of the numerous rules cited.

The Carrier argues that the evidence is conclusive that Claimant was in violation of Rule 11 and Rule 3134 in the manner in which he was using the claw bar to pull spikes. Rule 11 and Rule 3134 explicitly state how claw bars are to be used, and if Claimant had conducted himself in accordance with the requirements of these rules he would not have injured himself. Carrier also says that Claimant's testimony was evasive and convenient, because he was unwilling to recall just how he was working at the time of the injury.

The Board notes that in Claimant's 33 years of service with Carrier he has reported no less than 24 personal injuries of various types, some serious and some not so serious. The Board also notes that Claimant has previously been disciplined over some of the incidents involved in some of these injuries. And, the record also indicates that Claimant has been warned in writing that he should correct his work habits as he may be endangering himself and others. With this type of past record, it is easy to assume that the injury occurring on April 13, 1995, resulted from Claimant's failure of follow the dictates of specific rules and/or he was not performing the tasks assigned in a safe manner. Assumptions, though, are an insufficient basis to support imposing discipline of a suspension. Credible evidence must be introduced into the hearing record conclusively demonstrating that Claimant violated a specific provision of a Company rule, or that he otherwise went about his duties in a careless and unsafe manner. Without such evidence the Company has no basis to impose discipline, and the record in this investigation in this matter does not satisfy basic evidentiary requirements.

The only witness to testify on behalf of the Company was Claimant's Track Supervisor. His direct testimony consisted of reading an accident report into the record. On cross examination by Claimant's representative the Track Supervisor indicated that he did not witness the incident, and all that he knew was what the injured employee told him what happened. This was recorded as, "[Claimant] was pulling spikes with the claw bar, the claw bar slipped off the spike's head and out of [his] hands, hitting the right shin." There is no testimony that Claimant did not have his feet firmly placed, there is no testimony that he was not maintaining a braced position, there is no testimony that he was overreaching, or that he wasn't attempting to keep his hands and other body parts clear of pinch points, as required by Rule 11. Also, there is no testimony that he did not observe the position of the claw bar so that his hands would not be caught when the bar moved, the is not testimony that he had not placed the end of the bar under the spike properly with a firm grip, and there is no testimony that he did not make sure that no one was in a position to be struck by the bar, as required by Rule 3134.

All, that there is in this record is an assumption that because he was injured that Claimant must not have been working safely as contemplated by the rules. Assumptions, standing alone, are not evidence that Claimant was going about his work in an unsafe manner. Evidence would be an observation or an admission that Claimant was not working safely. These are missing in this record. Assumptions may only be credited when they cannot be rebutted. In this record the assumptions relied on by the Carrier are easily rebutted. Accordingly, the discipline assessed in this matter will not be allowed to stand.

In setting aside the five day suspension the Board feels compelled to make a comment to Claimant for his own well being. While Carrier has not established in this record that Claimant was not working safely when he was injured on April 13, 1995 and that is the sole reason we are setting his suspension aside, we are, nonetheless, concerned about the inordinate number of injuries sustained over a 33 year working career as a trackman. Twenty-four injuries in 33 years indicates that something is amiss somewhere.

We recommend that Claimant take a close look at his work habits, and that he follow safety rules to the letter to avoid more serious injury to himself or to others. Most accidents of the type under review here are preventable. Claimant needs to become aware of this fact. We recommend further that he become fully aware that this Carrier in particular and the industry in general will not tolerate, and retain in its service, employees that are accident prone because of their own carelessness and their refusal to follow good work habits, and abide by the letter of published safety rules.

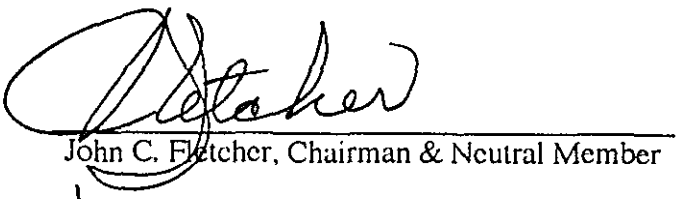
The claim will be sustained because Carrier has not established that Claimant was working in an unsafe manner when he was injured on April 13, 1995.

A W A R D

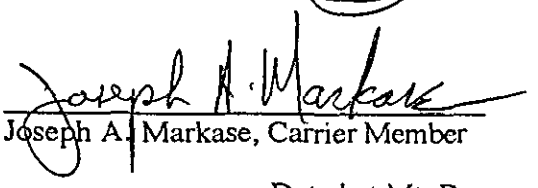
Claim sustained.

O R D E R

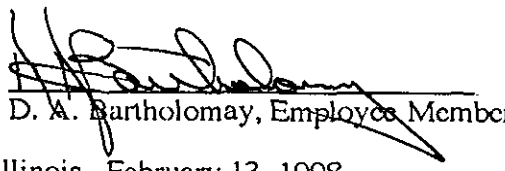
Carrier is directed to comply with the award and make any payments due Claimant within thirty days of the date indicated below.



John C. Fletcher, Chairman & Neutral Member



Joseph A. Markase, Carrier Member



D. A. Bartholomay, Employee Member

Dated at Mt. Prospect, Illinois., February 13, 1998