

PUBLIC LAW BOARD NO. 4450

AWARD NO. 87
NMB CASE NO. 87
UNION CASE NO. 97007
COMPANY CASE NO. 1036324

PARTIES TO THE DISPUTE:

UNION PACIFIC RAILROAD COMPANY
(Western Region)

- and -

BROTHERHOOD OF LOCOMOTIVE ENGINEERS

STATEMENT OF CLAIM: Appealing the UPGRADE Level 2 Discipline and 30-day suspension of Engineer J. M. Hylinger and request the expungement of discipline assessed and pay for all lost time with all seniority and vacation rights restored unimpaired. Action taken as a result of investigation held December 16, 1996.

OPINION OF BOARD: By letter dated December 26, 1996, Carrier issued a Notice of Discipline against Engineer J. M. Hylinger ("Claimant"), reading in pertinent part as follows:

"After having carefully considered evidence presented at the investigation held at Portland, Oregon, on Monday, December 16, 1996, I find the following charges have been sustained: While you were employed as Engineer on the PDSEZ-27 at approximately 6:15 p.m., PT, on November 27, 1996, near MP 1.8, Albina Yard, Subdivision No. 861, you failed to control your units and went over the fixed derail at the Albina Roundhouse after signal disappearance. This alleged action indicates violation of Rules 8.20, 5.3.3, 8.2 and 6.28 of the Union Pacific Rules, effective April 10, 1994. Upgrade Assessment of Discipline After Formal Investigation Form 3 is attached.

Therefore, effective this date, your record has been assessed Upgrade Discipline Level 2. Your previous Upgrade Level 4, plus the present assessment results in Level 4 status. Upgrade Level 4 discipline is as follows: 'Thirty days off work without pay and must pass necessary annual operating rules or equivalent in order to return to work. A Corrective Action Plan must be developed upon return to work.' Your 30-day suspension has been calculated beginning Monday, December 30, 1996 and continuing through Tuesday, January 28, 1997."

Careful examination of the record convinces this Board that Carrier's finding that Claimant violated Rules 8.20, 5.3.3, 8.2 and 6.28 on the night of November 27, 1996 must be set aside due to a fatal procedural defect in handling of this matter by Carrier managers. Specifically, the System Discipline Rule, "NOTICE" Item 3, is clear and unambiguous with respect to the manner in which the Carrier must serve a Notice of Investigation:

"Within 10 days of the time the appropriate company officer knew or should have known of an alleged offense, the engineer will be given written notice of the specific charges against him or her. (underscoring added).

In that connection, Claimant testified without contradiction that CMS woke him during his lawful rest period and the crew caller wanted to read the notice over the phone. Claimant said he was unprepared to write anything down and asked for it to be sent U. S. Mail as the Agreement stipulated. See Transcript page 8, reading in part:

Mr. J. M. Hylinger: Well, when I was contacted by the CMS Crew Caller, he said that he had Notice of Investigation to read to me, and it was a mile long. And I said, 'Well,' I said, 'I have no means of copying it down, you broke - - woke me up out of a sound sleep.' I said, 'I don't have a recorder.' I says, 'I'm not taking any Notice of Investigation with charges, and so forth, that there's no possibility of me writing down everything that's on this - - on this, as a Notice of Investigation.' I said - - told him to mail it to me like it's supposed to be, or - - or hand-deliver it. The Company had more than adequate time to hand-deliver it to me. I was on duty that evening, they could have hand-delivered it to me when I was called to duty. They could have hand-delivered it to me when I went through Fife, Washington, that night. They could have hand-delivered it to me at Argo Yard when I arrived. At none of those places did they ever even attempt to even deliver it to me.

Mr. R. G. Spjut: And you made no request of the Carrier to issue a copy of the Notice of Investigation, is that correct?

Mr. J. M. Hylinger: It's not my responsibility, it's yours.

Contacting an accused employee by telephone during his rest period and attempting to read him the written statement of charges over the telephone as a supplement to timely delivery of

written notice is not a fatal violation of due process. But in our considered judgement, oral or telephone notification in lieu of timely delivery of written notice may not be substituted unilaterally by Carrier in fulfillment of its plain obligation under the above-quoted language of the System Discipline Rule. Nor are we convinced that this fatal procedural defect was retroactively cured by the postponement of the original hearing under circumstances which leave substantial doubt that the Local Chairman's concurrence was voluntary.

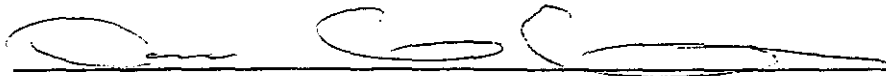
Based upon the failure of Carrier to provide proper notice in conformance with the System Discipline Rule, we shall sustain this claim without expressing or implying any opinion on its underlying merits. The Level 2 UPGRADE discipline under arbitral review in the present case was tacked onto a previous Level 4 (which had been imposed effective October 17, 1994 (after Claimant waived investigation into a charge of passing a stop signal). That reinvigorated the Level 4 status and created a new 36-month probation period, running from November 27, 1996 (under the UPGRADE retention periods in effect prior to the 1998 revisions). Since the Board has decided in favor of the Claimant in the present case, Carrier must rescind the instant Level 2 UPGRADE discipline imposed due to the November 27, 1996 incident. As a consequence, Engineer Hylinger must be made whole for time lost in the 30-day suspension beginning Monday, December 30, 1996 and continuing through Tuesday, January 28, 1997. In addition, his discipline status reverts back to a single Level 4 occurrence, with the 36-month probation period running from October 17, 1994-October 17, 1997.

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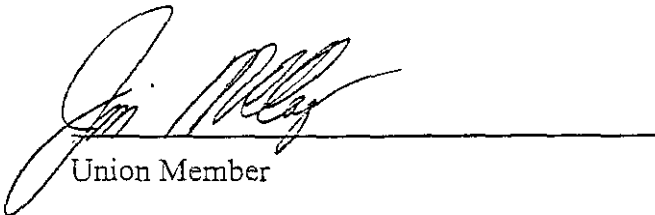
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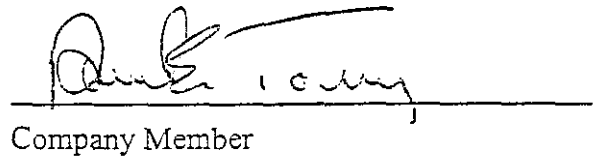
- 1) Claim sustained.
- 2) Carrier shall implement this Award within thirty (30) days of its execution by a majority of the Board.



Dana Edward Eischen, Chairman
Dated at Spencer, New York on May 7, 1999



Union Member



Company Member