

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. 1

CASE NO. 1

Organization File No. EM-13-1557

Carrier File No. 61-0300141

STATEMENT OF CLAIM:

Request on behalf of Southern California Conductor K. L. Jenkins ("Jenkins") for the removal of the Level S thirty (30) day record suspension and the three year probation from his record, with seniority, and all other rights unimpaired as well as payment for time lost.

STATEMENT OF FACTS:

On November 10, 2002, Jenkins ("Claimant") was assigned on the Z-PTLBCA-08A on duty at Barstow, California at 4:00 P.M. At approximately 5:30 P.M., Claimant sustained an injury to his knee while lining the South Wye switch at the Barstow Yard.

Claimant maintained that the injury occurred because the switch was extremely difficult to throw. No eyewitnesses were present to observe the attempted throw or the occurrence of the injury. Claimant immediately reported the incident to Trainmaster R. J. Florez ("Florez") who instructed him to complete the Carrier's injury report. In addition, Florez asked Claimant to answer three "post incident questions" which were reduced to writing and used by Florez to assist him in the preliminary investigation. Claimant submitted the injury report but failed to respond verbally or in writing to the three questions requested by Florez.

A preliminary investigation was undertaken in which the Carrier performed a reenactment of the incident with the assistance of Claimant. Claimant identified a switch similar to the one he used when the injury occurred and instructed the investigators regarding the procedure and technique used in throwing the switch.

As a result of the reenactment, the Carrier determined that Claimant's injury was "potentially" the result of his:

. . . insistence in throwing a difficult switch and failing to follow proper procedure and body alignment when throwing a switch.

A formal investigation was undertaken on December 10, 2002 and Claimant was charged with being in violation of the Carrier's General Code of Operating Rules ("GCOR"), as amended, effective April 2, 2000, Rule 1.1, 1.6 of the Train Yard and

Engine ("T. Y. & E") Safety Rules S-13.7 and 13.7.2. Rule S-13.7 addresses "Operating Switches and Derails." Rule S-13.7.2 addresses "Checking for Damage and Obstruction." General Requirements provide as follows:

Switches have different operating characteristics that could change because of weather, temperature, and maintenance. Before attempting to operate a switch:

1. Stop the car, locomotive, or other on-track equipment at least 50 feet from the switch stand to be lined, when possible.
2. Look in both directions and watch for moving equipment on adjacent tracks.
3. Visually inspect the switch to make sure it is not damaged, locked, or spiked.
4. Verify that switch points are not fouled by ballast, ice, snow, or other material.

Claimant was assessed discipline which carried a penalty of a Level S thirty (30) day record suspension and a three year probation period. (Carrier Ex. 6)

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. The Board is duly constituted by agreement of the parties and has jurisdiction over this dispute.

The Board finds that Claimant disregarded his personal safety when he failed to follow the Carrier's safety rules and procedures and when he failed to follow recognized yard procedures in throwing difficult switches.

In support of the Board's position, it relies upon PLB No. 4663, Award No. 25, (Neutral Hays) in which it was held that:

Claimant had on previous occasions, successfully completed the identical maneuver without incident. Therefore, we must presume, from the circumstances involved, that in his haste to accomplish the assigned tasks, claimant failed to take sufficient precaution to protect himself.

The Board further finds that Claimant endeavored to throw the switch under difficult weather conditions. As a result, the switch resisted Claimant's efforts, whereupon, Claimant should have ceased his efforts to proceed. However, Claimant continued his task and as a result, injured himself, notwithstanding the fact that he knew the proper procedure to follow but nevertheless, violated the Carrier's safety rules and in his attempt to force the switch over, caused his injury.

Claimant acknowledged that the Carrier's position was correct when he testified on the record, stating:

I, Mr. Jenkins while on duty attempting to throw the switch on the South leg of the Wye (sic) in Barstow yard, injured

my knee due to the switch being extremely difficult to throw.

Thus, Claimant knew or should have known that the existing weather conditions of the previous days and the darkness under which he was working, seriously affected his ability to throw the switch. At that point in time, Claimant should have taken greater precautions when undertaking the task and when the switch resisted his efforts, he should have terminated his efforts and reported the difficulty to the track supervisor pursuant to GCOR, Rule 1.1.

The Board reaches its conclusion, relying upon the foregoing safety rule which requires that the Employee maintain a safe course of action and when in doubt or uncertainty, take the safe course of action. Employees are required to be alert and attentive when planning and performing duties.

