AWARD NO. 138
NMB CASE NO. 138
UNION CASE 99070
COMPANY CASE 1203684

PUBLIC LAW BOARD NO. 4450

PARTIES TO THE DISPUTE:

UNION PACIFIC RAILROAD COMPANY
(Western Region)

- and -

BROTHERHOOD OF LOCOMOTIVE ENGINEERS

STATEMENT OF CLAIM:

Appealing the Upgrade Level 3 Discipline assessed to Engineer R. D. Hoverson and request the expungement of discipline assessed and pay for any and all time lost with all seniority and vacation rights restored unimpaired. Action taken as a result of formal investigation held on October 22, 1999.

OPINION OF BOARD: MOP P. T. Varland served Claimant with a Notice of Investigation dated October 14, 1999, stating, in pertinent part:

> The purpose of this investigation is to develop the facts and determine responsibility, if any, in connection with while you were employed as Engineer on the WP-61, (RE31 Board) at MP 290 (LaGrande), Subdivisions LaGrande (=837) and Huntington (810) you allegedly failed to comply with instructions directing you to minimize absences from work and meet the employment requirements of your assignment issued in conference with me on May 17, 1999, and subsequently confirmed with letter dated May 18, 1999. Your work history from February 9, 1999 to May 10, 1999, and monthly calendars from May 1, 1999, to April 15, 1999 were reviewed at this conference. In addition, your alleged continued failure to protect employment andcomply with above instructions by excessively absenting yourself from service as noted on your work history between dates of June 29, 1999, and September 27, 1999, while employed as Engineer with the Union Pacific Railroad may indicate possible violation of Rules 1.13 and 1.15 of the Union Pacific Rules, effective April 10, 1994, and Rule 1.15 of the Union Pacific Revised System Special Instructions, effect 0001, October 25, 1998.

Following formal investigation, Carrier found Claimant guilty as charged and assessed a Level 1 Upgrade penalty but, since Claimant was already at Level 2, his discipline was "upgraded" to Level 3 and he served a 5-day suspension without pay. Without addressing the merits of Carrier's determination of Claimant's guilt, we reverse this disciplinary action. The Organization made out a *prima facie* showing that the Notice of Discipline of October 14, 1999 violated the 10-day notice requirement of Section 3 of the System Agreement-Discipline Rule. Bare assertions that MOP Varland was on vacation from October 2-10, 1999, did not effectively refute that showing and Carrier declined repeated requests from the Organization to produce evidence of when, how and by

whom the information regarding Claimant's alleged attendance irregularities was transmitted to MOP Varland.

AWARD

1) Claim sustained.

2) Carrier shall implement this Award within thirty (30) days of its execution by a majority of the Board.

Dana Edward Eischen, Chairman

Dated at Spencer, New York on March 9, 2002

Union Member

Company Member