

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Jay S. Parker, Referee.

**PARTIES TO DISPUTE:**

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES**

**READING COMPANY**

**STATEMENT OF CLAIM:** Claim of the System Committee of the Brotherhood, that:

- (1) The Carrier violated the agreement when it assessed discipline against Section Foreman Arlington D. Beck, contending that he was responsible for water tank of weed burning outfit being struck by New Hope Local Engine 1599, October 4, 1948;
- (2) Section Foreman Beck be paid the wages he would have earned during the 5 days he was suspended from service because of the accident referred to in part (1) of this claim.

**OPINION OF BOARD:** On October 4, 1948, weed burning outfit consisting of two track cars was burning weeds between Ivyland and Traymore on the single track New Hope Branch. The first mentioned location is something over one and one-half (1½) miles west of the second one. About 11:20 A. M. of that day the outfit stopped on the track at Bridge 11/37, some 2400 feet west of Traymore, for the purpose of pumping water from the creek to refill water tanks and while so engaged the rear of the two track cars was struck by Engine No. 1599, pulling extra local freight train in a westerly direction from Roslyn to New Hope. The track approaching the bridge west of Traymore at the point of collision is on a four degree curve for about 700 feet and enters tangent track 325 feet east of such point. Part of the tangent track and the curve are in a cut. However, the engineer of the local freight had a clear view of the weed burning outfit 635 feet east of where it was stopped.

October 7, 1948 the Carrier held an investigation to determine the cause of and responsibility for the collision of the extra and the weed burning outfit resulting in damage to the latter and alleged to have occurred because of a violation of its Operating Rule 99. This rule, so far as pertinent to matters here involved, reads:

"When a train stops under circumstances in which it may be overtaken by another train, the flagman must go back immediately with flagman's signals a sufficient distance to insure full protection, placing two torpedoes, and when necessary, in addition, displaying lighted fuses. When recalled and safety to the train will permit, he may return.

When the conditions require, he will leave the torpedoes and a lighted fusee."

The transcript of the record of the evidence advanced at the hearing is quite lengthy and it will not be necessary to detail all that is to be found therein. It consists of testimony of the claimant Beck, a Foreman in charge of the weed burning outfit, of Sub-Foreman Stout, a member of that outfit, and of Engineer Mishler of Extra Freight No. 1599.

A portion of Foreman Beck's testimony discloses how the weed extinguisher happened to be at the point in question and the instructions he claims to have given Sub-Foreman Stout, who was acting as a Flagman, with respect to protecting trains coming from the east. It reads:

"We went and got the orders from the Operator at Ivyland right after 8:07 A.M. (Train 285) west. After receiving orders we went out and got our equipment, instructing the flagmen in both directions what we were going to do and orders read '504 and 505 work extra between 8:35 A.M. until 3:35 P.M. between Ivyland and Rushland.' We instructed Sub-Foreman Franklin Stout to stay at Ivyland and flag all extra trains and that the track cars would clear all regular trains. When the local freight arrived, the flagman was to flag the local freight and bring the train up to where the weed burning outfit would be overtaken. After that we went and proceed to work west of Ivyland, \* \* \* "

In addition to the above Beck conceded he was familiar with Rule 99 and admitted that when his outfit stopped at the bridge he made no further effort to protect it from trains approaching from the east, either by flag, fuses or torpedoes. His explanation for failing to do so was that he thought he had already protected the track cars in compliance with the requirements of such rule.

Respecting the instructions referred to in Beck's statement Stout testified as follows:

"We started to work at 7 o'clock and went to Ivyland Station. Section Foreman Beck came and told me I should flag all extras and permit regular trains to come. When the freight would come I should notify him and go up with train to destination. When freight came to Ivyland I told Engineer that weed burner was working between here and Grenoble, maybe in the siding at Grenoble or Rushland, and that I had orders from my Foreman to come up with the freight. I went into the caboose. I told the Conductor at the station men were also working between Ivyland and Grenoble."

Touching the same point, Mishler, referring to what appeared at Ivyland, said:

"A fellow came up with flag in his hand and said their men would be in Grenoble or Rushland taking dinner. Fireman was on ground with the tank and he heard what he said. When we left Ivyland, this Flagman said he would ride up with us. He walked back and got on the caboose, I waited until he got on and then I started the train, shut the throttle off and drifted because it is down hill, looking out for the weed burner. \* \* \* "

Ivyland Station, referred to in the three preceding quotations, is located approximately one and one-half miles from the place where the extra freight collided with the weed burning outfit and it is certain that both Beck and Mishler had received train orders placing them on notice the extra would pass the weed burner on the day in question somewhere between that location and Rushland.

