AWARD NO. 102
NMB CASE NO. 102
UNION CASE NO. 96062
COMPANY CASE NO. 1030002

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 4 Discipline with 30-day suspension of Engineer T. L. DuVall 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 September 30, 1996.

OPINION OF BOARD: Thomas L. DuVall, ("Claimant") was employed as an Engineer at Los Angeles on September 9, 1996, working on a yard job at Yermo, California, with Engine Foreman B. F. Kasper. and Helper R. D. Willis. At about 11:30 a.m. Claimant and crew were assigned to move one car from the yard to a spot at QMC. an industry, which entailed coming off the yard lead and then pulling the car eastward onto the No. 2 main track and then through a crossover onto the No. 1 main track. After the power switch had been lined and the signal cleared by the train dispatcher, the single car was shoved ahead of the two unit locomotive consist. spotted at QMC and tied down.

The main track switch had been left open for their return movement they were stymied

because an absolute signal right at the switch was displaying a red aspect. After trying unsuccessfully to contact the train dispatcher directly, Claimant made indirect contact through SYO (Yardmaster)Frank Valdez. Mr. Valdez relayed to the train dispatcher that Claimant and crew needed permission to come out of QMC and go west on the No. 1 main track. According to transcribed tapes of the three-way exchange, Mr. Valdez explained Claimant's situation to the dispatcher who informed Valdez: "Yeah, he can come out and he can head back east down the No. 1 there." Valdez, relayed this to Claimant as: "He says you have permission to come out"; to which Claimant replied: "Permission to come out. Thank you."

Because Claimant was operating from the west, trailing locomotive, he needed to come out far enough eastward to clear the spur track switch and then go westward on the No. 1 main track. Claimant elected to go eastward about five car lengths, in order to move westward on signal indication to avoid being limited to restricted speed. a sufficient distance to get east of a westward signal before making a westward movement. Using the same crossover they had used to come from the yard to QMC, Claimant made the reverse movement but the engine ran through that switch with resultant damage. Foreman Kasper subsequently was to testify that he switch was properly lined and the switch points moved as the engine passed over them, while carrier witnesses insisted that the condition of the switch indicated that it had been lined against the movement.

Following a formal investigation on September 30, 1996, Carrier found Claimant primarily responsible for the incident and assessed a Level 4 UPGRADE (30-day suspension) for allegedly violating Rules 6.27. 8.15, 9.10 and 9.11. The Organization timely protested significant procedural errors by Carrier managers in handling this matter which require rescission of the disciplinary action

and therefore this Board neither expresses nor implies any opinion concerning the underlying question of the relative culpability of Claimant, Foreman Kaspar, SYO Valdez and the train dispatcher. Specifically, it is not disputed that after interviewing and counseling the crew at the scene on the night of the incident, MYO Hutner intended to take no disciplinary action and therefore did not fill out the requisite UPGRADE system paperwork, Form 1 or Form 2. At some level, that decision was overridden and charges were brought against Claimant but no Form 1 or Form 2 ever was issued to Claimant. This is more than a "mere technicality" since it deprives a charged employee and the Labor Organization of notice and opportunity to prepare a defense and moreover deprives the charged employee of his right to make an informed decision whether to waive formal investigation. These fatal errors were compounded when Carrier failed to provide Engineer DuVall with a timely written Notice of Investigation citing the specific charges against him. That error was not cured by having a CMS operative read the notice to Claimant over the telephone.

Based upon the foregoing fatal flaws in the procedural handling of this mater, the Level 4 UPGRADE discipline is voided. As remedy, Carrier shall purge Claimant's personnel record of all references to this incident and make him whole for the wage loss suffered as a consequence of this invalid disciplinary action. In that connection, the record shows that his DOT/FRA certification was not revoked or suspended during the period of his UPGRADE suspension without pay.

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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 16, 2000

Union Member

Company Member

UPGRADE Policy
Changed 10/98
4/26/00