

PUBLIC LAW BOARD NO. 4901

AWARD NO. 195

CASE NO. 195

**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

EMPLOYEES' STATEMENT OF CLAIM:

"Request in behalf of Winslow Conductor J. N. Armstrong for the removal of the Level S Suspension of thirty (30) days, seven (7) of which were observed, leaving twenty-three (23) days record entry suspension that commenced on February 5, 2001. In addition, the assigned probation period of three (3) years, and exoneration of the alleged violations of Rules 1.1, 1.1.1, and 8.2 of the GCOR 2000, General Code of Operating Rules, Fourth Edition effective April 2, 2000; and Rule S-13.7 of the BNSF TY&E Safety Supplement No. 1. 1998, including revisions up to Sunday, October 10, 1999, from the Claimant's personal record, and that the Claimant be paid for all time lost for attending the Formal Investigation conducted on January 5, 2001, and from February 5, 2001 and continuing until returned to service, as a result of the Investigation held on January 5, 2001."

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.

According to the hearing officer's February 2, 2001 decision letter, Claimant was assessed the discipline in question for his "... failure to properly inspect ground throw switch XO-1591 from Track 1589 to Track 1591 resulting in switch being run through ..." At the time of the incident, Claimant had over twenty-three years of service. Although his past record reflects several disciplinary events, it was clear of any discipline for the nearly five years preceding the instant controversy.

With the exception to be discussed in the following paragraphs, our review of the record reveals no procedural or substantive irregularities of significance. It is not improper, by itself, for the charging officer to testify at the investigation. Nor is it improper, by itself, for the hearing officer to discuss the general nature of that testimony beforehand.

It is improper, however, to discipline Claimant for misconduct outside of the scope of the notice and which has not been proven.

As noted previously, the hearing officer found Claimant culpable for causing the damage to Switch XO-1591. It is clear from the notice of investigation, however, that the Claimant was charged with failing to inspect the switch *after* it had been run through – not before the damage had been

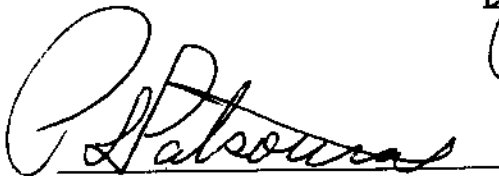
done. This timing discrepancy is also abundantly clear from the testimony of Carrier's witness in response to Question 138 in the transcript. Moreover, it is readily apparent from the testimony of the locomotive engineer that he assumed full responsibility for the damage and that Claimant's actions did not contribute to the run-through. No other witness could establish fault by Claimant prior to the run-through.

Given the basis underlying the hearing officer's assessment of discipline, which is patently incorrect, we, in our role as the reviewing Board, must assume that the quantum of discipline was directly, albeit erroneously, predicated upon the switch damage. Thus, the existing discipline must be set aside in its entirety.


However, notwithstanding the foregoing, the record does support the finding that Claimant failed to properly inspect the switch, after it had been damaged, before he attempted to throw it. The distortion of the connecting rod should have been quite apparent to the naked eye with the light of Claimant's lantern. As a result, Claimant does bear some culpability for violating the cited rules. Carrier may, therefore, issue a written reprimand, or its equivalent under Carrier's disciplinary policy, and note it in Claimant's work record.

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: March 25, 2003