

**SPECIAL ADJUSTMENT BOARD NO. 180**

AWARD No. 2376

NMB CASE No. 2376

UNION CASE No. E-29105-32-21(g)

COMPANY CASE No. 1372415

**PARTIES TO THE DISPUTE:**

UNION PACIFIC TRANSPORTATION CO.  
(WESTERN LINES)  
(Formerly Southern Pacific Transportation Company)

- and -

BROTHERHOOD OF LOCOMOTIVE ENGINEERS

**STATEMENT OF CLAIM:**

Claim of Southwest Hub Engineer S. C. Perez for reinstatement to service of the Company with full seniority and all other employment rights restored and that he be compensated for all time lost in connection with Claimant's Assessment of Upgrade Level 5 Permanent Dismissal, on September 3, 2003. Further, Claimant's annual vacation rights should be restored, and he should be compensated accordingly. In addition, Claimant's personal record should be completely expunged of any notation or record pertaining to this case.

**OPINION OF THE BOARD:** Tucson Engineer Steven C Perez ("Claimant") had been employed by the Carrier since April of 1995 when, Notice of Investigation ("NOI"), dated August 19, 2003, he was charged with violating Rule 1.6, Rule 1.13, Rule 1.15, Rule 1.16, and Tucson Superintendent Bulletin No. 4, in connection with his alleged failure to protect his assignment between July 8, 2003 and August 18, 2003. The referenced NOI read, in pertinent part as follows:

While employed as Engineer in Tucson, Arizona, you allegedly failed to protect your assignment between July 8<sup>th</sup>, 2003, and August 18<sup>th</sup>, 2003. During a conference you attended in Tucson on July 25<sup>th</sup>, 2003 as it relates to your attendance, you indicated you had medical condition involving your back. Consequently you were directed and allegedly failed to provide medical documentation substantiating the possible need for FMLA, or mark up to full duty within one week from said conference. In addition, you have allegedly failed to respond to repeated telephone messages left on your telephone answering machine by me. This is in possible violation of rule 1.6 (Conduct), Rule 1.13 (Reporting and Complying with Instructions), Rule 1.15 (Duty - Reporting or Absence) and Rule 1.16 (Subject to Call), as contained in the General Code of Operating Rules, effective April 2<sup>nd</sup>, 2000, and Tucson Superintendent Bulletin No. 4 (Absent Account Illness or Injury), effective January 1, 2003.

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When Claimant failed to appear at the formal investigation, the Hearing Officer refused to grant the Organization's request for a postponement, but rather held the hearing *in absentia*, over the strenuous objection of Claimant's BLE Representative. Based on the record of that hearing, Carrier found Claimant guilty as charged and terminated his employment. After carefully reviewing the record evidence, we conclude that the hearing *in absentia* was fatally defective and cannot be used to support the discharge decision. Accordingly, the discharge decision of September 3, 2003 must be rescinded by Carrier and Claimant's name and employee number restored to the employment roster, albeit without any back pay or benefits.

We come to this conclusion because, at the outset of the formal investigation, the Organization made out a *prima facie* showing that Claimant had not received the NOI record, which Carrier did not rebut. Indeed, it is undisputed that NOI, which Carrier chose to send by Fed Express courier service, was signed for not by the Claimant but by an individual identified only as "Cooley at the front desk". Given this fact and the simultaneous showing that Claimant had been marking off sick with some regularity during the time period under consideration, it was fatal error for the Hearing Officer to proceed *in absentia*. Nothing in this record shows that Carrier would have been prejudiced or disadvantaged by granting the Organization's reasonable request for a brief postponement to ascertain Claimant's whereabouts, his knowledge of the proceedings against him and whether his health permitted or precluded his attendance. Vindication of the contractual due process requirements of the controlling Agreement requires voiding of the discharge decision but no damages are awarded; precisely because it cannot be determined from the available evidence whether this Claimant abandoned his employment or was/is sick or well, dead or alive.

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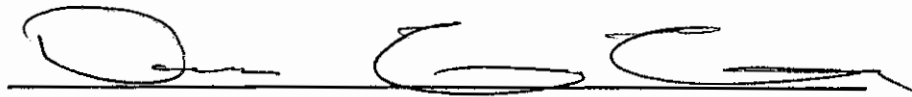
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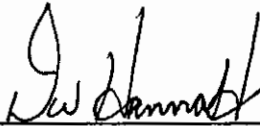
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AWARD

- 1) Claim sustained to the extent indicated in the Opinion.
- 2) Carrier shall implement the Award within thirty (30) days of its execution by a majority of the Board.
- 3) The Board shall retain jurisdiction of this matter to allow the Parties a reasonable period of time to ascertain the Claimant's whereabouts and health or well-being; following which we will entertain a motion for further proceedings and a supplemental Opinion and Award, if appropriate.



Dana Edward Eischen, Chairman



Union Member



Company Member

06-13-05