

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 23488
Docket Number TD-23474

A. Robert Lowry, Referee

PARTIES TO DISPUTE: { (American Train Dispatchers Association
(National Railroad Passenger Corporation

STATEMENT OF CLAIM: Claim of the American Train Dispatchers Association that:

(a) The National Railroad Passenger Corp. (NEC) (hereinafter referred to as "the Carrier") violated the Agreement in effect between the parties, Rule 19 thereof in particular, and exceeded the limits of managerial discretion by its action in dismissing Claimant P. H. Frank from service on May 8, 1979. Permanent dismissal is a harsh and excessive penalty and discriminatory in the light of discipline assessed other employees involved in the same incident.

(b) The Carrier shall now be required to reinstate Claimant to service, but without pay for time lost.

OPINION OF BOARD: Mr. P. H. Frank, the Claimant, was employed by the Carrier as a Block Operator and Train Dispatcher. with over ten years of service. On April 20, 1979, he was assigned as an extra Train Dispatcher to Section "B", a train dispatcher position in the New York Headquarters with assigned hours 7:00 AM to 3:00 PM. The dispatching territory of Section "B" includes that portion of Carrier's New York Division extending between Union, a Block and Interlocking Station, Mile Post 20.0 to Holmes, a Block and Interlocking Station, Mile Post 77.2, located near Philadelphia, Pa.

About 12:03 PM April 20, 1979, Carrier's Metroliner Train No. 111, consisting of an electric locomotive, No. 918, five occupied passenger cars and a power car, collided head-on with Plasser Track Machine (Tamper) 1307 at Edison, N.J., Mile Post 29.7, just west of Lincoln Block and Interlocking Station, on Claimant's dispatching territory. The Tamper, a self propelled Maintenance of Way tie tamping machine weighing forty-six and one-half tons, was destroyed. The electric locomotive was heavily damaged, causing damage to the equipment in excess of \$350,000.00 as well as injuring over seventy passengers and several crew members. At 8:45 PM that night Claimant Frank was suspended from service pending investigation.

The investigation was held on May 3, 1979, after one postponement. Copy of the Transcript was made a part of the record. A careful study of the transcript indicated Claimant was given a fair and impartial hearing. He was permitted to present witnesses, which he did not do, was represented by a Vice Resident, General Chairman and Local Chairman of his Organization. They were given full opportunity to question Carrier witnesses at length. Claimant was formally dismissed on May 8, 1979.

This dispute involves Claimant's performance **under** the Carrier's Operating Rules and Special Instructions **in** directing the **movement** of **Tamper** 1307, a self-propelled vehicle which does not shunt the signal system, eastward on Track No. 3 and Metroliner Rain No. 111 between Block and **Interlocking** Station, Midway, MP 41.6 and Block and Interlocking Station, **Union**, MP 20.0, with intermediate Block and Interlocking Stations at **County**, MP **32.9**, and Lincoln, MP 26.4, where Block Operators are assigned. The railroad **in** this territory is a four main track system. Tracks Nos. 1 & 2 are designated for eastward **movement** and Tracks **Nos. 3 & 4** designated for westward movements. Tracks Nos. 2 & 3 are **designated** and specified in the timetable as tracks where **movements** are operated in either direction by automatic block signals and by signals at **Interlockings** controlled by operators when the direction of traffic is established between two adjacent **Block** Stations under the jurisdiction of the Train Dispatcher.

The **movement** of self-propelled maintenance of way equipment is governed by "Supervisor **Operating** Rules" Notice **77-44** dated November 15, 1977, which read in part as follows:

**"B. MOVEMENT FOR EXTENDED DISTANCES BETWEEN 3 OR MORE
BLOCK AND/OR INTERLOCKING STATIONS:**

At originating Station. before FORM M is issued, signals must be in STOP POSITION and BLOCKING DEVICES must be applied to **SIGNALS** AND SWITCHES to protect the route. At Intermediate Block and Interlocking Stations, the route must be set and signals pulled to proceed indication with BLOCKING DEVICES applied in that position.

When entire route **i;** set and locked up, FORM M will be **issued** to all Block **Stations** and **FORM C** will be issued to pass Stop Signal **where** Rules 251-253-254 apply.

Train Orders will be issued where Rules 261-262-263-264 **apply.**

In the application of Rule 637, Operator of **MW Equipment** finding a **HOME SIGNAL** **more** favorable than STOP will take that signal as Block Operator's authority to enter INTERLOCKING: Operator of **MW Equipment** must report to clear to Block Operator when the **movement** has been made through the Interlocking and is Clear.

