

NATIONAL RAILROAD **ADJUSTMENT** BOARD

THIRD DIVISION

Award Number 20101
Docket **Number** MW-20329

Joseph A. Sickles, Referee

(Brotherhood of Maintenance of Way **Employes**

PARTIES TO DISPUTE: (

(Norfolk and Western Railway Company - (Western Region)

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

(1) The dismissal of Extra Gang Foreman C. J. Black, the **30-day** suspension of Section Foreman Z. C. **Jordan** and the **10-day** deferred suspension of Extra Gang Laborer D. E. Dykstra were without just and sufficient cause; on the basis of unproven charges; and wholly disproportionate to their respective responsibilities for the collision involving Train DM-4, Engine 8488 and Hi-Rail Truck No. 4027 on January 26, 1972 (System File MW-MOB-72-100).

(2) Claimant Black be restored to service; the record of all three claimants be cleared of the charge; Claimants Black and Jordan each be allowed pay for all time lost - all in conformance with Rule **20(g)** of the Agreement.

OPINION OF BOARD: This dispute concerns disciplinary action against three (3) employees regarding responsibility in connection with the collision of Train DM-4 and a hi-rail truck on January 26, 1972. After investigation, Carrier dismissed Extra Gang Foreman, Black; suspended for thirty (30) days Section Foreman, Jordan; and suspended for ten (10) days (deferred) Extra Gang Laborer, Dykstra.

On January 26, 1972, in the afternoon, the Claimants, utilizing Black's hi-rail truck and equipment, were assigned to repair a track **which** had pulled apart. Foreman Black had in his possession a "line up" of operating trains, however, it had expired at **12:30** P.M. Foreman Jordan determined the location of one remaining train by placing a telephone call. Although the information suggested that the train (DM-4) would arrive much earlier, the Foremen concluded that they had until **4:00 P.M.**, to complete repairs. Their estimate proved to be erroneous, because at either **3:25** P.M. or **3:35** P.M. (conflicting testimony) Train DM-4 rounded a curve, and **was** unable to stop in sufficient time to avoid a collision with the hi-rail truck in the immediate proximity of the three Claimants. Although there were no personal injuries, the hi-rail truck, a drill and a saw were damaged, and there was some damage to the Engine of Train DM-4,

The issue to be determined is whether Claimants' failure to utilize flagging procedures warranted discipline, and if so, whether the discipline imposed was excessive,

It is unquestioned by Claimants that under the circumstances, the Carrier's **operating** procedures required safety precautions.

Claimants should have placed on the track devices **known** as "torpedoes." When a train strikes and explodes such a device, the Engineer is required to reduce speed for one mile and to activate certain whistle procedures. In addition to employing torpedoes, a Flagman should be used to warn that there is obstruction on the track. **While** the record is not precise in this regard, it appears that "fuses" may be ignited and placed on the right-of-way. In the event of an emergency which precludes use of a Flagman, torpedoes, and (assumedly) fuses, a message should be directed to the train dispatcher so that he can take appropriate warning action.

Although it was an overcast day, with vision somewhat obstructed (and the repair site was near a **curve**), Claimants utilized none of the above described procedures. **They** insisted that all three (3) men were needed to perform the repair work and thus, it was not possible to spare anyone **to** serve as a Flagman. Torpedoes were not used **because** Black only had one **available**, which **was** not in proper working order. Black did have fuses **available**. His failure to **use** same was never explained, nor did Claimants suggest any reason for failure to contact the dispatcher. In the main, the Foremen suggest that the real culpability was not theirs, but was grounded upon insufficient manpower and inability to obtain required supplies, such as torpedoes.

