

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

**JOHN C. FLETCHER, CHAIRMAN & NEUTRAL MEMBER
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. 15
Case No. 15**

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

Statement of Claim:

Claim of Hereford Subdivision Engineer L. L. Hamilton for pay for all time lost while being withheld from service for the BNSF Railway Company while serving said 30 day suspension and that Engineer Hamilton's personal record to be expunged of any mention of the incident of April 25, 1996

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 25, 1996, claimant was operating a train at approximately 55 miles per hour when the approach signals for Joel Station indicated that the dispatcher would be placing the train in the siding at that location. The speed restriction entering the siding is 25 mph. Claimant first attempted to slow his train with dynamic braking. When this didn't reduce speed sufficiently, he applied air, and when he realized that he would still exceed 25 mph into the siding he placed the train in emergency, which stopped him short of the switch. Upon attempting to restart, less than two minutes later, Claimant placed his throttle in Run 1 for approximately 35 seconds, then quickly proceed through Run positions 2, 3 before his train started to move. Whereupon, he placed the throttle in position 4 for six seconds, and then 5, where his amperage increased to 1,045 with the train reaching a speed of 7.3 mph, when it broke in two, and went into emergency braking again.

Claimant was cited to attend an investigation, and following its conclusion was assessed discipline of a 30 day suspension. The Organization has appealed the discipline to

this Board on both procedural and substantive grounds. With regard to procedure the Organization faults the delivery of the notice of charges. It says that it was hand delivered rather than sent through the mail and that the short time between receipt of the notice and the scheduled date and time of the hearing deprived Claimant of the opportunity to prepare a proper defense. The Organization also contends that further error occurred when the discipline decision was issued before the transcript of the investigation was prepared.

On the merits of the matter the Organization contends that Claimant properly handled his train under the existing circumstances, it was not established at the investigation that he in any way was in violation of the several rules cited, and that the real cause for the train breaking in two was a defective yoke. It says that the evidence is conclusive that the draft gear had an old 50% break.

Carrier denies that any procedural irregularity occurred in this matter. On the merits it maintains that Claimant's own testimony indicates that he used excessive power in an attempt to start his train.

The record in this case strongly suggests that Carrier used the investigation process merely as a device to affirm preconceived notions as to Claimant's culpability. The investigation was held on May 17, 1996. The hearing was recorded by a court reporter. The same day of the hearing, before a transcript could be prepared, the Hearing Officer issued what amounted to a "bench decision" and assessed discipline. Moreover, there is an indication in this record that before the hearing was even scheduled a Carrier Officer stated that a suspension would be issued and that retraining would be required.

The requirement that a charged employee be afforded a fair and impartial investigation had ought not be treated lightly, or ignored, as seems to be the case here. Carrier is privileged to issue discipline to employees that engage in misconduct or violate its rules. Carrier is privileged to discipline employees (and require retraining) when they are careless or mishandle their trains, which seems to be apparent in Claimant's case in the emergency stop and attempted restart under review here. But Carrier must do so "by the book." It cannot issue discipline without first affording the charged employee an investigation that is impartial and fairly conducted. If they fail to "follow the book," then the investigation is flawed and seriously flawed investigations require that any discipline assessed be thrown out.

While concluding that the discipline must be negated because of the obvious predetermination of Carrier that a suspension was required the Board finds it necessary to comment about the equipment defects raised as a defense by the Organization. Had a normal stop been executed and a restart occurred without an application of excessive power, the draft gear defects would be of considerable importance in assessing the cause of the break in the train. In the opinion of the Board, though, it was the emergency stop, resulting from Claimant's inattention, and then an attempted restart, with an application of excessive power, without full brake release that caused the draft gear to separate. Although post-event examination disclosed old breaks these defects were not critical until the emergency stop and excessive application of power Claimant used to get going again. Claimant's mishandling of his train had ought not be excused because of the defects in the draft gear. Mishandling of a train by an Engineer may warrant discipline even if defects in draft gear are found to be present. In other words a fortuitous equipment defect is not an excuse to avoid responsibility for an apparent misapplication of emergency brakes and excessive power on restart.

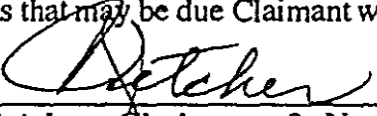
Nonetheless, the discipline assessed will be reversed because the procedures followed in the investigation were flawed.

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