

NATIONAL RAILROAD ~~ADJUSTMENT~~ BOARD

THIRD DIVISION

Award Number 20387
Docket Number TD-20479

Joseph A. Sickles, Referee

PARTIES TO DISPUTE: (American Train **Dispatchers** Association
(Burlington Northern Inc.

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

(a) Burlington Northern **Inc.** (hereinafter referred to as "the Carrier") violated the Agreement in effect between the parties, Article 24 thereof in particular, by its action in assessing discipline upon Train Dispatcher A. Christman amounting to thirty (30) days' actual suspension from service. The record of the formal investigation held on July 15, 1971 fails to establish any responsibility on the part of the Claimant as charged, thus Carrier's action was arbitrary, capricious and an abuse of managerial discretion.

(b) Carrier shall now be required to compensate Claimant for wage loss sustained, and to remove the charges from his personal record which purportedly provided the basis for assessment of discipline.

OPINION OF BOARD: On Saturday, July 10, 1971, at or about **7:05** a.m., Extra 4118 (Train **1312-10**) struck a motor car which was operated by Track Inspector, Brecht, even though Brecht had contacted Claimant for train location information prior to the accident.

Claimant was notified to attend an investigation for the purpose of ascertaining facts and determining responsibility in connection with the collision.

After investigation, Claimant was notified that he was suspended from service for a period of thirty days for violation of Rule 702(B) of the Consolidated Code of Operating Rules and **Item 27** of Train Dispatcher's Order Book.

The Board notes, however, that the August 3, 1971 letter of suspension does not state, in specific terms, that the asserted rules violation was a contributing cause of the collision.

Certain procedural impediments are urged, however, our disposition of this dispute on its merits makes it unnecessary to explore those issues.

The Claimant failed to issue a "lineup" on the day in question. An April 8, 1971 notification from the **Chief** Train Dispatcher was interpreted by its author as requiring that a lineup **must** be issued "each day." Claimant insists that neither he nor any of the other dispatchers ever issued lineups on Saturday. There was considerable controversy concerning this aspect at the investigation. For the purposes of this Award, we will assume that Claimant's failure to issue a lineup **on** July 10, 1971 was a violation of the directive. Yet, having made that assumption, the Board is not convinced that Carrier established a causal connection between the failure and the collision.

We have noted, above, that the suspension letter did not state, in specific terms, that failure to issue the lineup caused, or led to, the accident. While the matter was being considered on the property, the Carrier alluded to causal connections, but was reluctant **to** reach a specific conclusion to that effect.

In its Submission to the Board, the Carrier noted:

"Neither the Petitioner nor the Carrier have that power to discern, or such acute perception to judge, whether or not the accident would have occurred had a lineup been issued..."

Accordingly, it is incumbent upon this Board to review the record to determine if the Carrier established, at the investigation, by a substantive preponderance of the evidence, that the failure did, in fact, contribute to the incident.

The Claimant concedes that a lineup was not issued, stating that it was not his practice **to** do so on Saturdays. However, the Claimant insists that he gave all pertinent train location information to the **Trackman**, as it relates to this dispute.

The **Trackman** appears to confirm that testimony as follows:

"Q. Mr. Brecht, could you tell us what transpired after you came on duty, up to the time of the accident?

A. I got my line-up. I usually call the dispatcher and I got on the phone at approximately 6:10 or 6:15 and called the dispatcher for my information and this is what has arrived out of it.

" **Marv** Brecht: "This is the track inspector at Linnton on the Astoria Line. Is it clear for me to go?"

Dispatcher: 'When 4085 and 4118 come in.'

Marv Brecht: 'Do you mean 1312?'

Dispatcher: 'Yes.'

Marv Brecht: '1312 is coming into Linnton now.'

Dispatcher: 'Well, it should be clear for you to go. The other one must be by.'

So I left at approximately **6:30** to go and got hit at **MP 12** and one-quarter at approximately 7:00.

Q. This information you received **from** the dispatcher at Linnton, did you use the prescribed form on the train line-up?

A. Right. There was no line-up number that was put on it. We do not get any line-ups on Saturdays or on holidays.

Q. The dispatcher didn't issue a line-up on this particular day? Or you never copied it from the dispatcher, a prescribed form?

A. **A** prescribed form, no. The information, yes, on a prescribed form.

Q. Mr. Brecht, are you familiar with Maintenance of Way Circular No. 19 dated April 14, 1971, which states: (**Xerox** copy of Circular No. 19 attached).

