

**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. 27
Case No. 27
Engineer C. D. Mooneyham**

*Date of Hearing - October 28, 1998
Date of Award - January 29, 1999*

Statement of Claim:

Claim of Pikes Pike Subdivision Engineer C. D. Mooneyham for pay for all time lost while being withheld from service for the BNSF Railway Company while serving said 90 day suspension, including time lost attending the formal investigation, and that Engineer Moneyham's personal record be expunged from any mention of the incident of May 28, 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.

At 6:30 a.m. on May 28, 1997, Claimant, the engineer on Work Train J-TT031-26, Engine 9665, stopped short of the red signal at mile post 727.1 to await authority to enter Carrier's Pueblo, Colorado yard to tie up. At the time Claimant had in his possession a Rule 15.2, Form B Track Bulletin, effective from 7:30 a.m. to 7:30 p.m. between mile post 727 and 729. At 8:00 a.m., Claimant was told to enter the yard. At that time he asked for and received a proceed signal from the Dispatcher. Shortly after entering the yard the train was flagged by a Maintenance of Way Foreman, and the crew was accused of going by the Foreman's red flag without permission. Claimant and his Conductor disputed that a red flag had been properly displayed. Claimant was cited to attend an investigation. Following the hearing Claimant was disciplined with a 90 day actual suspension and placed on three year's probation.

LABOR RELATIONS

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FT. WORTH**

The discipline assessed has been appealed to this Board on two grounds. First the Organization argues that Claimant was denied a fair and impartial investigation. On the merits it maintains that Carrier never proved that Claimant passed a red flag, and the discipline was assessed on the basis of one employees statements against another, without any corroboration.

Carrier disputes that the investigation was procedurally flawed so as to void the result. Furthermore, it stresses that Claimant had admitted to a Supervisor, at the time of the incident, that he had observed the red flag, but believed that under the application of Rule 15.2 he was allowed to proceed into the yard if he did so at a restricted speed.

The Board has reviewed with care the transcript of the investigation and notes that because of omissions, testimony is in near hopeless disarray concerning actual facts on certain critical elements, among them the time that the red flag was set out and where it was placed. Not only are the facts in conflict, but study of the transcript does not contribute to sorting out this record because in critical areas it is incomplete. For example there may be as many as 100 instances where the phrase "(inaudible)" has been inserted in the record to indicate a gap in the transcript. What is missing in this gap might have a bearing on the conclusions to be drawn from the testimony of witnesses. This defect is demonstrated by looking at Questions and Answers 58 through 63, involving testimony by the Maintenance of Way Foreman on the placement of the red flag:

58 Q Do you know for a fact that you put the flag at 727, not in front of the engines, which might have been past Mile Post 727?

A I do know for a fact that (inaudible).

59 Q In front of the engines?

A (inaudible)

60. Q May be not at 727?

A It was at 727.0,

61. Q (inaudible) were behind the flag (inaudible)?

A And their engines were at 726.8 or so. So I waited (inaudible) 726. What's that?

62 Q Quite a ways from the signal?

A Oh, a little, ya, a little ways. I could, like I said, stated, I could see them, and they're higher up than me, (inaudible) and the red flag in front of them (inaudible).

63 Q (inaudible)

A (inaudible)

The gaps in the above testimony (coupled with the gaps elsewhere in the record) make it impossible for the Board to conclude that adequate evidence was submitted to

support a showing as to exactly where the flag was placed. Other testimony of the Foreman casts further doubt as to how close to the engine the flag was placed, which may indicate that the train crew could not see it after it was placed:

63 Q You stated you've never had a train sitting at the beginning of the limits like that before. Don't you think maybe it would been to your benefit to maybe throw a rock at them or something and just say, "Hey, I just threw a red flag in front of you, I'm going to go start doing my work?"

A Well, I don't believe that's my job to do that, no.

The Carrier has the burden of supporting its allegations with adequate evidence. In this matter Carrier chose to meet this burden with testimony from the Maintenance of Way Foreman that he had in place a proper flag at the proper time, and that the Engineer ran past that flag without permission. This burden has not been met to our satisfaction. From the evidence available for our review in this record the Board simply cannot fairly conclude that a proper flag was placed where the Crew on Train J-TT031-26 would have been expected to see it.

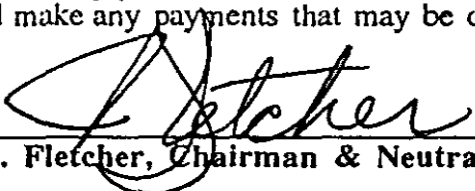
Accordingly, the discipline assessed will not be allowed to stand. The claim filed in this matter will be sustained.

A W A R D

Claim Sustained

O R D E R

Carrier is directed to comply with the terms of this Award within thirty 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., January 29, 1999