In addition, the Board finds that Claimant violated Rule 1.6 when he negligently proceeded to pursue a task that he knew was difficult which task should have been tagged for inspection and further attention.

However, the Board finds that insufficient evidence was produced by the Carrier to support the conclusion that had Claimant used different body mechanics when throwing the switch, the injury would not have occurred. Consequently the conclusion reached by the Carrier is defective and this violation must be dismissed. The inspection

results of the switch, after the injury occurred, revealed pressure readings of almost twice the normal level. Therefore, whether using different body mechanics would have avoided the injury, is speculative.

The Board finds no probative value in the fact that three trainmen threw the same switch earlier in the day without incident. Instead, the Board concludes, as weather conditions change, so does the impact on the switches and a trainman's ability to safely throw a switch.

The Organization submits that the investigation was procedurally defective, that Claimant was denied a fair and impartial hearing and that as a result, discipline should be vacated.

Specifically, the Organization claims that the reenactment of the incident was not accurate inasmuch as a similar switch was used rather than the same switch. In addition, Claimant was not able to physically participate in the reenactment due to his injury and the Carrier used V. L. Stewart, Terminal Manager, to reenact Claimant's actions. The Organization maintains that Claimant's witnesses were not made available and the Organization was unable to properly cross-examine Florez because his testimony was given via teleconferencing format. In addition, the Organization expressed concern as to the conditions under which the teleconferencing was operating.

The Organization submits that the Carrier failed to prove the existence of a Rule violation and under such circumstances, a formal investigation was unnecessary and a violation of the Memorandum dated November 16, 1984. The Organization concludes that the evidence entered into the record was “purely speculative, circumstantial, a guess at best and the discipline was harsh and arbitrary.”

In summary, the Organization submits that the Carrier made no attempt to use the same switch, or wait until the Claimant was available for the reenactment, failed to properly “mimic” the Claimant’s movements and improperly substituted an officer of the Carrier.

In response, the Board relies upon PLB 4901, Award No. 148 (Neutral Wallin) which held that:

When an objection is raised about the absence of a witness, it is almost always necessary for the objecting party to make an offer of proof to explain on the record and for the benefit of the hearing officer, what relevant information the missing witness possessed. If there is no such offer of proof in the transcript, the hearing officer normally cannot be faulted for completing the hearing without the witness. *Moreover, we in turn, cannot determine, during our later review of the record whether the missing witness had any relevant information or not.* (Emphasis added)

The Board finds that the Organization’s objection to the manner in which the reenactment was conducted is without merit inasmuch as Claimant previously agreed to the manner in which the reenactment was conducted.

As a result of the foregoing, the Board concludes that Claimant's violations were the root cause of his injury, that he knew the switch was difficult to throw due to dirt and rust but nevertheless, he continued his attempts to force the switch and thereby injured himself.

Finally, the Board concludes that substantial evidence was adduced at the investigation to conclude that Claimant's injury was due to his disregard of safety policies and training when he failed to abide by the Carrier's Rules pertaining to due and proper performance.

AWARD:

The Organization's claim is sustained in part and denied in part in accordance with the Findings herein, as follows:

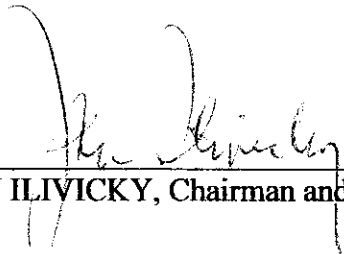
- 1) The Carrier's charge is sustained to the extent that Claimant's injury was due to his disregard of safety policies.

- 2) The Carrier's charge is denied to the extent that insufficient evidence was produced to support the conclusion that had Claimant used different body mechanics when throwing the switch, the injury would not have occurred.


3) The Level S thirty (30) day record suspension is reduced to a twenty (20) day record suspension.

4) The three year probationary period shall be reduced to a one year probationary period.

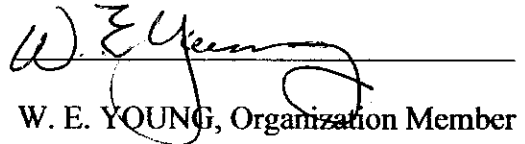
The Carrier shall comply with this Award within thirty (30) days from the date of issuance



JOAN ILIVICKY, Chairman and Neutral Member



GENE L. SHIRE, Carrier Member



W. E. YOUNG, Organization Member

Dated: 