

PUBLIC LAW BOARD NO. 4450

AWARD NO. 81
NMB CASE NO. 81
UNION CASE NO
COMPANY CASE NO PAD0322A

PARTIES TO THE DISPUTE:

UNION PACIFIC RAILROAD COMPANY
(Western Region)

- and -

BROTHERHOOD OF LOCOMOTIVE ENGINEERS

STATEMENT OF CLAIM:

Appealing the UPGRADE Level 4 Discipline assessed against Engineer L. G. Clemens and request the expungement of discipline and pay for any and all time lost with all seniority and vacation rights restored unimpaired. This action taken as a result of formal investigation held March 7, 1996.

OPINION OF BOARD: Engineer L. G. Clemens (Claimant) established seniority as a Switchman/Brakeman on the Oregon Second District in May 1978 and as an Engineer on same said district in November 1992. On February 28 1996, while working as an Engineer, Claimant was operating train MESEZ-23 against the current of traffic (operating East to West) between Biggs, Oregon (Milepost 103.2) and Crates, Oregon (Milepost 81.6). He was operating under the authority of Rule 15.3 (as specified in Track Bulletin Form 2, and the Union Pacific General Code of Operating Rules. Claimant and his Conductor erroneously concluded that, under this authority his train could operate at a speed of 49 mph on account of Timetable Special Instructions. However, the Special Instructions also verified that all existing speed restrictions remained in effect.

The Union Pacific General Code of Operating rules state that, when a train is operating within yard limits, speed must be restricted to 20 mph. Claimant subsequently conceded that his

train entered the yard at The Dalles (Milepost 85) in excess of 35 mph. He was assessed UPGRADE Level 4 Discipline following a formal hearing on the charge that, while operating MESEZ-23 between Hinkle and Albina, Oregon, on February 28, 1996, he failed to proceed at restricted speed between MP 88.0 and MP 81.7 at The Dalles, Oregon when operating against current of traffic.

The disciplinary action must be reversed, primarily because of an act of prejudgement by Carrier managers which fatally prejudiced the record before the charges were even served on Claimant. In that connection, MOP Loring Kohrt had interviewed the crew and was in the process of downloading speed data when another Company officer, T. G. Repp, peremptorily removed the crew from service shortly after they arrived at the yard office. To make matters worse, on February 29, 1996, several days before a Notice of Investigation was sent to Claimant in this matter, the Carrier officer made the following entry in Claimant's work history:

"02/29 CM 02/29/96 17:48 **ENG-CRT** CERTIFICATION STATUS CHANGED FROM Y TO N
CM 02/29/96 17:48 **ENG-CRT** CLASS SERVICE: DE-CERTIFIED
CM 02/29/96 17:48 **ENG-CRT** SPECIAL CONDITION CODE 23 DEACTIVATED
CM 02/29/96 17:48 **ENG-CRT** THIS UPDATE WAS PERFORMED BY OADM248"

Since the work history had already noted the fact that Claimant had been decertified prior to the hearing, we concur with the Organization's conclusion that Carrier had judged him guilty for purposes of its Upgrade Discipline Program as well and that the determination of decertification coincided with determination of Level 4 Discipline. In consideration of this, Claimant was not afforded the fair and impartial hearing to which he was entitled under the Agreement and for that reason alone his discipline cannot stand. It is also worth noting, however, that Claimant's confusion about appropriate speed and the location of yard limits was not without foundation since the

Timetable he was provided with contained misleading information which was inconsistent with the requirements of the Rules.

Based upon all of the foregoing, we conclude that the Level 4 discipline must be rescinded and Claimant made whole. This Board is well aware of the contentious issues and difficulties which are presented when an arbitration tribunal under Section 3 of the Railway Labor Act reverses wrongful disciplinary action upon which Carrier has also premised a revocation, suspension or decertification action under 49 CFR Part 240.1. In seeking and obtaining reversal of the UPGRADE disciplinary action through arbitration before this Board, the BLE concedes that the holdings of the NRAB First Division in Awards 24782 (Gerstenberger) and 24424 (Mikrut) are authoritative for the principle that we have no jurisdiction to remedy FRA engineer licensing action which was premised upon faulty disciplinary action by Carrier. However, nothing in those decisions precludes us from directing Carrier to promptly apprise the LERB of this Board's decision that the Carrier's finding of a speeding violation was *void ab initio* and the disciplinary suspension imposed on action taken against Claimant was a miscarriage of justice.

FLB NO- 4450
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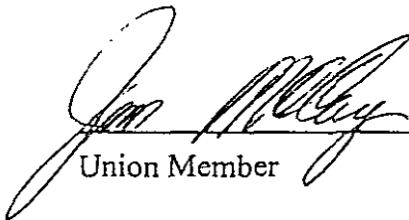
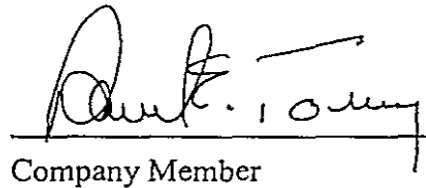
AWARD

Claim sustained.



Dana Edward Eischen, Chairman

Dated at Spencer, New York on September 24, 1998


Union Member
Company Member