Block and/or **INTERLOCKING STATIONS** to the rear of the movement may remove their BLOCKING DEVICES after the **move-**ment has reported clear **of** the Interlocking of the Adjacent Block and/or Interlocking Station."

It should be noted that Rules **261-262-263-264** apply to this territory. Thus, any **movement** into a territory blocked for the **movement** of **MW** Equipment as provided in Notice **77-44** can only be authorized by the Train Dispatcher with TRAIN ORDERS.

The record shows that Claimant issued at 10:43 AM Track Car permit, FORM M, and **FORM C** Clearance via Block Operator at Midway, authorizing Tamper 1307 to enter the **main** track and proceed eastward on Track No. 3 **from** Midway to **Union** between 10:43 AM and 12:15 PM. The record further clearly shows Claimant did not follow the specific requirements of Notice 77-44, quoted above, by failing to instruct the Block operators at the Intermediate Block and Interlocking Stations at **County**, **Lincoln** and **Union** to set the route and pull signals to proceed **indication** with **BLOCKING DEVICES** applied in that **position** to protect the **movement** of **Tamper 1307**. Tamper 1307 departed Midway at 11:01 AM moving east on Track No. 3 without the protection specified in Notice 77-44. The **Tamper** moved by **County** with the authority of FORM C Clearance Card approved by Claimant. The Tamper departed County at 11:50 AM on Track No. 3. The collision with Train 111 occurred at 12:03 PM, 3.2 miles east of County at **MP 29.7**.

Claimant's representatives contended poor telephone communications had something to do with the failure of the **Block Operators** at **Lincoln** and **Union** not getting **instructions** from the **Rain Dispatcher** on the **movement** of Tamper 1307. They also raise some questions concerning the performance of these two **Block Operators** in the **movement** of Train No. 111. Irrespective of any **communications** defects or failures on the part of the **Block Operators**, **imagined** or real, it was unquestionably Claimant's responsibility to comply **fully** with Notice 77-44 by obtaining assurances from the **Block Operators** at the Intermediate Block Stations, **County**, **Lincoln** and **Union** that the switches and signals were set **in** the proper position to set the route for Tamper 1307 and the **BLOCKING DEVICES** were properly applied. This was not done. It was this failure that allowed Train No. 111 to proceed by **Union** and **Lincoln** on Track No. 3 causing the accident. If there had been a **communication** failure the train dispatcher should not have issued authorization for the **Tamper** to enter the Block where the **communication** failure occurred.

The Carrier has **proved** its case. Claimant clearly violated the positive provisions of Notice 77-44 in the movement of Tamper 1307 between Midway and the point of the accident.

Because we have disposed of this dispute on its **merits**, we do not believe that **it** is necessary to address the several procedural issues raised by the parties in their respective **handling** of this case.

The two **Block Operators** at **County** and **Lincoln** were dismissed, one was reinstated after 30 days suspension and the other after 90 days. The **Organization** contends, since Claimant is still out of service, that he has been discriminated against. The record clearly shows that Claimant was the Train Dispatcher having full authority for the **movement** of trains and equipment **over that portion of** the railroad and had he fully complied with the rules and special **instructions** the **Block Operators** would not have been placed in the **positions they were** which gave rise to their questionable fault in the incident. Thus, we disagree with the contention that Claimant was discriminated against.

A review of Claimant's record, which was made a part of the record, indicates that he has had long history of experiencing difficulties **in** complying with Carrier's operating rules, both as a Block Operator and Train Dispatcher. **On several** occasions he voluntarily **accepted** suspension **from** service and reprimands **rather than** stand for investigation for violations of Carrier's **operating** rules. **Therefore**, this Board concurs in the dismissal of Claimant **by** Carrier as it is clear this **employee** does not possess skills and the **temperment necessary to perform** the exacting duties of a Block Operator **nor** can he take the pressures and exercise the supervisory skills of a Train Dispatcher in an effective and **safe manner**, as prescribed by the operating rules.

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 **Employees** involved in this dispute are respectively Carrier and **Employees** 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**.

A W A R D

Claim denied.

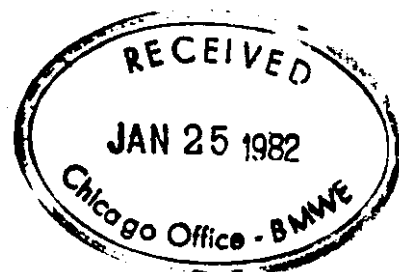
NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of **Third** Division

Attest: _____

A. W. Paulson

Executive Secretary

Dated at Chicago, **Illinois**, this **8th** day of January 1982.



