

**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. 5
Case No. 5
Interpretation**

*Date of Hearing – March 31, 1999
Date of Award – May 24, 1999
Date of Interpretation – September 30, 2000*

Under date of May 24, 1999, this Board issued the following award:

Statement of Claim:

Claim of Engineer C. J. Eifert to expunge discipline from personal file as a result of investigation held on July 29, 1998, and that he be paid for all time lost.

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; and, that the parties to the dispute(s) were given due notice of the hearing thereon and did participate therein.

The herein Claimant, Engineer C. J. Eifert, was operating a train between Pratt, Kansas and Dalhart, Texas on June 27, 1998, when Carrier conducted a light out, dark signal test a MP 491.1. Upon approaching the dark signal, Claimant attempted to stop his train without placing it in emergency braking, but was unable to do so before his engine passed the signal. Claimant was cited to attend an investigation into the incident, and was subsequently issued a 30-Day suspension. That suspension has been appealed to this Board on a variety of procedural and substantive grounds. (Claimant also had his Engineer Certification revoked for 30-days. That revocation was appealed to the Locomotive Engineer Review Board, which after review of Claimant's petition, overturned Carrier's action on procedural grounds.)

Before this Board, the Organization asserts that the discipline assessed should be negated because Claimant is; 1) an SSW Engineer that is covered by the SSW Agreement and is not subject to UP charge letters, UP Agreements, or UP discipline policies; 2) the Locomotive Engineer Review Board overturned Carrier's decision to revoke Claimant's FRA certification on procedural errors, which are the same errors challenged in this matter; 3) Claimant was charged

with a violation that occurred at 2:16 a.m. on June 26, but the record is conclusive that he did not go on duty until 6:50 p.m. that date; 4) the signal test was defective, and the lighting of the signal beyond the dark signal provided false information to Claimant; and 5) efficiency tests should be performed for educational purposes and discipline assessed for failure to pass an efficiency test should be corrective, not unreasonable, harsh, and arbitrary, the situation involved here.

Carrier responds that the efficiency test was conducted correctly and fairly. Further, it denies that sufficient procedural error occurred so as to fatally flaw the investigation. And, even though the Locomotive Engineer Review Board restored Claimant's certification, this should not be considered "controlling" on this Board, as the tests and standards for review are different in each forum.

The Board finds that this matter is replete with substantive evidentiary defect and procedural flaw. First it should note that the Board has difficulty with the manner in which the efficiency test was reported to have been conducted. The testimony seems to be conclusive that only one shunt was used, while tests of this type, to be realistic, would require two shunts. Secondly, the location and indication of the "second" signal, could at night, give the illusion that a clear track was available.

With regard to procedure, it should first be noted that Engineer Eifert was working under the SSW Agreement at the time of the incident and that the requirements of that agreement would control, in all instances where the UP policy would conflict. Notwithstanding that there no longer exists an SSW in tariff provisions the BLE - SSW Labor Agreement survives over the former lines of the SSW, until that Agreement is changed or revised, as provided in the Railway Labor Act. And, if Carrier fails to meet the requirements of the SSW Agreement, with respect to the imposition of discipline, then it must be prepared to accept the conclusion that the discipline will be considered flawed.

The substantive evidentiary defects coupled with several procedural flaws required that the discipline assessed here be rescinded in total. Accordingly, we will direct that all reference to this matter be removed from Claimant's personnel record, and that he be paid for all wage and benefit losses incurred.

The claim has merit. It will be sustained.

A W A R D

Claim sustained, as indicated above.

O R D E R

The Board concludes that an award favorable to Claimant will be made. Carrier is directed to comply with this award, and make any payments that may be required within sixty days of the date indicated below.

Following receipt of the Award, Carrier made a payment in the gross amount of \$9,505.04 to Engineer Eifert, representing wages lost during the period of his suspension between June 27, 1998 and August 30, 1998. This payment was made on September 30, 1999. However, the 46 work days lost and the \$9,505.04 back-pay were not used to compute Claimant's vacation credits and vacation compensation for either the vacation taken in calendar year 1999 or 2000. On March 24, 2000, the Organization's General Chairman made the following demand on Carrier:

Pay Engineer Eifert an additional \$182.87 per week for each week of vacation taken in 1999, or add the \$9505.04 to his total income in 1999, and pay vacation pay in calendar year 2000, based on these additional earnings.

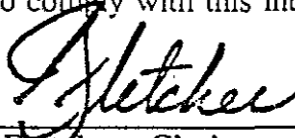
Carrier responded to this request by stating:

The Carrier's position on this matter is, and always has been, that in order to qualify for vacation or pay in lieu thereof, and employee must render compensated service. The decisions of the Section 10 Committee created by the National Vacation Agreements support the Carrier in this respect.

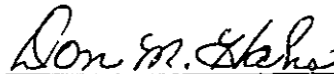
Carrier has submitted a number of decisions that it contends support its position in this regard. Nonetheless, this Board is convinced that the Carrier is in error in this matter. Notwithstanding what the National Vacation Committee may have decided in the cases it was reviewing (which cases incidentally were not submitted to this Board at the time Case No. 5 was under consideration) it was our intent in Award No. 5 that Claimant Engineer Eifert be made whole in all respects as a result of Carrier issuing discipline in a flawed proceeding. When Carrier refuses to count the days that Claimant was improperly held out of service, and/or refuses to include the compensation that he is awarded as back-pay, for purposes of vacation qualification and compensation entitlement, then Engineer Eifert is not being made whole. He is still being penalized as a result of discipline imposed from a flawed procedure. This is contrary to our expressed intent that Engineer Eifert be "paid for all wage and benefit losses incurred."

Therefore, we will reaffirm our order that Claimant Engineer Eifert be compensated for "all wage and benefit losses incurred." Carrier is to accomplish this result by treating the \$9,505.04 back-pay received as compensation earned in 1998, and adjusting Claimant's 1999 vacation pay accordingly by paying him an additional \$182.87 for each week of vacation taken in calendar year 1999.

Carrier is directed to comply with this interpretation within thirty days of the date indicated below.



John C. Fletcher, Chairman & Neutral Member



T. M. Stone, Carrier Member

Don M. Hahs, Organization Member

Dated at Mount Prospect, Illinois., September 30, 2000

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

**JOHN C. FLETCHER, CHAIRMAN & NEUTRAL MEMBER
A. C. HALBERG, CARRIER MEMBER
D. E. THOMPSON, ORGANIZATION MEMBER**

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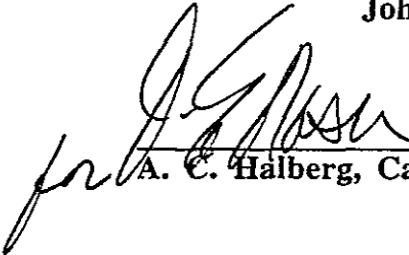
Claim sustained, as indicated above.

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John C. Fletcher, Chairman & Neutral Member

 5-31-99

A. C. Halberg, Carrier Member



D. E. Thompson, Organization Member

Dated at Mt. Prospect, Illinois., May 24, 1999