

AWARD NO. 136
NMB CASE NO. 136
UNION CASE 99055
COMPANY CASE 1194517

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 assessed to Engineer J. Apking and request the expungement of discipline assessed and pay for any and all time lost with all seniority and vacation rights restored unimpaired. Action taken as a result of formal investigation held on August 3, 1999.

OPINION OF BOARD: Following an investigation into charges presented by Manager of Train Operations M.S. Leatherbury on July 26, 1999, Superintendent Workman issued a notice of discipline against Claimant, dated August 11, 1999, as follows:

While employed as Engineer on Train CSVR 22 at Wendover, Utah, near Milepost 806 at approximately 2331 hours on July 22, 1999, you failed to comply with the requirement of a "Yellow Flag" located at Milepost 810 and you failed to have speed of your train under 10 MPH, in violation of Rules 1.1.2, 1.47 and 5.4.2 (B) as contained in General Code of Operating Rules, effective April 10, 1994

Under the UPGRADE progressive Discipline Table the current violation requires your record be assessed with a (LEVEL 4) status of the Upgrade Discipline Policy. A (LEVEL 4) discipline requires that you serve 30 days without pay and 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 began at 12:01 a.m. on July 23, 1999, and you may mark up for duty at 12:01 a.m. on August 22, 1999.

The grounds set forth in the Vice General Chairman's letter of August 26, 1999, appealing the discipline Claimant, included the following very serious procedural due process objection, reading in pertinent part as follows (Emphasis added):

"In accordance with the System Agreement - Discipline Rule - and that portion addressing Appeals, Section 11 thereof, as agreed to by the Union Pacific Railroad Company and the Brotherhood of Locomotive Engineers (Western Region), we respectfully appeal the Upgrade Level 4 Discipline assessed to Engineer J. Apking and request the removal of discipline assessed and pay for any and all time lost with all seniority and vacation rights restored unimpaired. . . .

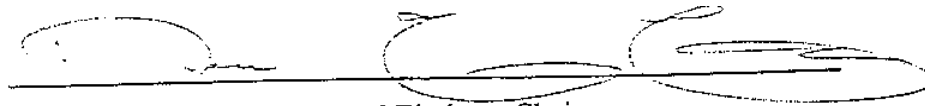
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... Among other items regarding this case, we note the fact that Superintendent Workman actively participated in the so-called efficiency test as part of the testing team and then made final determination with respect to Upgrade Discipline assessment and FRA revocation of Claimant's engineer's certification.

Neither in the denial letters on the property nor in handling before this Board did Carrier even address the undisputed fact that Superintendent Workman was a member of the three-man testing team and thus passed judgement on his own actions when he made the final determination that Claimant was guilty of failing the test and issued the disciplinary action against Claimant. That patent violation of the principles of fairness and impartiality in disciplinary investigations mandated by the System Agreement-Discipline Rule and the Upgrade Program requires summary reversal of the disciplinary action in this case. As this Board had previously held, the LERB decision which held that this procedural violation was not fatal to an administrative determination concerning FRA license suspension has no collateral estoppel effect upon our arbitral determination under RLA Section 3 that Carrier violated the terms of a collectively bargained Agreement.

AWARD

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

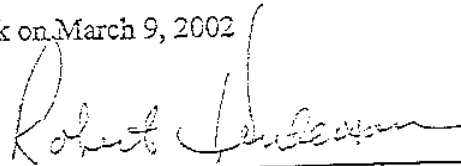


Dana Edward Eischen, Chairman

Dated at Spencer, New York on March 9, 2002



Union Member



Company Member