

**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. 36
Case No. 36
Engineer L. D. Baker**

*Date of Hearing - March 21, 2000
Date of Award - May 14, 2000*

Statement of the Issue

The Chairman and Neutral Member, after review of the entire record, has determined that the issue before this Board is:

Was Carrier justified in dismissing Claimant Engineer L. D. Baker for his alleged failure to control the speed of his train on the Cajon Subdivision on January 22, 1998?

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.

Before this Board, the parties present the instant dispute concerning Claimant Engineer Baker's alleged failure to control the speed of his westbound train through the Cajon Pass between Barstow and San Bernardino, California on January 22, 1998. Carrier provides a history of prescribed operating practices on the Cajon Subdivision, Claimant's alleged disregard of these practices which essentially represents the foundation of its charge in this case. In early 1996, one of Carrier's trains, traveling westbound down the mountain grade pass between the stations of Summit and Cajon derailed, resulting in two fatalities and a hazardous material spill. That incident also caused significant disruptions in traffic on major California roadways for several days, and as a direct consequence, the State of California now monitors, indeed regulates, Carrier's westbound operation through

the Cajon Pass. Prescribed operating practices in this area are set out in Carrier's Southern Division Timetable, Cajon Subdivision, Timetable No. 3 (Carrier Exhibit 1), and contain the following provisions pertinent to this case:

Section 1(D). Speed-Other

Speed restrictions, dynamic brake requirements, and special instructions governing the use of retainers for westbound freight trains operating between MP 56.6 and MP 78.0.

1. Locomotive weight will not be included in train tonnage except for those units on which dynamic brake is inoperative.

2. Speed Restrictions Westbound Freight Trains:

North Track between MP 56.6 and MP 64.2X and on Both Tracks between MP 61.5 and MP 78.0:

- A. 30 MPH if train does not exceed 6500 tons or 95 TOB.**
- B. 20 MPH if train exceeds 6500 tons or 95 TOB.**
- C. Cannot proceed if train exceeds 16,000 tons or 135 TOB.**
- D. 35 MPH for light engine consist.**

The Board notes that Carrier operates over two Main Line tracks through the Cajon Pass, and speed restrictions as prescribed by timetable are different on the North and South tracks due to varying grades. In this case, Claimant was operating on the North track, so the timetable provisions cited above are applicable.

Carrier clarifies that the TOB, or Tons per Operative Brake referred to above, is a value unique to each train, and is achieved by dividing the number of cars with operating brakes (excepting locomotives with operating dynamic brakes) into the train's total tonnage. According to Carrier, the TOB values for westbound trains out of Barstow are routinely calculated by train crews based on train list information, and are placed, *inter alia*, on the "Cajon Sub Checklist" prior to departure. Carrier further explains that in an effort to consistently monitor train speeds through this territory, the State of California requires that locomotive event recorder tapes be secured from each and every westbound train arriving in San Bernardino, and all speed data from those tapes be compiled and submitted in a monthly report to State regulating bodies.

On the date in question, Claimant was called for westbound Train M-BARWCL1-22A with a consist of three operating locomotives (BNSF 8283, ATSF 565, and BNSF 1029) and 48 cars. According to the train list, the total tonnage of Claimant's train was 4762 tons. (The Board notes that the Cajon Sub Checklist for M-BARWCL1-22A on January 22, 1998 [Exhibit E to the transcript] did not indicate a TOB calculation, but based upon the above formula, should have reflected a value of 99.2 TOB.)

According to the evidence, the event recorder tapes, pulled in routine manner from BNSF 8283 and BNSF 1029 upon Claimant's arrival at Rana (an outlying point within the San Bernardino terminal area) on January 22, 1998, revealed that his train had reached a speed of 31 MPH on the North Track at MP 73.79 in the Cajon Pass, 11 MPH over the maximum allowable speed prescribed by timetable Section 1(D) above. As a result, Claimant was directed to attend a formal investigation in connection with his alleged failure to control the speed of his train in violation of Timetable and General Rules cited, and was dismissed from Carrier's service subsequent to the February 24, 1998 hearing.

