

PUBLIC LAW BOARD NO. 3193

Case No. 10

Award No. 10

Parties	United Transportation Union
to	and
Dispute	Burlington Northern Railroad Company
Statement of Claim	Claim of Yard Person H. Lang for all time lost from January 14, 1981, through and including January 28, 1981, fifteen (15) days, and that all mention of this matter be stricken from her record.

Findings: The Board, after hearing upon the whole record and all evidence, finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended, that this Board is duly constituted by Agreement dated March 16, 1982, that it has jurisdiction of the parties and the subject matter, and that the parties were given due notice of the hearing held.

On December 3, 1980, Claimant H. Lang was employed as Yard Foreman on the 11:30 PM Westend Yard Switch Assignment at Carrier's Yardley, Washington, facility. Claimant completed her assignment without a reported incident. However, under date of December 4, 1980, Claimant was sent notification which, in pertinent part, stated:

Attend investigation in the Terminal Superintendent's Office, West 221 First Avenue, Spokane, Washington at 1:30 p.m. Monday, December 8, 1980, for the purpose of ascertaining the facts and determining your responsibility in connection with derailment and damage to GN 171055 and damage to MP 717088, BN 318450, BN 390034, BN 246129, NP 4694, GN 39540, GN 39746, GN 39739, GBW 7160, and CFPX 4675, at the east end, Yardley Yard, Yardley, Washington, at about 6:25 a.m. on December 3, 1980.

Arrange for representative and/or witnesses, if desired, in accordance with governing provisions of prevailing schedule rules.

* * *

The rescheduled investigation was held on December 29, 1980, resulting in a letter of discipline to Claimant under date of January 14, 1981, stating, in pertinent part:

Investigation was held in the Terminal Superintendent's Office, Spokane, Washington, at 9:30 a.m. December 29, 1980, for the purpose of ascertaining the facts and determining responsibility in connection with derailment and damage to GN 171055, and damage to MP 717088, BN 318450, BN 390034, BN 246129, NP 4694, GN 39540, GN 39746, GN 39739, GBW 7160, and CFPX 4675, at the east end of Yardley Yard, Yardley, Washington, at about 6:25 a.m. December 3, 1980.

Investigation established you to be in violation of Rules 808(C) and 808(E) of the Consolidated Code of Operating Rules.

For your failure to comply with the aforementioned rules, you are hereby suspended for a period of 15 days, January 14, 1981 thru and including January 28, 1981.

Your past satisfactory record has been taken into consideration in the assessment of this discipline.

* * *

Rules 808(c) and 808(e) state, in pertinent part:

808(c). Before shoving cars, the cars must be coupled and slack stretched to be sure all couplings are made. Before shoving cars it must be known there is sufficient room to hold the cars.

808(e). When switching or placing cars, they must be left where they will fully clear passing cars on adjacent tracks and where they will not cause injury to employees riding on the side of cars.

Organization advances the appeal vigorously arguing that Carrier denied Claimant a full, fair and impartial hearing when it failed to call essential witnesses, the other Yard Crew that was on duty and working in the same area and same tracks at the approximate time of

Claimant's assignment, despite repeated requests for the calling of those witnesses and objection to the hearing officer's failure to call the witnesses.

Organization further avers that the proofs are speculative and based upon "guesstimates" of times for switching moves involving Track No. 10 as well as "guesstimates" of times that the other crew, headed by Foreman Decker, were involved in the handling of cars shoved in Track No. 10.

Carrier responds to the arguments pointing out that the evidence replied upon by Carrier points almost exclusively to Claimant's involvement. Additionally, Carrier points out that by Claimant's own testimony, Foreman Decker's involvement could only have occurred before Claimant became involved in any activity on Track No. 10, since Decker's crew occupied the lead until they were done with their work on the rip-track, thus permitting Claimant access to the lead and her switch moves.

A review of the transcript reflects that at approximately 5 a.m. Claimant's crew was given a list of cars for Track No. 3 to switch; the list consisted of 13 cars, 3 of which were to be placed on Track 10. Claimant switched out the majority of the cars and then placed 3 cars on Track 10 with, by her testimony, enough room to clear the lead. Claimant contends that it was not necessary for her to shove the track to place them in the clear. According to the record, prior to Claimant's switching Track 3, another crew, working at the other end, had placed 6 cars on Track 10 while switching Track 11.

Carrier replied upon testimony of the approximate time of switching moves based upon the Yard Supervisor's entries of the PICL'd times.

Through vigorous cross examination, Claimant's representative developed that the times were not exact, that they could be off as much as 10 or 15 minutes or even greater amounts of time.

The amount of time and the discrepancy of those times are unclear. What is clear is that Carrier, based upon a reconstruction of the events by respective supervisors, focused on Claimant as the culprit. Decker's assignment was involved in the use of the subject track, the shoving of cars to it, all in the same band of time.

Claimant's representative pointed out to the Hearing Officer the need for Decker's appearance and testimony. The Hearing Officer noted the objection for the record but failed to take any action to honor the request for Decker's appearance.