For all other purposes it can be said, assuming since it was not denied by Stout that Beck's version of what he instructed that individual to do is correct, that a review of all the testimony of the three persons heretofore mentioned makes it clearly appear the collision would not have occurred

except for (1) Stout's failure to definitely carry out Beck's instructions, (2) Mishler's failure to heed the warning Stout did give him, to keep a proper lookout and to maintain a speed at which he could stop his train on sudden notice, and, (3) Beck's failure to protect his outfit by torpedoes, fuses, or other warning signals after it came to a complete stop at the bridge.

At the outset it should be stated the rule that there can be more than one cause for an accident or collision is too well settled to admit of dispute. The same holds true of the principle that responsibility attaches regardless whether the cause is due to action or inaction so long as there is a failure on the part of one or all the parties involved to do or refrain from doing something they are obligated to do or not do. Under the facts of this case, as heretofore indicated, we think there were three concurring causes which contributed to the collision and that it cannot be said, as the Organization vigorously contends, the fact action and/or inaction on the part of Stout and Mishler preceded Beck's inaction in point of time, absolves the latter from responsibility even though, under the Agreement, he had a duty to perform and failed to fulfill it.

Having determined the foregoing question the sole issue remaining becomes apparent. Indeed there can be no dispute regarding it for the parties agree on it. In its ex parte submission the Brotherhood states:

"In substance, the Employees' position is based on the contention that Foreman Beck had used the proper and necessary precautions in protecting the equipment, that he did comply with the rules of the Carrier, by placing a Flagman to afford this protection."

While the Carrier's initial submission contains the following statement:

"Under the facts and circumstances set forth herein, it is the Carrier's position that proper and adequate protection was not afforded the operation of the weed burning outfit here involved to insure full protection as required by Rule 99, which was the responsibility of Section Foreman Beck who was in charge of the operation of the track cars and weed burning equipment."

The Organization first contends the Rule heretofore quoted merely requires that, when under circumstances here involved a train stops, a flagman must go back immediately with flagmen's signals to insure full protection, and no more. It then argues that when Beck left one flagman (Stout) back at Ivyland, one and one-half miles from his outfit, with proper instructions, he had complied with all its requirements. Strictly construed express language in the rule requires more than that. However, a fair inference to be derived from the record is that existing practice does not always require two torpedoes to be placed, as the rule plainly states, and that all that is required is that they be placed when the conditions require. We therefore proceed on that premise. Even so the Organization's contention on this point cannot be upheld. The rule as modified by practice requires the placing of torpedoes when conditions require even though a flagman has been sent back a sufficient distance for the purpose of insuring full protection.

Next it is argued that by leaving Stout at Ivyland and giving him the instructions to which he testified Beck used all precautions necessary and proper under the rule to protect the equipment for which he was responsible, hence discipline of 5 days was arbitrarily and capriciously imposed. The short answer to this contention is that the collision occurred under circumstances where the weed burning outfit was not adequately protected. However, we are not inclined to base this Opinion upon that fact. Instead we prefer to predicate it upon the premise that, with knowledge the extra would be approaching and with his outfit at a complete standstill at a point where it could not be seen as the extra approached from the east, around a curve, until within a distance of 635 feet, it was Beck's duty, even though he had given Stout the instructions he said he had, to further protect his equip-

ment by seeing to it that torpedoes or fusees were placed far enough back to give a warning which would insure its full protection unless the engineer of the extra negligently disregarded them and that in failing to do so he was guilty of a violation of Rule 99 under the practice existing with respect thereto. We therefore hold that under the circumstances discipline was proper and that the penalty of five days' suspension was not arbitrarily or capriciously imposed.

Complaint is made but not strenuously argued in the submissions that the Carrier prejudged Beck's case because of a statement made by R. L. Palsgrove, Road Foreman of Engines and one of the investigating officers at the investigation while examining Mishler to the effect that the track car crew had failed to afford proper flagging protection and that the members thereof would be taken to task for their violation of Rule 99. This statement does not state what discipline, if any, would be imposed, and it appears it was correct as to the fact there had been a violation. Moreover it was not made by an official of the Company charged with the duty of determining whether discipline should be assessed. For that reason we are not disposed to hold it had the result of making the Carrier's subsequent disciplinary action arbitrary or capricious, particularly in a case where the Organization, as heretofore quoted, definitely indicates its position is that the accused employe used the proper and necessary precautions and complied with the requirements of Rule 99.

Little, if any, weight has been given to the Employes' argument that the weed burning equipment gang was small in numbers, that Beck did not have another flagman and other men were not available to take additional precautions after the crew started to fill the water tanks at the creek. He could have required some member of the crew to take those precautions when the outfit stopped and before the tank filling started or he could have done it himself thereafter. In any event under the existing circumstances it was his duty to see that it was done even though such action would have necessitated an entire stoppage of weed burning work until it was completed.

**FINDINGS:** The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employe involved in this dispute are respectively Carrier and Employe within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was not violated.

#### AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

ATTEST: A. I. Tummon  
Acting Secretary

Dated at Chicago, Illinois, this 8th day of August, 1951.