LABOR MEMBER'S DISSENT
TO AWARD 23488 (DOCKET TD-23474)

On the first page of the Award, the Majority wrote:

"... A careful study of the transcript indicated Claimant was given a fair and impartial hearing. He was permitted to present witnesses, which he did not do, was represented by a Vice President, General Chairman and Local Chairman of his Organization. They were given full opportunity to question Carrier witnesses at length, . . ."

In point of fact, the Claimant was denied due process in the manner discussed by the Employees in their representations both on the property and before the Board. That a fair and impartial hearing is a condition precedent to the assessment of discipline is clearly shown by Third Division Awards 3288 and 22258.

The most serious procedural flaw in the record is the Investigative Officer's denial of full right to free cross-examination of Block Operator Williams, who appeared as a Carrier witness. The Employees' discussion of this critical **procedural** blunder is found at Record pp. 10-11:

"Additional evidence of prejudgment of Claimant P. H. Frank is found in the Investigative Officer's attempts to prevent Claimant's representative from fully developing pertinent testimony from Block Operator Williams. Prior to the point in the investigation where the full details of Block Operator Williams' oversight were of record in the transcript, Claimant's representative asked Mr. Williams why it suddenly became necessary for him to attempt to contact Train No. 111 to stop, as had been his testimony at such time. Carrier's Investigative Officer immediately interrupted with the unpropitious prejudgmental statement :

'...Mr. Williams is not on trial. This is not Mr. Williams' investigation. The investigation is that of Mr. Frank. I think your line of questioning is a little out.' (Tr. p. 19)

Subsequently, Claimant's representative attempted to inquire of Block Operator Williams how it was (electrically) possible for him to allow Train No. 111 to proceed under the conditions of 'a release of the traffic eastbound to County' (Tr. p. 32) Again, the Carrier's Investigative Officer interrupted with the adverse statement:

'I object to the question. I have told you before that Mr. Williams is not on trial.'

Claimant's representative then asked Block Operator Williams (Tr. p. 33) 'Did #111 enter the block on Track 3 between Lincoln and County on signal indication'. The Investigative Officer allowed Mr. Williams to successfully evade pertinent answer to that very important question with 'I believe it would be detrimental for my trial for tomorrow morning.'

Labor Member's Dissent to Award 23488 (Docket TD-23474) **Cont'd**

The Carrier called Block Operator Williams as its witness, to give testimony in connection with its charges against Claimant Train Dispatcher Frank. In order for Claimant to have had a fair and impartial investigation of those charges, all the facts and circumstances surrounding **those charges** should have been allowed to be fully developed. Indeed, the Investigative Officer should have insisted on it."

It is further discussed at Record page 171:

"... due process includes the right to **cross-examine** hostile witnesses. The Carrier's Hearing Officer refused Claimant this right, with respect to certain critical questions asked of Block Operator Williams . . . evidencing a prejudicial attitude against the Claimant, and denying his due process thru a fair and impartial hearing. . . ."

The Carrier's ineffective responses to these contentions give no good cause for the Investigative Officer's arbitrary decision. No explanation at all, just a disclaimer.

The testimony of Block Operator Williams was crucial to the facts of the case. Whether or not he was told by the Claimant of the eastward movement of TC-1307 (a point of dispute), the record nevertheless plainly shows that Williams did know of TC-1307's eastward movement on Track 3 before he permitted Train No. 111 to enter the track at Lincoln. Therefore, regardless of how he knew TC-1307 was moving, his actions were the **immediate cause** of the accident. Record p. 9:

"Although the Block operator **at** Lincoln, Mr. Richard T. Williams (referred to as 'Dick' in EXHIBIT **TD-1**), had been advised of the eastward movement of TC-1307 on Track **#3** (Tr. pp. 8. 15. **23**), the record clearly shows (EXHIBIT TD-1 and Tr. p. 33) that Mr. Williams overlooked the fact that TC-1307 was in eastward movement on Track **#3** when he allowed westward passenger train No. 111 to enter that same section of the trackage;

The record also shows, without challenge **or** contradiction, that Claimant Train Dispatcher Frank did not authorize the westward movement of Train No. 111 on Track **#3** from Lincoln (Tr. pp. 6, 18, **31**), which was occupied by TC-1307."

And, **at** Record pp. 172-173:

"Contrary to the Carrier's statement on pages 23-24 that:

'**The** record demonstrates that after the train dispatcher decided to move the track machine on No. 3 track, he failed to inform the Block Operators prior to or after the movement of the track machine....'

the transcript record demonstrates that Claimant Frank did no-

tify Block Operators of the movement of Tamper 1307, as shown in the following testimony therefrom:

[Record p. 88]: 'Q. Mr. Frank, did you advise the operators at County, Lincoln and Union that Tamper 1307 had a Form **M** Midway to Union?