During the investigation, the conductor of Claimant's assignment confessed that he had neglected to calculate the TOB prior to departing Barstow (Transcript of investigation at page 80). However, of particular interest to this Board is Claimant's own testimony at page 73 of the transcript, wherein he admitted that both he and Conductor Lipscomb decided to proceed at 30 MPH through the Pass, even in the absence of the prescribed TOB calculation. Claimant further acknowledged at page 76 of the hearing transcript, that he failed to comply with General Rule 6.31, the provisions of which were included in the hearing record at page 87.

General Rule 6.31 states:

General Rule 6.31 Maximum Authorized Speed

Conductors and engineers are jointly responsible for knowing and not exceeding the maximum authorized speed for their train.

Upon the whole of the record, this Board has no sound reason to doubt the accuracy of the event recorder data obtained from M-BARWCL1-22A on January 22, 1998, and, in that regard, Carrier's case is certainly compelling. Based upon this significant evidence alone, there is no doubt that Claimant exceeded the maximum allowable speed for his train in the Cajon Pass on that date, and Carrier's charge to that effect was thereby proven legitimate. Remaining before this Board, then, is the question of remedy, as we find no evidence in the record that Claimant's right to due process compromised during the handling of his case on the property.

While we certainly affirm Carrier's finding that Claimant was in clear violation of Rule 6.31 cited above, we are inclined to agree with the Organization that, by virtue of the very language relied upon by Carrier, the Conductor in this case is equally culpable. The record shows in contrast to that determination, that they were treated quite differently in

terms of discipline assessed. Conductor Lipscomb received a 25-day actual suspension for this incident, while Claimant was dismissed.

On this point, the Organization cites a number of prior Awards addressing the issue of disparate discipline, arguing that "[D]isparate discipline is a practice that has been frowned upon at the National Railroad Adjustment Board", and further that "[I]f Carrier's Operating Rules call for joint responsibility between the Conductor and Engineer, then discipline should be assessed equally between the same two crew members" (Organization Submission at pgs. 19 and 20). Its assertion of this basic tenet in labor relations is well-founded and certainly supported by prior arbitral authority. However, that being said, we cannot, in this case, simply ignore Carrier's accepted discipline policy when the "playing field" is not level.

In keeping with the Organization's own statement at page 4 of its Submission, this Board notes that Conductor Lipscomb had "over 40 years of exemplary service" at the time of this incident. Claimant's *less than* exemplary 6-year employment history, a copy of which was furnished this Board, does not merit equal consideration in our opinion. According to his record, (Carrier Exhibit 7), Claimant was promoted to engine service in 1994, one year after he entered Carrier's employ. In each succeeding year (with the exception of 1996), he was disciplined, in some cases more than once, for improper train handling. Of particular note are back to back actual suspensions in 1997, the latter of which was accompanied by a 3-year probationary period commencing January 11, 1998, just 11 days prior to the incident at bar. As a result, this Board does not consider Claimant's status with Carrier on a par with that of a conductor with 40 plus years of "exemplary service", and will not therefore overturn Carrier's action in this case to the extent that both crew members are treated equally.

We do, however, recognize that in the truest sense, both Claimant and Conductor Lipscomb were jointly responsible for "knowing and not exceeding the speed of their train" on January 22, 1998, and on that basis, find that dismissing Claimant under this particular set of circumstances was excessive. We hereby reduce the discipline assessed in this case to 120 days actual suspension. In so doing, we reactivate the previous 3-year probation, the duration of which is not discounted by this suspension, nor by any time the instant claim was pending. Carrier is ordered to immediately reinstate Claimant to service with all seniority rights unimpaired, and is additionally directed to make him whole for any time lost over and above the 120 days suspension.

AWARD

The issue before this Board:

Was Carrier justified in dismissing Claimant Engineer L. D. Baker for his alleged failure to control the speed of his train on the Cajon Subdivision on January 22, 1998?

is answered in the negative, "No". Claim is sustained as set forth in the findings.

ORDER

Carrier is directed to comply with this Award within thirty (30) days of the date indicated below, and make any payments that may be do Claimant within that time period.



John C. Fletcher, Chairman & Neutral Member



Gene L. Shire, Carrier Member



Don Hahs, Employee Member

Dated at Mt. Prospect, Illinois, May 14, 2000