

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 6198**

**JOHN C. FLETCHER, CHAIRMAN & NEUTRAL MEMBER
T. M. STONE, CARRIER MEMBER
DON M. HAHS, ORGANIZATION MEMBER**

**BROTHERHOOD OF LOCOMOTIVE ENGINEERS
SLSW, GENERAL COMMITTEE**

and

**UNION PACIFIC RAILROAD COMPANY
(FORMER ST. LOUIS SOUTHWESTERN RY. CO.)**

**Award No. 16
Case No. 16
Engineer M. D. Stady
Level 3 discipline
Five day Suspension**

*Date of Hearing - May 1, 2000
Date of Award - July 31, 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 assessing Claimant Engineer M. D. Stady Level 3 discipline (5 days actual suspension) in connection with his alleged failure to stop short of a dark signal located at Mile Post 342.3 on the Dalhart Subdivision of the Burlington Northern-Santa Fe Railroad on September 9, 1999?

FINDINGS:

Public Law Board No. 6198, 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.

The parties present the claim of Engineer M. D. Stady (and the adjunct claim of Student Engineer K. L. Montgomery in Case No. 17 before this Board), that he was unjustly disciplined in connection with his alleged failure of a Light-Out efficiency test conducted on Train MDHDH-08 by BNSF Officers on September 9, 1999.

According to the record, Student Engineer Montgomery, under Claimant's direct supervision and authority, was operating that westbound assignment on the Dalhart Subdivision of the BNSF Railroad (over which Carrier has trackage rights) when she failed to stop at a signal BNSF officials contend was displaying no aspect at the time. (Unknown to the three-person UP/SSW crew aboard MDHDH-08, five BNSF officers were performing a Light-Out operating efficiency test at Signal 342.3, none of whom, the Board notes, visually confirmed the aspect of that signal before Claimant's train passed it.) Nevertheless, it was determined by the testing Officers that the failure of Train MDHDH-08 to stop at Signal 342.3 constituted a violation of General Operating Rule 9.4, and Claimant's entire crew was removed from service pending investigation.

By letter dated September 10, 1999 (BLE Exhibit 1), Claimant and Student Engineer Montgomery were properly notified under the controlling Agreement to attend a formal investigation into the events of September 9, 1999, and a hearing on the matter was held over a three-day period beginning on September 14, 1999 and ending on September 16, 1999. By letter dated September 26, 1999 (BLE Exhibit 3) and *postmarked* September 27, 1999 (BLE Exhibit 5), Claimant was assessed Level 3 discipline (5 days actual suspension) under Carrier's UPGRADE Policy, the propriety of which is now before this Board for full and final disposition.

The Organization has presented an unavoidable threshold issue concerning the timeliness of discipline notification in this case, which we pointedly observe was raised with Carrier *prior to* initial appeal on the property. By letter dated October 6, 1999, Organization Local Chairman William Hill notified Carrier Superintendent Shudak as follows:

Attached you will find a photocopy of postmark on the envelope used to deliver the Notice of Discipline issued by you to Engineers Ms. K. L. Montgomery, Mr. M. D. Stady and Local Chairman BLE W. E. Hill. This attachment clearly shows and is irrefutable evidence that the discipline issued is outside the allowable time limit of the Collective Bargaining Agreement in effect between the Carrier and the BLE. The discipline had to be issued not later than the 26th of September, within 10 days of the close of the investigation held September 14-16th 1999

That is clearly and undeniably the case at hand, I ask you to set aside all discipline issued in the investigation held September 14-16th in which the above named individuals were involved and restore all monies lost, expunge their personal records of all reference to this matter and return them to duty without delay."

Article 71 of the controlling Agreement to which Local Chairman refers provides in pertinent part:

Article 71-1 – Rights to Hearing

... Decision [subsequent to investigation] will be rendered within ten (10) days following the date investigation is completed.

Additionally that agreement reads:

Item 14. If a dispute arises concerning the timeliness of a notice or decision, the postmark on the envelope containing such document shall be deemed to be the date of such notice or decision."

Upon careful review of the entire record and the persuasive argument presented by Local Chairman Hill, this Board is convinced that Claimant's right to systematic due process under the clear and unambiguous language of Article 71 of the controlling Agreement (further augmented and clarified on point by Item 14 above), was compromised to such an extent in this case that the discipline assessed by letter dated September 26, 1999 was rendered void *ab initio* the instant a belated postmark was affixed to the discipline notification. We remind Carrier that it is not privileged to "swing both ways" on the postmark issue when determining the timeliness of notices and decisions under Item 14 of the System Discipline Agreement, and neither is this Board. We direct Carrier's attention to Award 14 of this Board, wherein we unequivocally validated its contention that, as stipulated *by agreement*, "postmarks rule". We are quite content to find so in this case as well.

Based upon the above, then, we find the discipline at issue in this case void *ab initio* as a consequence of the untimely notification, and it will not be allowed to stand. With respect to Carrier's assertion that we lack authority to make such a determination based upon the fact that remedial action for bona fide violation of Article 71 is not stipulated by agreement, we respond: **nonsense**. This Board does not subscribe to erroneous notions, sometimes touted as precedential authority on this point, which, when extrapolated to its logical conclusion, provides no incentive whatever for Carrier to comply with the terms of an Agreement provision when stipulated consequence or recourse for the Organization are not specifically stated. In any event, we remind Carrier that, in this instance, we are *voiding discipline*, not altering any provision in the applicable Collective Bargaining Agreement. Furthermore, we admonish Carrier that the signing of that Agreement, of which Article 71 is a part, in effect consummated its commitment to all requirements contained therein, (as opposed to only those stipulating redress for violation), and advise, not surprisingly, that this Board's sole function is to assure that that preexisting commitment, as it applies to Claimant, is honored.

On that basis, we determine that Claimant should never have been required to serve the discipline at bar due to the untimely handling of notification under Article 71, and as such will, by virtue of this Award, be made whole for any losses he may have incurred as a result. The instant claim will be sustained without a determination on its

merits, and Carrier is hereby directed to remove the Level 3 discipline and all references to the events of September 9, 1999 from Claimant's service record and compensate him for all time lost in connection with its assessment.

AWARD

The issue before this Board:

Was Carrier justified in assessing Claimant Engineer M. D. Stady Level 3 discipline (5 days actual suspension) in connection with his alleged failure to stop short of a dark signal located at Mile Post 342.3 on the Dalhart Subdivision of the Burlington Northern-Santa Fe Railroad on September 9, 1999?

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

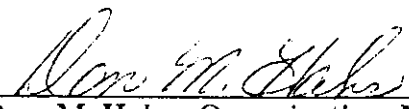
ORDER

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

~~Dissent~~
T. M. Stone, Carrier Member


Don M Hahs, Organization Member

Dated at Mount Prospect, Illinois., July 31, 2000