

**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. 4
Case No. 4
B. I. Lane**

*Date of Hearing - October 22, 1997
Date of Award - March 26, 1998*

Statement of Claim:

Claim of Illinois Division Engineer B. I. Lane for pay for all time lost while being withheld from service from the Burlington Northern Santa Fe Railway Company while serving a forty-five day suspension including pay for time lost while attending the formal investigation and that Mr. Lane's personal record be expunged of any mention of the incident of December 22, 1994.

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.

Engineer B. I. Lane appeared before the Board when this matter was considered.

On December 22, 1994, Illinois Division Engineer B. I. Lane was a member of a three man crew operating Train C-CHYUC1-22 between Fort Madison, Iowa and Chicago, Illinois, when, in the vicinity of Mile Post 57, they passed a yellow flag on the North Main track¹ without reducing speed to 10 miles per hours, as required by the rules. At the time the train was being operated by a student engineer, with Claimant working as an instructor.

¹ That had been placed there by Carrier officials conducting an efficiency test.

The crew was cited to attend a joint investigation, that Carrier also indicated would serve as an Engineer Certification revocation hearing in compliance with 49CFR240. Following the investigation/revocation hearing all three crew members were visited with Level 5 - 45 day suspension. The engineer trainee also had his Locomotive Engineer Certification revoked.

The Organization has appealed Claimant's suspension to this Board on a variety of grounds, both procedural and substantive. But, mainly it argues that at the time that Train C-CHYUC1-22 passed the yellow flag, it was foggy, with nearly zero visibility. Furthermore, the Organization notes that the Locomotive Engineer Review Board, in an order issued on July 19, 1996, found that Carrier's decision to revoke the student engineer's certification was improper because "the particular test ATSF conducted, was unreasonable and unfair based upon a totality of the circumstances."

In response the Carrier argues that the Board should not be influenced by the decision of the Locomotive Engineer Review Board because that decision involved a student engineer and our decision involves a promoted Engineer. Also, our case involves the application of standards associated with the Collective Bargaining Agreement, while the Review Board decision does not, their standards being outside our jurisdiction. Carrier insists that the test was conducted properly and that Claimant should have noticed the flag and alerted the Student Engineer to reduce speed. That he did not was a violation of Carrier's Rules, discipline was warranted, and the suspension imposed was consistent with Carrier's discipline policy.

Carrier's attempts at rejection of the Review Board's determination are misplaced. Every argument it may have advanced ignores the fact that the Review Board found the particular test conducted in this matter to be unreasonable and unfair based on the totality of circumstances. This determination was made after consideration of the same evidence that this Board is obligated to consider. It is not, as Carrier argues, the issue of whether or not an engineer trainee was certified, decertified, or recertified. It is the issue of the test being fairly conducted. Carrier is not privileged to discipline any employee for failure to pass an efficiency test that is not conducted fairly.

That evidence demonstrates conclusively that the test administered in this matter was conducted at night, and fog was present. On its face the staging of the test was patently unfair, unless additional measures were taken to insure that the marker would be noticeable in the weather conditions prevailing at the time. When an efficiency test is to be conducted it should be conducted in a manner that insures that the test markers can be seen by a reasonably alert employee, even if it is dark and foggy. Carrier has offered no persuasive evidence that the test marker it placed at mile post 57 should have been seen by the crew of the train, or that it took the extra precautions necessary to insure that the train crew would notice the marker in the prevailing weather conditions.

As the Review Board did earlier, this Board must also find that the test was unreasonable and unfair, and that discipline was not warranted. Carrier simply is not privileged to impose discipline for rules violations when the test to determine compliance with the rules was not fairly administered.

The suspension imposed in this matter will be rescinded.

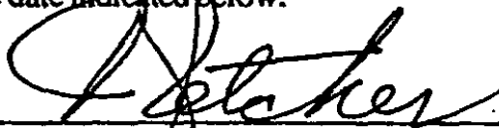
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A W A R D

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., March 26, 1998