NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 6041

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BROTHERHOOD OF LOCOMOTIVE ENGINEERS
BNSF SANTA FE, GENERAL COMMITTEE

and

BURLINGTON NORTHERN AND SANTA FE
RAILWAY COMPANY

Award No. 6
Case No. 6
B. T. Shadoan

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

Statement of Claim:

Claim for Southern California Division Engineer B. T. Shadoan for pay for all time lost while being withheld from service of the Burlington Northern Santa Fe Railway Company while serving a ninety day suspension, including pay for time lost attending the formal investigation, and that Mr. Shadoan's personal record be expunged of any mention of the incident of September 15, 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.

The herein Claimant, Engineer B. T. Shadoan, was a crew member on Train M-LABA1-14, being operated by a student engineer near Summit, California, that ran past Signal 522 displaying red, damaging a power switch at that location. The crew of LABA1-14 immediately contacted the Dispatcher to report the incident, and stated that the signal was displaying a false clear at the time. All members of the crew were cited to attend an investigation on the incident. Following the investigation Claimant was disciplined with a Level 4, 90 day suspension. That suspension has been appealed to this Board on both procedural and substantive grounds, but mainly the Organization argues that its claim must be allowed as presented because the Superintendent did not timely respond to the Local Chairman's appeal dated December 14, 1994.

From review of the record, the Board concludes that the Organization's contentions are well placed, that its time limit Rule was violated when Carrier's Superintendent failed to

make a timely response to the appeal placed before him on December 14, 1994. Under the time limit Rule, the Superintendent had thirty days from date of receipt of the appeal to render a decision and make a written response to the Local Chairman. The rule specifically requires that failure to comply with its terms closes the matter and settles it. Paragraph 6 of the Rule reads:

> If there is a failure to comply with the time limit provision of this agreement by either party, the matter will be considered closed, and settled accordingly, but this shall not be considered as a precedent or waiver of the contentions of either party for the handling of other similar discipline cases.

The record indicates that no response was made within the thirty day period. Established in the rule. On January 29, 1995, when the Local Chairman had not received a response to his December 14, 1995 letter, he contacted the Superintendent in writing and advised that it had been forty-six days since the appeal was placed before him. Like the December 14, 1994, the second letter, too, was ignored. On February 21, 1995, a third letter was addressed and sent to the Superintendent pointing out that the claim of Engineer Shadoan had never been acknowledged. It was not until March 15, 1995 that the Superintendent made his first and only response to Engineer Shadoan's appeal. The entire text of that response consisted of:

> With reference to your letter dated February 21, 1995 concerning Engineer B. T. Shadoan, your appeal is denied.

This response did not indicate a substantive reason for denial of the appeal, nor did it address the time limit breach raised twice by the Organization. In its appeal to this Board, Carrier asks that we ignore the Organization's time limit contentions because it has no record of ever receiving its December 14, 1994 appeal, and it is not its practice or habit to violate time limits, especially in discipline-related matters.

Carrier's contentions are not found persuasive for several reasons. First, it was not one letter that the Superintendent did not respond to within thirty days, but two - the December 14, 1994 letter and the January 29, 1995 letter. Carrier acknowledges that it received the January 29, 1995 letter, but claims that this was the "fist reference" it had to the appeal. If this was the first reference, as argued, Carrier was obligated, at that time, under the time limit rule, to effect a response within thirty days. That response could well have dealt with the merits, and if the Carrier chose, argued that the appeal of the Organization was out of time because it had not received the December 14, 1994 letter. Carrier, at that time, did not make either contention. It was not until a third letter was received that Carrier effected a response to the claim, and that letter did not mention time limits or indicate that the Superintendent had no record of receipt of the December 14th letter. It was only later that the defense that the original claim was never received was raised by Carrier. In the contemporary circumstances reviewed in this record this defense cannot be credited.

Carrier's failure to make a timely response to the Organization's appeal to the Superintendent requires that the Claim of Engineer B. T. Shadoan be allowed as presented, without consideration of the merits, as, under the time limits rule, the broom sweeps both ways. If the Organization had not timely appealed the claim at all steps of the procedure, Engineer Shadoan could never have his claim considered on the merits, regardless of

whether or not the investigation was flawed, and regardless of whether or not Carrier failed to establish a violation of its rules with credible evidence.

AWARD

Claim sustained, as presented to the Division Superintendent, for failure of the Superintendent to make a timely response as required by the Agreement.

ORDER

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