Did you receive a line-up on this particular day?

A. No, sir.

Q. Did you request a line-up?

Mr. F. H. Funk

Mr. Rasperski, a point of clarification. It was previously stated in the transcript by Mr. Brecht that on holidays and

"Saturdays, there is not a line-up, as such, put out on the Astoria line and this is for a point of clarification and that is this information is secured from the dispatcher and he did use the form.

Q. I am not quite clear on what the dispatcher told you, Mr. Brecht. He told you that he had two trains coming off the Astoria line?

A. No, he did not say there was two trains coming, he mentioned two numbers.

Q. The 4085 and the 4118?

A. The 4085 was the first 1312. The first 1312 was carrying white lights. It was not carrying any green flags on it.

Q. Well these are extra trains Mr. Brecht, so they wouldn't be carrying any other flag signals.

A. Well, there was a following train behind him where he should have a green flag to show a train coming.

Q. No, these are extra trains and they don't carry anything but white signals. Now the dispatcher states that he had the 4085 and the 4118 coming to **Linnton**, is this correct?

A. Yes.

Q. And his instructions were after the 4118 went by you could leave?

A. NO. I said, you mean 1312 and he said yes. And I said 1312 is coming into **Linnton** now. Then he said, 'Well, it should be clear for you to go after it goes by.' He did not mention what 4118 was or anything. It **could** have been the 1302 coming off the hill or it could have been by already which it usually does come in at that time.

Q. **This** information you received from the dispatcher was written down by **you**?

"A. By me.

Q. And he did not actually give you a line up
nor did you ask for one?

A. No."

From the above recitation of **testimony**, it appears that the **Trackman** received all pertinent **information** and, in fact, had *the* "line-up" information on the prescribed form. The record does not suggest that a physical issuance of an official lineup would have conveyed any additional information. We can only conclude, therefore, that the dispatcher gave all pertinent information to the **Trackman** and that the actual failure to issue a lineup **was** not a contributing cause of the accident.

We have reviewed this Board's Award *concerning* the **Trackman's** responsibility (19908). However, we do not conclude that it is significant to a resolution of Claimant's culpability.

Carrier urges that a **review** of Claimant's testimony demonstrates that he was less than fully attentive to all aspects of duty on the day in question. The Organization denies that assertion. The Board feels that each party is interpreting *Claimant's* testimony at the investigation in the most favorable light to *its* position of *advocacy*, and notes that, in many **instances**, the testimony is susceptible to contrary interpretation. In any event, we certainly do *not* condone a failure to comply with operating rules **and** directives. But, limiting ourselves solely to the facts and circumstances of this record, the assumed failure to comply with the directive, was not (under the proof demonstrated at the investigation) a contributing factor to the collision.

We are well aware that this Board should not substitute *its* judgment for that of Carrier in determining matters of discipline. At the same time, we are aware of our duty to assure that the Carrier establishes, by **a** preponderance of evidence, the basis for the discipline. We note that the Carrier stated, on the property:

"**Had** the **Claimant** issued the lineup, his responsibility **may** very well have been entirely different."

We feel that the information which would have been included in the lineup was supplied to the **Trackman**. The claim will be sustained.

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 violated.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: *A. W. Paulsen*
Executive Secretary

Dated at Chicago, Illinois, this 6th day of September 1974.

CARRIER MEMBERS' DISSENT TO AWARD NO. 20387
DOCKET NO. TD-20479 - REFEREE SICKLES

During the investigation Claimant freely admitted that he did not comply with **written** instructions concerning the issuance of track car lineups. He also admitted violating Rule 702 (b) of the Operating **Rules** and General Instructions, and Item 27 of the Train Dispatchers **Manual**.

Despite these clear admissions by **Claimant**, the Referee based his opinion on the fact that:

"We have noted, above, that the suspension letter did not state, in specific terms, that failure to issue the lineup caused, or led to, the accident".

Claimant **was** granted an investigation to determine his responsibility in connection with **Extra 4118**, Train **1312-10**, hitting motor car operated by **M. W. Brecht**, Track Inspector. The suspension letter referred to the investigation in connection with **Extra 4118 - East**, Train **1312-10**, hitting motor car operated by **M. W. Brecht**, Track Inspector, and then went on to state:

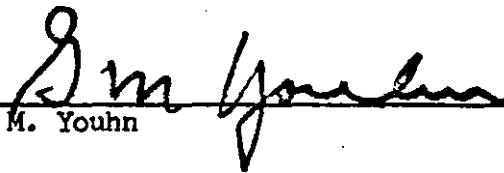
"This investigation develops violation of Rule **702 (B)** of the Consolidated Code of Operating Rules and Item 27 of Train Dispatchers Order **Book** on your part".


