

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 6041**

**JOHN C. FLETCHER, CHAIRMAN & NEUTRAL MEMBER
GENE L. SHIRE, CARRIER MEMBER
DON HAHS, EMPLOYEE MEMBER**

**BROTHERHOOD OF LOCOMOTIVE ENGINEERS
BNSF SANTA FE, GENERAL COMMITTEE**

and

**BURLINGTON NORTHERN AND SANTA FE
RAILWAY COMPANY**

**Award No. 11
Case No. 11**

*Date of Hearing - May 20, 1998
Date of Award - November 1, 1998*

Statement of Claim:

Claim of Phoenix Subdivision Engineer H. W. Wilson for pay for all time lost while being withheld from service for the Burlington Northern and Santa Fe Railway Company while serving said 30 day suspension, including time lost while attending formal investigation and that Engineer Wilson's personal record be expunged of any mention of the incident of February 7, 1995.

FINDINGS:

Public Law Board No. 6041, upon the whole record and all of the evidence, finds and holds that the Employee(s) and the Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and, that the Board has jurisdiction over the dispute(s) herein; and, that the parties to the dispute(s) were given due notice of the hearing thereon and did participate therein.

On February 7, 1995, Claimant was working as an engineer on a train operating between Ashfork, Arizona and Phoenix, Arizona. While performing a switching operations at El Mirage, Arizona two cars were derailed resulting in substantial damage. In the process of investigating the cause of the derailment, pulse tapes and event recorders were removed from the locomotives. These tapes allegedly indicated that Claimant's train exceeded speed restrictions several times enroute between Ashfork and El Mirage. Claimant was cited to attend an investigation "to determine all facts and place responsibility, if any, concerning alleged overspeed of your train and derailment of TTGX 983695 and TTGX 912070 in tack 2232, El Mirage, Arizona." Following the conclusion of the investigation Claimant was determined to be without responsibility for the derailment, but was adjudged responsible for several instances of overspeed in the trip between Ashfork and El Mirage. Claimant was assessed with a thirty day suspension, that has been appealed to this Board on a variety of grounds, procedural and substantive.

LABOR RELATIONS

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On procedure, the Organization challenges the fairness of the investigation because it was scheduled on "extremely short notice." Furthermore, it asked for copies of the speed tapes and track warrants before the hearing, and these were not provided. The conduct of the hearing officer is also challenged, the Organization claiming that he restricted the scope of questioning by Claimant's representative, so as to foreclose an adequate defense. When attempts were made to "sort out" the actual rules alleged to have been violated, the hearing officer interrupted the questioning and decided that this would be done after the hearing was concluded. The Organization also claims that the transcript is flawed and full of "scrivener's errors."

With regard to the merits, the Organization claims the investigation was a witch hunt. On the alleged instances of overspeed, it is argued while the tapes were not accurate or complete. If some overspeed occurred it was do to the make up of the train, but, nonetheless when this occurred Claimant responded prudently to get within limits, the Organization says. Furthermore, the speed tapes that were relied on were taken from the trailing unit, and it was possible that the speedometer in the lead unit, relied on by Claimant in controlling his train, did not indicate any overspeed at all.

The Carrier denies that any procedural deficiencies exist in this record so as to void the discipline assessed. Furthermore, on the merits, it notes that the totality of the record indicates that the Organization has acknowledged that Claimant exceed the maximum authorized speed when it stated that "it is obvious that [Claimant] was taking action to control the speed of his train, and the alleged overspeeds appear to be nothing more than accidental and not threatening to the safety of the crew."

The Board does not find the procedural arguments advanced by the Organization to be persuasive. While the conduct of the hearing officer was at times arbitrary, it did not reach the level where it was so outrageous as to prejudice the investigation and flaw the results.

Nonetheless, Carrier hearing officers should be cautioned that it is their responsibility to conduct the proceedings fairly, giving the charged employee and his representative a full and complete opportunity to advance any defense to the charges they believe appropriate, so long as the defense is not patently out of line or frivolous. Hearing Officers need to be told that a failure to conduct a fair proceeding, will in appropriate circumstances, void the results of an investigation, without consideration of the merits. Hearing officers from time-to-time need to be reminded that their role in an investigation is to gather all pertinent information favorable and unfavorable to the charged employee. Their role is not one of a prosecutor, they should be seeking truth, regardless of who may be affected by the truth. When they assume the role of a prosecutor they flaw the procedure.

With regard to the merits, the evidence is conclusive that Claimant exceeded speed restrictions on a considerable number of occasions between Ashfork and El Mirage. Sometimes he was nearly 10 mph over the maximum speed authorized. One, or perhaps two, of these instances of overspeed could be explained away in the manner that Claimant attempted to excuse all instances noted on the speed tapes. But the totality of the occasions of overspeed suggests that either gross inattention to duty occurred or that Claimant was attempting to maintain an average speed approximating the maximum speed authorized on the line - 49 mph. He claims to have monitored his speed by the speedometer in the lead locomotive and with his watch. If he had been doing either it is difficult to account for the number of instances of overspeed that occurred, unless they were intentional. The

defenses offered for the instances of overspeed simply do not seem credible. They are rejected.

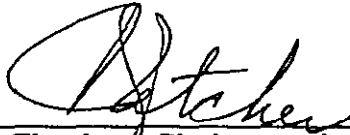
Discipline was warranted. The discipline assessed in this matter will not be disturbed.

A W A R D

Claim denied.

O R D E R

The Board concludes that an award favorable to Claimant shall not be made.



John C. Fletcher, Chairman & Neutral Member


Gene L. Shire, Carrier Member
Don Hahs, Employee Member

Dated at Mt. Prospect, Illinois., November 1, 1998