A. I advised the operator at County and Lincoln that the track car had a **Form M** to Union. I advised the operator at Lincoln to talk **on** the arrival of the Tamper 1307.

Q. This notifying of County and Lincoln, was that done over the train wire?

[Record p. 89] A. The notifying of Lincoln was done by the outside telephone because prior to the movement of the Tamper 1307, the operator **at** Lincoln advised me that he was not receiving on the Train Dispatcher's wire nor could he ring County or Union because of electricians working on the system....'

We also disagree with the Carrier's statement on page 25 [Record p. 69] that:

'...No other employee who might have been involved in this regrettable (sic) accident was similarly situated....'

Block Operator **R. Williams** at Lincoln was very similarly situated, in that he had advance knowledge of the eastward movement of **Tamper** 1307 on No. 3 Track. In fact, he had been in contact with the Block Operator at County 'establishing traffic eastbound' (Tr. p. 25) for this movement. The Block Operator at Lincoln is in sole control of the levers authorizing movements between County and Lincoln, . . ."

The denial of an unhibited right to cross-examine Williams resulted in the exclusion of evidence that might have shed illumination on the proximate cause of the accident.

At Record pp. 68, 69, and 187, the Carrier asserted:

"The record of the investigation confirms that the train dispatcher failed to issue copies of the Form **M** to the Block Operators at **County**, Lincoln and Union as required by the Operating Rules and Instructions."

"The Train Dispatcher, Appellant Frank, issued Form **M** to the track machine to operate via No. 3 Track from Midway to Union. However, he did not protect the route and continued to permit trains to operate on No. 3 Track in the block at Union and at Lincoln Block Stations in violation of Carrier's rules."

This is not a case involving a theoretical '**might-have-**

Labor Member's Dissent to Award **23488** (Docket TD-23474) **Cont'd**

been' situation, even if such a situation could be considered to be, which it cannot, less serious than the head-on collision which occurred in this instance because of the Appellant's violation of Carrier's rules.

As the Train Dispatcher, the Appellant had the responsibility for the safe movement of trains over his territory. As a direct result of the Appellant's violation of Carrier's rules, a head-on collision occurred. The primary cause of this collision was the Appellant's failure to observe those rules. . . ."

"**The** record is replete with substantial credible evidence supporting the findings that the Appellant was guilty of serious rule violations." (All underscoring supplied).

Having made such sweeping declarations, with respect to the culpability of Claimant Frank, it is inexplicable that Carrier neglected to place into the record any rule or instruction, save Notice 77-14 (Record pp. **115-116**), and that document's applicability was challenged in the investigation. The Carrier has the burden of proof in discipline cases, and it must demonstrate not only to its own satisfaction, but the the charged employee, to his representative, and especially to this Board, that the convicted employee has violated ted some Carrier rule or instruction. Third Division Awards 10405 (Mitchell), 11556 (Dolnick), 14120 (Harr), 17347 (**McCandless**), and 20958 (Norris).

The Discipline Notice at Record p. 23 refers to violation of Paragraph (3) NEC Special Instructions Governing Operation of Signal and **Interlockings**. That instruction was not made available to this Board.

The Discipline Notice at Record p. 24 refers to violation of Paragraph (1) Rule **806-NEC** 400. That rule, likewise, was not made available to this Board.

The Board cannot examine these rules and, as an appellate body, make an independent assessment whether they have been violated. The Employees do not have the burden of proving compliance. For all the information given the Board, these rules might require the wearing of purple socks while on duty on Saturdays.

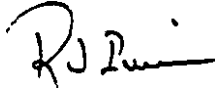
As for Notice 77-14, it is noted that its applicability was challenged during the investigation, and the Employees continued to adhere to their position it was not effective. (Record p. 10). The Carrier did not even answer that contention.

Finally, the disparity in the amount of discipline meted out to the Claimant, as compared to the other principals (particularly the Block Operator at Lincoln Tower who, without the permission, authority, or direction of the Claimant, manipulated

Labor Member's Dissent to Award 23488 (Docket TD-23474) **Cont'd**

the controls that permitted Train No. 111 to enter Track 3 having been told a few minutes before that TC-1307 was moving in the opposite direction) cried out for redress. Third Division Awards 1989, 5297, and 18050.

Because of the initial denial of due process, however, the investigation should have been declared void, ab initio, and the claim sustained.


R. J. Irvin
Labor Member

