PUBLIC LAW BOARD NO. 5606

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

STATEMENT OF CLAIM:

1. The reprimand and two (2) day suspension assessed Trackman P. G. Tanguay, Jr. for alleged involvement with the injury he sustained on July 24, 1995 was without just and sufficient cause, based on upronven charges and in violation of the Agreement.

2. As a consequence of the aforesaid violation, Trackman P. G. Tanguay, Jr. shall have his record cleared of the charges leveled against him and he shall be compensated for all wage loss suffered. (Claim MW-95-14)

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.

While working as a Trackman with a panel gang in Portland, Maine on July 24, 1995, the Claimant sustained a personal injury. In an attempt to retrieve a tie of a certain grade and length from a pile of about 40 ties that was needed to complete the panel that the crew was working on at the time, the Claimant climbed onto the pile of cross-ties. While standing on a stack of ties about three ties high off the ground, and trying to push or roll a tie that was several ties higher in the stack over another tie, the tie that the Claimant was pushing slid back, and then, as the Claimant reportedly sought to jump off the pile of ties, the tie bounced and pinned his arm against the ties, causing him to suffer a broken forearm. At the time of the incident, there was no foreman present, and the Claimant had taken it upon himself to get three ties that were needed to complete the panel while two other trackmen were working on the other end of the panel. The Foreman had previously left the crew to pickup a compressor from Rigby Yard for use by the track gang.

The Claimant was thereafter directed to report for a hearing to investigate the incident. Following the hearing, the Carrier notified the Claimant that he was being disciplined to the extent of a reprimand and two-day suspension in a determination that his failure to have performed his duties in a safe and proper manner caused the personal injury. In this respect, the Carrier basically says that the Claimant knew or should have known that the act of climbing on ties is an unsafe act in and of itself and, further, that the proper equipment for moving ties was readily available for removal of ties from the pile of ties.

It is the position of the Organization that the discipline should be set aside on procedural grounds, if not in a failure on the part of the Carrier to meet a necessary burden of proof that the Claimant was at fault for the personal injury. It claims that the Carrier disciplined the Claimant because he was injured, and not because he violated any rules.

In procedural argument, the Organization says that the Claimant was denied contractual due process in a contention that: 1) The notice of hearing was not sufficient to apprise the Claimant of the act to be investigated. 2) The Claimant was adjudged guilty of violating rules that were not set forth in the charge or presented during the hearing. 3) A Carrier officer who appeared as a witness at the hearing rendered the discipline.

Section 26.1 of the Discipline Rule reads in part here pertinent as follows:

> No employee will be disciplined without a fair hearing. The notice of hearing will be mailed to the employee within 10 days of the Carrier's first knowledge of the act or occurrence. The notice of hearing will contain information sufficient to apprise the employee of the act or occurrence to be investigated. Such information will include date, time, location, assignment and occupation of employee at the time of the incident. The notice of hearing will also include a list of witnesses to be called. . . . .

There is no question that the notice of hearing, which was issued under date of July 27, 1995, clearly fell within the 10-day notification requirements of Article 26. The notice also appears to have met the other required conditions of Article 26 concerning the date, time, location, etc., of the incident, in that it included a statement which reads: "This notice is issued to develop the facts and place your responsibility, if any, in connection with an incident and injury to you on July 24, 1995 at approximately 1020 hours at Brighton Avenue, Portland, ME. Mr. Richard F. Dixon, Chief Engineer of Track, will also be at this hearing."

Contrary to the contentions of the Organization, nothing contained in Article 26 obligates the Carrier to cite or charge an employee with a violation of specific rules. The notice requirements of Article 26 basically provide that an employee be given sufficient details about a cited incident so that he or she can come to the hearing prepared to explain their conduct or defend against the charge. That the notice here at issue sufficiently apprised the Claimant as to the nature of the offense to be investigated is demonstrated by the fact that there was no request for a clarification or protest of the charge either before or at the investigation. Moreover, the record of hearing shows that both the Claimant and his representative came to the investigation fully prepared with a defense in support of the actions of the Claimant involving the cited incident and injury.

The Board also finds no reason to hold that the Carrier did not have the right, following the investigation, to set forth in the notice of discipline the specific rules which it found the hearing record to support as having been violated by the Claimant in the performance

of his duties. Although safety and other rules believed to have been violated are often cited in a notice or at an investigation, it is nevertheless to be recognized that awards of numerous past boards have held that an accused employee, upon trial, may be disciplined for any rule violations that are disclosed by the company investigation. After all, the purpose of the investigation is not to prove the correctness of the charge, but for the purpose of determining all facts material to the charge, both those against and those favorable to the employee.

We also find nothing of record to show that any fundamental right of the Claimant was prejudiced because a Carrier officer who appeared at the hearing as a witness was also the disciplinary officer. Unlike those cases where it was held that the concept of a fair and impartial trial was violated when the same official served in multiple roles as the prosecutor, judge and jury, the Carrier officer here challenged gave but limited testimony concerning an interview that he had with the Claimant following the incident, and then, after reviewing the entire transcript, issued discipline. As stated above, service in these two particular roles did not deprive the Claimant of a fair hearing, especially in view of the admissions that the Claimant made in the course of his testimony.

On the merits of the case, the Claimant's own testimony leaves no doubt that it was his reckless disregard for his own safety and a violation of safety rules that caused him to suffer a personal injury. We are not persuaded that the injury resulted from a lack of proper training, much less a failure on the part of the Carrier to have specifically instructed the Claimant not to climb onto a pile of ties. Certainly, no carrier can be expected to list every unsafe practice that an employee should not engage in while performing their duties. The Claimant should have known from his past service and previous employment in construction that you do not perform work in the manner he attempted in this instance. Under the circumstances, it cannot be said that the instant discipline was without justifiable cause. The claim will therefore be denied.

AWARD:

Claim denied.

Robert E. Peterson
Chair & Neutral Member

David F. Sibley
Carrier Member

Stuart A. Hurlburt, Jr.
Organization Member

(I dissent to the above)

North Billerica, MA.
December 22, 1997