AWARD NO. 148
NMB CASE NO. 148
UNION CASE NO. 20152
COMPANY CASE NO. 1282940

PUBLIC LAW BOARD NO. 4450

PARTIES TO THE DISPUTE:

UNION PACIFIC RAILROAD COMPANY
(Western Region)

- and -

BROTHERHOOD OF LOCOMOTIVE ENGINEERS

STATEMENT OF CLAIM:

Appeal the Upgrade Level 5 Discipline assessed to Engineer N. R. Flores and request the removal of discipline assessed and pay for any and all time lost with all seniority, vacation, and all other rights restored unimpaired.

OPINION OF BOARD: Following an investigation conducted on September 20, 2001 and October 9, 2001, Engineer N. R. Flores ("Claimant") was found guilty by Carrier of dishonesty and dismissed him by letter of November 8, 2001, on the following charges:

> While you were employed at Engineer on the YTA72 at approximately 5:45 a.m., P.T., September 5, 2001, near MP 145, Fife, Seattle Subdivision #860, you absented yourself from Company property without authority subsequently accruing additional punitive wages for which no services were rendered after approximately 5:00 a.m., P.T., left property at 5:45 a.m., P.T., and telephoned tie-up in at 7:45 a.m., P.T. to crew manager. Your actions were in violation of Rule 1.6 of the Union Pacific Rules effective April 2, 2000.
>
> This is a Level 5 rules violation. Your current discipline status of Level 0, plus this Level 5 violation results in assessment at this time of Level 5 discipline. Upgrade Level 5 discipline is as follows: Permanent dismissal.

During claims handling, without prejudice to either Party, Claimant accepted Carrier's offer of reinstatement to a Level 3 Upgrade status, with the reserved right to "appeal claims for lost time from the date removed from service until the date of the Superintendent's offer of reinstatement,

which was previously rejected".

The disciplinary action in this case must be reversed on both procedural and substantive grounds. MTO Smith, the Charging Officer, conceded that he failed to consult with anyone from Senior Union Pacific Management prior to bringing the Rule 1.6 Level 5 charges against Claimant. This was a plain violation of Item #10 of the Union Pacific UPGRADE Discipline Policy, which reads in pertinent part as follows:

> Regional vice president, equivalent senior manager, or their designated representative will be consulted before an employee is charged with a Level 5 offense, other than Rule 1.5. Dismissal for Level 5 offenses, except Rule 1.5 will be only with the concurrence of the vice president or equivalent.

In addition, Claimant and the other accused employees testified without contradiction that claiming overtime was a *quid pro quo* for working through their meal periods was a prior arrangement established by MTO Nibblick and MTO Whiteman, Carrier officers who preceded MTO Smith as their supervisors. Carrier declined to provide these former supervisors to testify at the investigation, despite the requests of the Organization that they be called as witnesses. Consequently, Claimant's testimony stands unrefuted that these Carrier officers had not only condoned but authorized the practice of overtime pay for employees who "ran the beans", behavior which MTO Smith characterized as dishonest after he took over supervision of the operation. Based on all of the foregoing, this Board concludes that Carrier must rescind the Level 3 discipline and reimburse Claimant for "lost time from the date removed from service until the date of the Superintendent's offer of reinstatement, *which was previously rejected*".

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AWARD

1) Claim sustained, as indicated in the Opinion of the Board.

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

Dana Edward Eischen, Chairman

Union Member

Company Member