

**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. 23
Case No. 23
Engineer Randal W. Cook**

*Date of Hearing - October 28, 1998
Date of Award - December 30, 1998*

Statement of Claim:

Claim of Cajon Subdivision Engineer Randal W. Cook for all time lost while being withheld from service for the BNSF Railway Company while serving said 365 day level 5 suspension including pay for attending the formal investigation and that Engineer Cook's record be expunged of any mention of the incident of July 6, 1997.

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 July 6, 1997, mid afternoon, Claimant was operating a train between Cajon and Lugo. On their approach to Signal No. 453, Claimant contends that he observed a yellow signal, which required him to approach the next signal prepared to stop. The next signal, No. 473, according to Claimant and his fellow crew member displayed yellow over green (Advance Approach) which required the train to proceed to the next signal not exceeding fifty miles per hour. Accordingly, as they approached the signal at Lugo train speed was increased to 50 MPH. The Lugo signal displayed red (Stop), Claimant placed his train in emergency braking, while his crew member alerted the Dispatcher by radio of the situation. The train did not come to a stop until 800 feet beyond the signal.

On July 7, 1997 a "re-enactment" was held. This re-enactment indicated that the lower light of Signal No. 473 was mis-aligned, causing it to appear dark to some, light with no color to others, and yellowish to still others.

Claimant's engineer certification was revoked. He was cited to attend a combined "railroad discipline and Federal certification" hearing on July 31, 1997. At the conclusion of that hearing, Claimant was disciplined with a 365 day suspension. On August 28, 1998 the Department of Transportation, FRA Locomotive Engineer Review Board disapproved Carrier's decision to revoke Claimant's certification. The Engineer Review Board determined that Signal No. 473 was mis-aligned and poorly lighted and that Claimant may have viewed a more favorable aspect than that which the signal actually displayed. It also determined that Carrier's failure to provide requested written reports and documents to Claimant and his Representative before the hearing was not acceptable in a locomotive engineer certification case.

On appeal to this Board the Organization makes basically the same assertions that were made to the Engineer Review Board. It claims that a fair investigation was not conducted because Claimant was not provided with copies of all material that was used in the investigation before the hearing date. On the merits, the Organization argues that Signal 473 was defective and displayed yellow over green when Claimant passed it.

Carrier dismisses the Organization's procedural argument as not being supported by the Agreement. It argues that the information requested may contain personal notes of BNSF officers, these notes were not entered into evidence, and that the Organization has no enforceable right to compel Officers to turn over their personal notes. Secondly, it points out that all information entered into evidence was provided the Organization on the date of the hearing, and it had the opportunity to take as much time as it wished to review the material and digest its contents. Carrier notes that on other parts of the BNSF, agreement provisions are in place providing for pre-hearing discovery. And while pre-hearing discovery could be made available to the Organization in this territory through negotiations, it should not be imposed through a decision of a Public Law Board, as to do so would amend the agreement without negotiations.

On the merits, Carrier notes that the evidence is conclusive that the signals were working properly, even though one may have been slightly mis-aligned. Such misalignment, however, could not have displayed a yellow over green indication, as Claimant's "self serving" testimony would have the Board believe.

On the level of discipline assessed, Carrier notes that the suspension was for the same period as the revocation of Claimant's engineer certification, as provided in Federal Law. Moreover, Carrier indicates that Claimant is no stranger to discipline. In December 1996 Claimant received a reprimand for departing a station without the required level of train braking. In March 1995 Claimant was assessed a conditional suspension due to a violation of Carrier's Drug and Alcohol program.

The Board notes that this is the second case of this type that it has considered involving a run through of a red signal at Lugo. See Award No. 6 of this Board. In that award the claim of Engineer Shadoan was sustained because of a violation of the time limits of the parties Agreement without consideration of the merits. Nonetheless many of the same contentions were raised in Award No. 6 were also raised here. Particularly, the alignment of the lower light being so poor that even Carrier witnesses had a difficult time in correctly seeing the correct aspect until they were right on top of the signal. As was the case with the Locomotive Engineer Review Board, the mis-aligned lower light casts sufficient doubt as to the reliability of the signal indication so as to render the assessment of discipline suspect.

Accordingly, it must be concluded that the evidence relied on by Carrier to assess discipline in this matter is insufficient for this purpose. The claim will be sustained as presented.

A W A R D

Claim Sustained.

O R D E R

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


John C. Fletcher, Chairman & Neutral Member


Gene L. Shire, Carrier Member


Don Hahs, Employee Member

Dated at Mt. Prospect, Illinois., December 30, 1998