

(Brotherhood of Maintenance of Way Employes  
PARTIES TO DISPUTE: (  
(**Missouri-Kansas-Texas** Railroad Company

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

(1) The ten (10) days of actual suspension and ten (10) days of deferred suspension imposed upon Section Foreman **J. W. Cryer** and the five (5) days of actual suspension and ten (10) days of deferred suspension imposed upon Extra Gang Foreman **K. D. Ward** for alleged failure '\*\*\* to follow instructions by your supervisor and adhere to the rules and regulations in force to protect the safe passage of trains which caused a backhoe owned by Woods Dirt Contractors to be struck by Extra SP 7541N near mile post 629, pole 29 about 3:55 p.m., Thursday, September 26, 1985.' was without just and sufficient cause and on the basis of unproven charges (System Files 500-72/2579 and 200-130/2579).

(2) The claimants' records shall be cleared of the charges leveled against them and they shall be compensated for all wage loss suffered."

FINDINGS:

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

The carrier **or** carriers and the employe **or** employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction **over** the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

On September 26, 1985, Carrier's roadmaster advised the Section Foreman, Claimant Cryer, to get a" operator with a backhoe to MP629 in order to clean out a ditch. Claimant Cryer, in turn, instructed Claimant Ward, the extra gang foreman, to show the backhoe operator how to get to the location. Apparently this was done. Claimant Cryer also had a message issued to Train **SP7541N** to be aware that a backhoe would be working in the area of MP629, and this information **was** received by the train crew.

Claimant Ward also instructed the backhoe operator to be clear of the track by 3:30 P.M. before Train **SP7541N** was due to pass.

Despite all of the foregoing, there was a collision between Train SP7541N and the backhoe at approximately MP629. Claimants were given notice of investigation on a number of rule citations including:

" 'MOVEMENT OF TRAINS AND ENGINES 99 (I). Foreman **or** man in charge is responsible for protection when track is rendered, impassable **or** unsafe or caused to be obstructed; and he will not let other duties interfere with the proper protection, and must require flagman **to** act promptly and in accordance with the rules.'

'.....OPERATION OF MECHANIZED WORK EQUIPMENT 367. OPERATION MECHANIZED **WORK** EQUIPMENT: Foreman (or machine operator in absence of foreman) is responsible for protection being provided **as** prescribed by Rule 99 when the machine is engaged in work in the track'....."

Concerning the provision of protection, Claimant Cryer testified as follows:

"Q. Other than telling the backhoe operator **to** be out of the track, was there any flag protection **or** train orders issued to protect the backhoe?

A. There was no train orders issued but flag protection was supposed to be there.

Q. Who was supposed to be providing this flag protection?

A. I asked Kenny Ward to take the backhoe up there and see that the job was done and I thought he was going to protect it because when **I** asked him on the radio he replied 'I 'ill see.'

\* \* \* \* \*

Q. Mr. Cryer, did you instruct Mr. Ward to flag for the machine?

A. NO.

\* \* \* \* \*

Q. You have mentioned on Page 6 second answer from bottom last portion thereof see that work was done, from information that we have this is not exactly what was told. By that I mean, was there **some** doubt as to how long Mr. Ward was to be there at that location inasmuch as he replied back to you per **one** of your answers on page 7 third from top. 'I will see.'

A. For myself, I do not see where there would be any doubt that he would have stayed there because the backhoe just had between 30 to 45 minutes to take **to** do the job.

\* \* \* \* \*

Q. Mr. Cryer, did you ask Mr. Ward if he could stay for a little while or did you ask if he might stay until the work was finished?

A. I asked if he could take the backhoe up there and show him where to work and I did not ask him if he could stay."

Claimant Ward testified:

"Q. If you were not instructed, then why did you show the backhoe where to work?

A. Mr. Cryer asked me, K. D. Buck, to find the location for the backhoe operator since he was already going down the track on the **hyrailer.**

Q. Under whose supervision does Mr. Buck work?

A. I am his foreman.

Q. Who showed the backhoe how to get to this location?

A. K. D. Buck and myself.

Q. Were you present at mile post 629 pole 20 when the backhoe obstructed the track?

A. NO.

Q. Did you furnish any kind of protection for this backhoe?

A. Had K. D. Buck called **Durant on** the radio and asked them **to** inform the train crew that a backhoe may be at this location and to watch out for it.

Q. Was there any other type protection **pro-** provided by flagging or train orders?

A. There was not at this time because backhoe had to go to tow" to get a flat fixed and not knowing that he would return and work that day.

Q. Did you have a clear understanding with Mr. Cryer about who was going to furnish protection for this backhoe?

A. Mr. Cryer asked us to show backhoe where work was to be done. **Protection** was never mentioned.

Q. **Did** Mr. Cryer ask if K.D. Buck would stay with the backhoe?

A. He did not ask me, no.

Q. Did you talk to Mr. Cryer before leaving the location where the backhoe was struck to make sure that protection was afforded?

A. **No.**

Q. Did you instruct the operator to make sure he had protection before being on the track?

A. NO."

What is clearly evident from the foregoing testimony is that neither of the Claimants fulfilled his responsibility. Each concluded that the other would provide protection. Such failure warrants this Board's conclusion that Claimants were deficient in their responsibilities as supervisors. Whether others were also derelict, does not excuse the responsibility to provide protection. Since Claimants are equally guilty, the discipline assessed Claimant Ward will stand, and Claimant **Cryer's** discipline is modified to the same. Claimant Cryer shall be allowed five (5) days pay at the applicable rate and his record corrected accordingly.

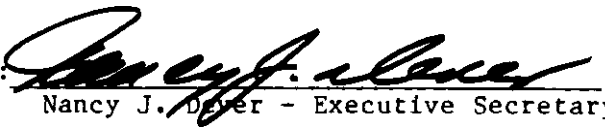
Form 1  
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Award No. 26864  
Docket 'No. W-27424  
88-3-86-3-665

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest:   
Nancy J. Dover - Executive Secretary

Dated at Chicago, Illinois, this 25th day of February 1988.