

PUBLIC LAW BOARD NO. 4901

AWARD NO. 174

CASE NO. 174

**PARTIES TO
THE DISPUTE:**

United Transportation Union

vs.

The Burlington Northern Santa Fe Railway Company
(Coast Lines)

ARBITRATOR: Gerald E. Wallin

DECISIONS: Claim sustained in accordance with the Findings

STATEMENT OF CLAIM:

“Request in behalf of Phoenix Brakeman J. E. Thew for the removal of the Level 2 record entry suspension of ten (10) days and exoneration of the alleged violation of Rules 1.1.1, 1.1.2, 1.1.3, 1.1.4, 1.25, 1.6, of the General Code of Operating rules B.N.S.F. version with revisions #1 effective April 1, 1998, and rules S-1.2.4, S-1.4.1, S-1.4.7, S-13.7.1 and S-13.73 of the T.Y.&E. Safety Supplement No. 1 in effect April 1, 1998, from the Claimant’s personal record and for pay for all time lost for attending the Formal Investigation conducted on October 20, 1998.”

FINDINGS OF THE BOARD:

The Board, upon the whole record and on the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that this Board is duly constituted by agreement of the parties; that the Board has jurisdiction over the dispute, and that the parties were given due notice of the hearing.

Claimant sustained an injury to his right shoulder while throwing a switch at Ash Fork, Arizona at approximately 12:15 a.m. on August 21, 1998. Although he mentioned to other members of his crew that he might have hurt himself, he did not report the injury or any concerns about the condition of the switch to a train dispatcher or a Carrier management official until arriving in Phoenix several hours later.

Following an investigation hearing, Claimant was found to have violated several Carrier rules and was assessed a Level 2, 10-day record suspension under Carrier’s Employee Performance Accountability program. At the time of this action, Claimant had approximately eighteen months of service. His employment record shows no prior discipline of any kind.

Our examination of the hearing transcript reveals no procedural shortcomings of significance. The investigation dealt with the late timing of Claimant’s report of his injury and the possible involvement of the switch. The time of his report was never in dispute. Therefore, it was not necessary to have the testimony of the Carrier official who initially received Claimant’s report.

Review of the discipline on its merits, however, discloses two significant irregularities. First, at the outset of the investigation, the hearing officer read thirteen rules into the record. The discussions depicted on pages 5 and 11 of the transcript confirm that Claimant was not being charged with violating Rule S-12.4. Consequently, the text of this rule was never read into the record.

Thereafter, the hearing officer determined that twelve of the thirteen rules had been violated. Not surprisingly, a violation of Rule S-12.4 was not among his findings. Upon his review, however, the Carrier's highest designated officer (HDO) found insufficient evidence to support all of the hearing officer's determinations; the HDO reversed six of the twelve rule violations found by the hearing officer. In essence, the HDO upheld the violations associated with the late reporting of a possible defective switch but overturned those relating to the late reporting of the injury.

Our examination of the record reveals substantial evidence in support of the violations thus determined. Claimant admitted he was unable to complete the final inch or so of the switch throw. He had to reposition himself to gain leverage and sustained his injury while completing the throw. Under these circumstances, Claimant should have immediately called attention to the switch so it could be checked out.


In addition, however, the HDO's decision cited Claimant for a violation of Rule S-12.4(B). As noted previously, this rule was affirmatively excluded from the scope of the hearing. As a practical matter, therefore, Claimant had no fair and impartial hearing with respect to this rule. Accordingly, the HDO's finding of violation in this regard cannot stand.

The second significant irregularity is revealed upon review of the quantum of discipline imposed. It is clear from the record that Claimant was not cited with a Level S violation under Part II of its discipline policy. Part II encompasses "Serious Offenses" and prescribes disciplinary suspensions of up to 365 days for a first offense. Instead, Carrier assessed Level 2 discipline under Part I of its policy. But this part of the policy describes the 10-day suspension associated with Level 2 as being applicable only when there has been a second offense within three years. As noted earlier, Claimant's work record contained no prior discipline. Moreover, Carrier's policy explicitly provides that the lower disciplinary steps under Part I "... may not be skipped ..." On this record, therefore, Claimant should have been assessed with Level 1 discipline, which calls only for a formal letter of reprimand. Thus, his discipline must be modified accordingly.

Claimant's 10-day suspension must be set aside and he must be made whole for all losses associated with that suspension. Carrier may substitute a formal letter of reprimand and Claimant's records should be revised appropriately.

AWARD:


The Claim is sustained in accordance with the Findings.



P. L. Patsouras,
Organization Member



Gerald E. Wallin, Chairman
and Neutral Member



Gene L. Shire,
Carrier Member

DATE: OCT 17, 2002