Rule 702 (b) provides that **employees** must comply with Instructions from the proper officer. Claimant admitted that he did not comply with that rule.

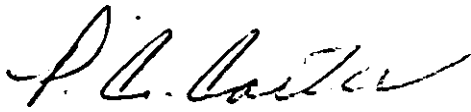
Rule 27 provides that train dispatchers shall issue lineups for all concerned at times specified by the Superintendent. Claimant admitted that he did not issue a lineup and that he did not comply with **Rule 27**.

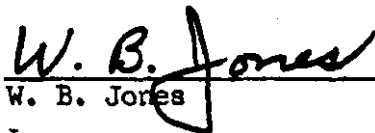
When consideration **is** given to the notice to attend the investigation, the rules admittedly violated by Claimant, and the letter of suspension, along **with** the Referee's incomprehensible statement that the discipline letter did not specifically state that failure to Issue the lineup caused the accident, one can only come to the conclusion that this Referee is so deeply engrossed in sophism that he **will** go to any lengths to sustain a wholly unwarranted claim.

The Award is clearly erroneous, and **we** most vigorously dissent thereto.


G. M. Youhn


H. F. M. Braldwood


P. C. Carter


W. B. Jones


G. L. Naylor

Labor Member's Answer to Carrier Members'
Dissent to Award 20387, Docket TD-20479

The Carrier Members state that they most vigorously dissent to Award 20387 when it appears they most vertiginously dissent to the Award. Some of the defenses already exhausted by the Carrier in the record are played around again spiced with some misstatements or half-truths that culminate in an assertion that Referee Sickles is a disciple of sophism.

The "clear admissions by Claimant" that he had violated Rule 702(b) of the Operating Rules and General Instructions and Item 27 of the Train Dispatchers' Manual stressed in the Carrier Members' Dissent concerned instructions from the Chief Train Dispatcher regarding line-ups and followed the Chief Train Dispatcher's testimony interpreting his own instructions. Claimant admitted that he had not complied with the instructions as the author of these instructions had just interpreted them and if such interpretation was correct then he had violated Rule 702(b) and Item 27 but this was not the way these instructions had been previously interpreted and it was not the practice of the train dispatcher in that office to issue line-ups on Saturdays. It was not the "clear admission" that Carrier Members' Dissent implies.

Claimant and/or his representative at the hearing asked for a postponement or recess to permit entering testimony regarding the issuance or non-issuance of line-ups on Saturdays and/or a check of the Carrier records for such evidence which Carrier refused and the Employees claimed this was a denial of due process and/or the fair and impartial hearing provided in the Agreement. Award 20387 in ruling on this facet of the dispute stated:

"Certain procedural impediments are urged, however, our disposition of this dispute on its merits makes it unnecessary to explore those issues.

"The Claimant failed to issue a 'lineup' on the day in question. An April 8, 1971 notification from the Chief Train Dispatcher was interpreted by its author as requiring that a lineup must be issued 'each day.' Claimant insists that neither he nor any of the other dispatchers ever issued lineups on Saturday. There was considerable controversy concerning this aspect at the investigation. For the

Labor Member's Answer to Carrier Members' Dissent to Award 20387,
Docket TD-20479 (Cont'd)

"purposes of this Award, we will assume that Claimant's failure to issue a lineup on July 10, 1971 was a violation of the directive. Yet, having made that assumption, the Board is not convinced that Carrier established a causal connection between the failure and the collision."

The Carrier Members' Dissent recognizes that "Claimant was granted an investigation to determine his responsibility in connection with Extra 4118, T-rain 1312-10, hitting motor car operated by M. W. Brecht, Track Inspector." but fails to recognize that Award 20387 clearly held that the assumed failure to comply with the directive (i.e., issue a line-up each day) was not a contributing factor to the collision and the information which would have been included in the line-up was supplied to the Trackmen.

The sophism in the Carrier Members' Dissent does not detract from the sound reasoning found in Award 20387.



J. P. Erickson
Labor Member