

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

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GENE L. SHIRE, CARRIER MEMBER
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**BROTHERHOOD OF LOCOMOTIVE ENGINEERS
BNSF SANTA FE, GENERAL COMMITTEE**

and

**BURLINGTON NORTHERN AND SANTA FE
RAILWAY COMPANY**

**Award No. 14
Case No. 14**

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

Statement of Claim:

Claim for Newton Subdivision Engineer G. H. Weis for pay for all time lost while being withheld from service for the BNSF Railway Company while serving said 15 day suspension and pay for 5 days being withheld from service waiting for the results of the FRA Drug Screen and that Engineer Weis' personal record be expunged of any mention of the incident of April 27, 1994.

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 April 27, 1994, Claimant was working as a Yard Engineer in Carrier's Sand Creek Yard. Immediately after lunch that day Claimant was operating a consist of one locomotive and a slug. The Conductor lined up a movement to allow the consist to come out onto Track 8122 in an eastward movement so it could then proceed to the west end where their next work was to take place. After clearing the lead switch, the helper gave Claimant signals to stop and then proceed westward. As the consist was proceeding westward Claimant noticed that the slug moved to the left in a crossover, rather than straight down the track. He braked the consist, but before stopping ran into a train on an adjacent track that had just entered the yard.

Following the incident the crew was tested for drugs and alcohol. Claimant's results were negative.

The entire crew was cited to attend an investigation. The investigation was postponed a number of times. On May 25, 1994, it was rescheduled for June 14, 1994. On June 6, 1994, Claimant's representative requested a postponement because the investigation was now scheduled "in the middle of [Claimant's] vacation." The postponement request was denied without any reasons being offered.

Following the conclusion of the investigation, Claimant was given a sixty day suspension with thirty days deferred. The Helper was given a 90 day suspension, with thirty days deferred. The Conductor was exonerated. The Organization appealed Claimant's suspension on a variety of grounds, both procedural and substantive. On appeal the discipline was reduced to a 15 day suspension, with the right of Claimant to appeal the matter to this Board.

The Board is compelled to find that the assessment of any discipline in this matter is inappropriate on both procedural and substantive grounds. In looking at procedure first, it should be noted that it is patently unfair to conduct an investigation during a time that an employee is scheduled for vacation, unless some compelling reason exist to do so. In this matter no compelling reasons were advanced to establish that it was necessary to hold the investigation while Claimant was scheduled to be on vacation. The incident occurred on April 27, 1994. For unexplained reasons the initially scheduled investigation was postponed at the request of the Conductor on the job. For unexplained reasons the request of Claimant was not granted. No compelling reasons were advanced to suggest that Claimants' postponement request was not valid, or that notwithstanding the request it was necessary to have him interrupt his vacation to attend an investigation.

The Board notes the manner in which the Hearing Officer treated the objection concerning Carrier's failure to grant Claimant a postponement. At page 19 of the transcript Claimant's representative entered an objection on this point and the Hearing Officer made the objection a part of the record. The fact that this particular objection was never considered again is evidenced by the fact that the discipline was issued before the record of the investigation was available. The hearing occurred, as has been noted above, on June 14, 1994. On June 17, 1994, Mr. J. L. Hankins, Superintendent, notified Claimant that he was being disciplined with 3 suspension. However, the transcript of the investigation was not prepared until June 21, 1994. Such handling prejudices Claimant due to the fact the decision regarding appropriate discipline was based upon something other than on the written record of the hearing, and could not have considered, among other things, the objection concerning the failure of Carrier to grant Claimant a postponement so that the hearing could be held at a time when he was not observing his scheduled vacation.

Because Carrier has offered no sound reason that it was necessary to hold Claimant's investigation while he was on vacation sufficient defect exists so as to flaw the result and void the discipline. But additional flaws are also present. The Board is deeply concerned with an apparent issuance of discipline before the individual making the decision has an opportunity to review the transcript made at the hearing. A basic purpose of requiring a complete record of all of the testimony is so the individual making a decision and placing responsibility has a complete record of the evidence developed. This purpose is rendered useless if a decision is made without reviewing the transcript. A decision that is made before the transcript of the hearing is available strongly suggests pre-judgment. It is an indication that the hearing is merely window dressing, a formality to be followed to lend credence that due process considerations are being followed. This Board is unwilling to endorse such a charade.

In addition to issuing discipline before the transcript was even prepared, the Board is concerned about the arbitrariness of the Hearing Officer. For example, at page 55 of the transcript Claimant's representative attempted to inquire of a Carrier witness if there had been any other accidents at the location of the crossover switch involved in Claimant's charge. The Hearing Officer refused to permit this question on the basis that the investigation did not concern the "prior history of the switch." His refusal to allow the Organization to pursue this course of inquiry was totally inappropriate. It is a legitimate avenue of inquiry to explore the prior accident history of a crossover switch in such situations. If similar types of accidents have occurred in the past it may well be an "equipment malfunction" as opposed to "human error" that was the real cause of the incident.

The Hearing Officer's failure to allow this line of questioning is a fatal flaw, and another basis to void the discipline. It is interesting, too, to note the manner that he disposed of the Organization's objection on this point. The Hearing Officer, as was his custom, stated, "objection noted; it will be in the transcript." The transcript, however, was not prepared until after the discipline was issued.

The Board will not belabor other procedural defects, as the merits also require that the discipline be rescinded. Claimant operated his consist under the direction of two ground crew members. The switch standard was not visible from the side of the engine that Claimant was operating his consist from, also the switch points were not visible from that seating location. Claimant never got off the locomotive to line any switches. In the circumstances existing, therefore, it is difficult to contemplate how any assessment of discipline was warranted.

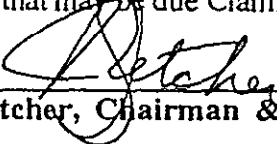
The discipline will not be allowed to stand. The claim will be sustained.

A W A R D

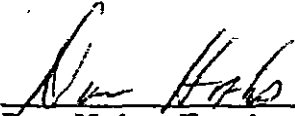
Claim sustained.

O R D E R

Carrier is directed to comply with this award within thirty days of the date indicated below and make any payments that may be due Claimant within that time.


John C. Fletcher, Chairman & Neutral Member


Gene L. Shire, Carrier Member


Don Hahs, Employee Member

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