Initially we will consider the Foremen's responsibility. Upon a consideration of the entire record we find that their disregard for the safety operating rules caused the collision. Black was in the prime position of responsibility. Although he had a red flag with him, he had only one torpedo. **The** track supervisor testified that torpedoes were available at Bussey on the day in question, and that Black had not requested torpedoes at any time reasonably related to the incident. In any event, we feel that Black demonstrated a rather cavalier disregard for safety in another manner. The claimants waited at Bussey for a Burlington Northern train to pass before proceeding to the site of the broken rail. At that time, Black obviously knew that he only had one defective **torpedoe**. Not only did he fail to attempt to obtain any torpedoes, he never even mentioned, to the other two claimants, that he did not have the required equipment. In point of fact, Jordan had, in his car at Bussey, a supply of torpedoes, yet Jordan was not aware that Black did not have adequate safety material until the Claimants arrived at the location where the rail was to be repaired. Had Black been **concerned** enough to mention to his co-workers his shortage of safety equipment or exhibited any outward manifestation of concern, the torpedoes could have been easily obtained from Jordan. Instead, Black remained silent, apparently prepared to proceed to the damaged rail without concern for safety factors, even though, as he conceded at the investigation, use of proper equipment would have avoided the collision.

We have referred above to the fact that Black's only **torpedoe** was not in proper working order. It did not contain a "lead", however Black testified that he could have wired the **torpedoe** to the track. He did not do so because he desired to save it in the event the rail "Broke... in two we could put that on the rail and warn the train to be on the lookout for a flag."

A determination of fault in a collision is often a difficult resolution. We do not suffer from such an impediment in this case, Black was fully and completely aware of, but ignored, the safety measures required of him.

Foreman Jordan **was** equally aware of the detailed safety requirements of Carrier. Although he was not aware of the lack of proper flagging equipment until arrival at the site of the rail repair, the record clearly **shows** that he **acquiesced** in the determination to proceed absent required safety precautions.

Concerning Foreman Black, - upon the entire record, the Board finds that none of his substantive procedural rights were violated in any manner. Substantial and credible evidence was presented at the investigation, including claimant Black's own testimony, to establish his responsibility. This Board will not disturb an assessed penalty unless it finds that Carrier's decision was so unjust, unreasonable, arbitrary, capricious or discriminatory so as to amount to an abuse of discretion. (Award 19433 (Blackwell)). Upon consideration of the matters discussed above we are unable to make such a finding in this case, and we will deny Black's claim,

Concerning Foreman Jordan, for the same reasons cited **immediately** above, we will deny Jordan's claim.

Concerning Laborer, Dykstra, the Board is of a different view. While it is well established that this Board may not substitute its own **judgement** for Carrier's, at the same time, we must assure that Carrier has met its burden of proof by a substantial showing of evidence. It may be that Carrier focused its attention upon the two (2) Foremen and tended to be less concerned with the Laborer. But for whatever reason, the Board is not convinced that Carrier ever established any culpability on the part of Dykstra. It **must** be remembered that the charge against Dykstra dealt with "responsibility." Quite tersely we wonder, from a review of the record, what "responsibility" Dykstra had, or what influence he could have exercised.

At the hearing, Dykstra was questioned minimally concerning his actions and/or decisions. It appears that he was never issued Carriers' operating rules. On the day in question, the record shows that his only assignment was to assist Black in changing the rail. On prior occasions he has used flagging equipment which was normally given to him by the Foreman, or on occasion by another crew, There is nothing to suggest that he was required to maintain his own supply of safety equipment. At the investigation, a number of Operating

Rules were read into the record, and Black and Jordan were asked if they were familiar with the rules. When the last Rule was read into the record, Dykstra was asked if he understood it. He replied in the affirmative. But, understanding a rule as it is read to you does not imply prior familiarity, especially when it was un rebutted that he had never been issued the rules, As stated above, the Board feels that Carrier failed to establish, by substantive evidence that Dykstra was anything other than a helper without authority. We find no evidence to suggest that in his position he could have exercised any meaningful discretion, and accordingly we question that Carrier established any degree of "responsibility" for the collision on the part of Dykstra. While it is true that his punishment was not severe, nonetheless, in the claim, Dykstra requests that his record be cleared of the charge. We believe that he is entitled to that consideration, We **will** sustain the claim as it pertains to claimant Dykstra.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the **Employes** involved in this dispute are respectively Carrier and **Employes** 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 concerning Claimants Black and Jordan. That, the Agreement was violated concerning Claimant Dykstra.

A W A R D

Claim of Black and Jordan is denied. Claim of Dykstra is sustained.

NATIONAL RAILROAD **ADJUSTMENT** BOARD
By Order of Third Division

ATTEST: *A.W. Paulson*
Executive Secretary

Dated at Chicago, Illinois, this 11th day of January 1974.