Elsewhere in the record, Yardmaster Ervin testified:

Q - Do you, in your mind, didn't feel that it was necessary to run a list of 10 to find out whether there was room in that track?

A - No, because I had run one earlier, say, within the hour, and it showed that there was sufficient room for those three cars.

* * *

Q - In your judgment, based on those record that you have, was Mr. Decker's work completed before Mr. Anderson's work?

A - Yes, it should have been, yes. At least the 49 which was PICL'd at 4:45. He may have filled on working on 18 - the second list he had, but the switching that was PICL'd at 4:45, of track 49, that was enough.

Q - Any other questions of Mr. Ervin?

A - Yes.

Q - Mr. Ervin, referring to this time that Mr. Anderson's crew had completed their move, was this referring to Track #11?

A - Yes.

Q - And they completed that move at 5:45, is that what it shows?

A - It shows that it was PICL'd at 5:45. The PICL Clerk did the work on the tract at 5:45.

Q - And this accident occurred at 6:25?

A - That is what Mr. Phillips stated, yes.

* * *

(Emphasis Ours)

No one really stated what time the accident occurred but the Carrier official involved indicated that it was reported at approximately 6:25.

Claimant tied up at 7:15. While cars were being switched into Track 10 from the west end, a third yard crew was switching cars on the east end of this yard. The east end crew (Anderson) was given a switch list of Track 11. The east end crew was given their list of Track 11 at approximately 5:45 a.m. The east end crew pulled 11 Track out of the lead, cupped the head 16 cars off to clear 6 and these 18 were then shoved into 6. The east end crew then went back against cars on the lead and pulled the remaining cars up to lead placing them on 2 track. While those cars were standing the lead track, cars from Track 10 had been shoved into the side of the cars, resulting in the last car on 10 Track being derailed and tipped on its side and 11 cars that were standing on the lead were damaged as they were pulled by the derailed car.

Notwithstanding Carrier's best effort to try and sort out and recreate, in the abstract, what occurred by referring to time records that were admittedly not accurate, the Board is convinced that Decker's testimony would have lent some clarification, if not possible exoneration, to Claimant, had he been permitted to testify. It remains a mystery as to why the Hearing Officer failed to call this witness who

was obviously involved in putting cars into Track 10 within the time frame that this incident possibly occurred.

Organization cites a number of cases in support of its position that Claimant was denied a full and fair investigation, amongst them Public Law Board 2806, Award No. 15 (Marks) which, in pertinent part, held:

...It was the hearing officer who should have inquired into the need for all members of both crews to attend, if possible. Surely, hearing officer was repeatedly put on notice of this by the Organization together with risk of failing to have the opposite witness available...

(Emphasis Ours)

Also, Public Law Board 364, resulting in Award No. 27 (Coburn) which, in pertinent part, held:

A carrier is not obligated to call as witnesses at an investigation each and every employee whose presence is requested by the Organization. Such witnesses may be unavailable for one reason or another, or their testimony may not be relevant or material to the subject matter of the investigation. Where, as here, however, the witness was a participant in the incident giving rise to the investigation and was, therefore, in a position to testify on matters material to the subject matter thereof, it was a denial of due process to refuse or fail to produce him as requested. (See First Division Awards 19910, 20094, 20466, 20906, among many others.)

Accordingly, the Board finds prejudicial error on the part of the Carrier in the conduct of the investigation in this case. The claim will, therefore, be sustained.

The Board is compelled to conclude that the investigation focused on Claimant and the proofs developed at the investigation were marshalled in a way to support a conclusion that Claimant was responsible for the cars on 10 fouling the lead. Organization has argued pre-judgment and we are impelled, on this record, to agree with that argument. The Yardmaster testified that there was room for the 3

cars placed in Track 10 by Claimant; Claimant testified that she had no need to shove 10 to put the cars into clear. What happened after Claimant left the cars is the subject of the inquiry. Was the crew working on the opposite end responsible for shoving cars against the west end of 10 resulting in the cars being pushed out the east end? That area was not explored by the Hearing Officer and no witnesses were called to eliminate that possibility.

As was stated in First Division Award 19873:

...management's minds should be held open until the evidence is in and the transcript is studied...

Here the Carrier failed to fully develop the record to exclude other possible explanations. Such limited inquiry, in the circumstances of this case, was improper.

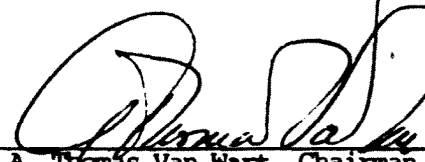
Accordingly, on the record before us, we are compelled to conclude that the claim should be sustained.

AWARD: Claim Sustained.

ORDER: Carrier is directed to make this Award effective within thirty (30) days of date of issuance shown below.


W. A. Bell, Carrier Member


D. E. Wegler, Employee Member


A. Thomas Van Wart, Chairman
and Neutral Member

Dated: Aug. 17, 1987