

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6798

PARTIES UNITED TRANSPORTATION UNION

TO and

DISPUTE THE BURLINGTON NORTHERN and SANTA FE RAILWAY CO.
COAST LINES

AWARD NO. 7

CASE NO. 7

Organization File No. EM-13-1566

Carrier File No. 61-04-0001D

STATEMENT OF CLAIM:

THE ORGANIZATION STATES ITS CLAIM AS FOLLOWS:

Appeal is now being made on behalf of Southern California Division Conductor E. T. Winston for the removal of a Formal Reprimand and the accompanying one-year probationary period for the alleged violation of Rules 6.27 and 8.15 from the Claimant's personal record, and pay for all time while attending investigation held on September 24, 2003.

STATEMENT OF FACTS:

E. T. Winston ("Claimant") was employed by the Carrier in 1998 as a Switchman. The instant matter concerns an incident that occurred on August 29, 2003 when Claimant was working in the capacity of Conductor assigned to M-BARWATL-28 at Barstow, California and Watson Yard. Claimant's shift began at 9 P. M., at which time there were three jobs in the same area, namely, the 4th Watson job (304), the midnight Port job (731) and the M-BARWAT. Claimant and Engineer J. Shadoan ("Shadoan") handled the M-BARWAT job.

At about 4 A. M., while working on the M-BARWAT job, Claimant proceeded westward running through the Rolling Junction mainline switch. The next job to traverse that switch was job Y-WAT301-28. In the process of traversing that switch, BNSF 2427, BNSF 2837 and ATSF 622941, all part of the Y-WAT301-28 job, derailed which derailment was attributed to a damaged switch believed to have been caused by "running through the Rolling Junction mainline switch" by the crew of the M-BARWAT job.

Assistant Division Trainmaster Vanessa Knapton, Keith Miller and Superintendent of Operations, David Leathers, were sent to the site of the derailment to inspect the scene of the accident and to conduct a preliminary investigation.

A Formal Investigation was held on September 24, 2003. Claimant was held responsible for damaging the switch, for failing to reline the switch prior to traversing it and charged with violation of the General Code of Operating Rules ("GCOR"), Fourth Edition, April 2, 2000, Rules 6.27 and 8.15 which provide, as follows:

Rule 6.27 Movement at Restricted Speed

When a train or engine is required to move at restricted speed, movement must be made at a speed that allows stopping within half the range of vision short of:

- Train.
- Engine.
- Railroad car.
- Men or equipment fouling the track.
- Stop signal.
- Or
- Derail or switch lined improperly

The crew must keep a lookout for broken rail and not exceed 20 MPH.

Comply with these requirements until the leading wheels reach a point where movement at restricted speed is no longer required.

Rule 8.15 Switches Run Through

Do not run through switches, other than spring switches or variable switches. If a rigid type switch is run through, it is unsafe and must be protected by spiking the switch, unless a trackman or other competent employees takes charge.

An engine or car that partially runs through a switch must continue movement over the switch. The engine or car must not change direction over a damaged switch until it has been spiked or repaired.

Claimant was issued a Formal Reprimand and a one year probationary period for the above violations.

FINDINGS:

Based upon the record, the Board finds that the parties herein are the Carrier and the Employee Representative within the meaning of the Railway Labor Act, as amended. This Board is duly constituted by agreement of the parties and has jurisdiction over this dispute.

The Board finds the charges against Claimant are without merit inasmuch as the Carrier failed to establish any act or failure to act relating to the incident.

On the date and time of the events that resulted in the multiple derailments at issue herein, Claimant proceeded westward, running through the Rolling Junction mainline switch in a fault free manner. Significantly, no evidence was produced that contradicts the foregoing findings although the Carrier contends that the Conductor should have stopped and relined the Rolling Junction switch.

Claimant testified that there was no reason for him to stop the train or to reline the switch since the switch was in the proper direction and therefore, he was required to proceed.

The Board noted that the Carrier relies upon GCOR Rules 6.27 and 8.15 because a derailment occurred approximately four hours after the M-BARWAT traversed the switch. The Carrier would be correct but for the fact the M-BARWAT traversed such switch without incident, as well as the first two cars of the Y-WAT301-28 job and the derailment finally occurred more than four hours later when the third car of the Y-WAT301 job, for reasons, unknown and unexplained.

In addition to the foregoing, the Board concludes that the Carrier failed to set forth credible and/or admissible evidence to support the charges against Claimant. Thus, Chuck West ("West"), Assistant Trainmaster, Watson Yard, testified over objection, on facts concerning that which he had no first hand knowledge. Instead, the witness relied upon what he was told by David E. Leathers ("Leathers"), Superintendent of Operations and Vanessa Knapton ("Knapton"), Assistant Division Trainmaster. In the absence of the testimony of the person or persons with actual knowledge of the facts, the testimony of another party purportedly testifying with knowledge of the facts, is inadmissible and violative of due process practices. As a consequence of the foregoing, West's testimony must be disregarded by the Board.

Keith Miller ("Miller"), Road Foreman of Engines, Southern California, was called as a mechanical witness for the Carrier. Unfortunately, Miller was placed in a position where he too had no first hand information to permit the Board to understand and rule upon what had transpired when Claimant was working M-BARWAT. His

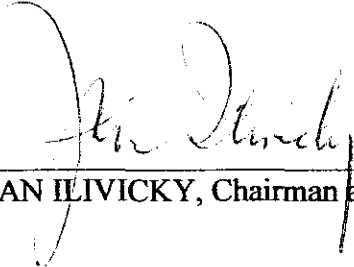
third hand testimony must be ignored inasmuch as he acknowledged receiving his information from L. R. Gomez ("Gomez"), Terminal Superintendent.

In the absence of any witnesses with knowledge of the facts and the Carrier's failure to produce Knapton, Gomez and the crew of the derailed Y-WAT301 job, the Board concludes that the charges against Claimant should be dismissed with prejudice and his record expunged of wrongdoing.

AWARD:

Based upon the foregoing, the Claim is sustained.

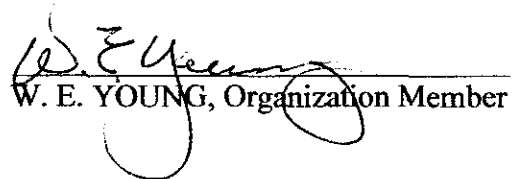
The Carrier shall comply with the above Award within thirty (30) days of the date of issuance.



JOAN ILIVICKY, Chairman and Neutral Member



GENE L. SHIRE, Carrier Member



W. E. YOUNG, Organization Member

Dated: 