PUBLIC LAW BOARD NO. 4450

AWARD NO. 3
NMB CASE NO. 3
UNION CASE NO. PR-VASQUEZ, M. J.-90
COMPANY CASE NO. 9001970

PARTIES TO THE DISPUTE:

Union Pacific Railroad Company (Western Region)

- and -

Brotherhood of Locomotive Engineers

STATEMENT OF CLAIM:

Request the expungement of 31 day actual suspension of Engineer M. J. Vasquez and pay for all time lost.

OPINION OF BOARD:

Engineer M. J. Vasquez (Claimant) has been in service with Carrier for some 17 years. As of August 1990 he was working on the Engineers Extra Board at Las Vegas, Nevada, subject to call by Carrier's Crew Management Service (CMS). Train and engine employees at this location were subject to the following managerial policies regarding missed calls:

ANY TRAINMAN OR ENGINEMAN WHO MISSED A CALL, OR WHO IS REPORTED BY CMS AS HAVING MISSED A CALL, MUST CONTACT A LOCAL MANAGER TRAIN OPERATIONS, OR MANAGER OPERATING PRACTICES WITHIN 48 HOURS.

W. S. NUA	388-9270
M. O. LODGE	388-9269 OR 254-1201
W. L. MILTON	388-9292
G. G. ESCALANTE	388-9231

W. L. MILTON
MANAGER OF TRAIN OPERATIONS

CC: AAC GGE WLM DMS MOD WSN

POST: TRAINMEN'S AND ENGINEMEN'S NOTICE BOOKS MILFORD, LAS VEGAS, AND VERMO.

* * *

CALIFORNIA DIVISION SERVICE UNIT
GENERAL NOTICE NO. 080
LOS ANGELES - AUGUST 23, 1990

TO: ALL T. E. & T. EMPLOYEES:

GENERAL NOTICE NO. 22 WAS IMPLEMENTED ON JANUARY 19, 1990 IN ORDER TO REDUCE MISS CALLS. IT WAS NOT DONE SO. THEREFORE A MORE STRINGENT POLICY SEEMS IN ORDER.

1) CANCELLATION NOTICE:

CALIFORNIA DIVISION GENERAL NOTICES NO. 33 AND 79 ARE CANCELLED. NO. 79 HAD IMPROPER DATE OF ISSUE.

2) EFFECTIVE IMMEDIATELY, THE FOLLOWING POLICY WILL APPLY REGARDING "MISS CALLS".

FIRST MISS CALL - LISTEN OF REPRIMAND IS SENT

SECOND MISS CALL - 30 DAYS DEFERRED SUSPENSION

THIRD MISS CALL - 31 DAYS ACTUAL SUSPENSION

FOURTH MISS CALL - DISMISSAL

EMPLOYERS WILL CLEAR THEMSELVES FROM THE PROGRESSIVE CYCLE, UNLESS IN DISMISSED STATUS, IF THEY MAINTAIN ONE YEAR FREE OF "MISS CALLS" FOLLOWING DISCIPLE FOR THE FIRST OR SECOND "MISS CALLS" OR FOLLOWING THE SERVICE OF ACCUMULATED SUSPENSION TIME RELATING TO A "MISS CALL".

TONY CHACON
TRANSPORTATION SERVICES

At about 5:00 p.m. of the afternoon of August 9, 1990, Claimant called CMS and learned that he stood ninth out. He anticipated that with normal work flow he would probably get out by mid morning on August 10, 1990. Apparently Claimant left his residence on the evening of August 9, 1990 and did not return

until after 1:00 a.m. on August 10, 1990; but he later testified that he had with him the pager or beeper which he is required to monitor while subject to call. Apparently there was a greater manpower need than usual, because CMS called Claimant at 1:00 a.m. on August 10, 1990. He did not answer his home telephone nor did Claimant make a call-back response to the pager.

When Claimant learned that he had missed a call, he telephoned Manager W. S. Nua at the number listed on the above policy circular. The telephone was answered by an answering machine and Claimant left a message that he had missed a call. Carrier's next action, however, was a letter of August 14, 1990 from Superintendent Chacon, notifying Claimant as follows:

> "Under the provisions of Rule 136 of the Agreement between the Union Pacific Railroad Company and the Brotherhood of Locomotive Engineers, effective April 15, 1972, this is to advise that your personal record is being assessed with 31 days suspension, to be served, for your responsibility in missing call to perform service as Engineer on Job NPLAZ on August 10, 1990, at 0100 at Las Vegas, Nevada, in violation of General Rules A, B, D and operating Rules 600, 604, 607 and 619, as contained in the General Code of Operating Rules effective October 29, 1989.
>
> If advice is received that discipline is not acceptable, hearing will be scheduled as outlined in your agreement.
>
> In checking your personal record, I find that you were assessed a 30 day suspension, to be deferred, under date of March 27, 1990, and it will now be necessary that you serve the 30 days deferred, including the 31 days actual. This suspension will commence on August 27, 1990 and you may mark up for work on October 27, 1990. Any rules or physical examinations due must be taken prior to your marking up for duty on this date. Failure to report for duty within ten (10) days from the above date will result in your being considered absent from duty without permission and your record will be handled accordingly."

Claimant and the BLE rejected the proposed 61-day actual suspension and requested a hearing. At the hearing, Claimant testified without contradiction that he had telephoned Manager Nua and also presented uncontroverted written evidence that he had missed the call because his pager was defective. Specifically, the transcript contains the following evidence that Claimant presented the faulty pager for repair on August 10, 1990, after learning that he had missed a call:

> "D. M. Daly: Exhibit No. 1 dated August 10, 1990. This is a return Lease equipment #48721, from Centell Phone Company in Las Vegas, Nevada stating that Mr. Vasquez, at the time of the alleged miscall, had a faulty pager, and exchanged for a repair of a new pager. Mr. Escalante, if you would like to review that.
>
> G. G. Escalante: Indicating that 8/10/90, Return Lease Equipment of a faulty pager was exchanged for repairs and Sharo Roll, CCPO signed it.
>
> M. O. Dodge: I will mark as exhibit no. 1 the Return Lease Equipment that you referred to Mr. Daly."

Claimant's unrebutted evidence notwithstanding, Carrier implemented the 61 day actual suspension, ie, imposed a 31-day actual suspension for the "triggering incident" of August 10, 1990, which activated a previously deferred suspension based upon the following record:

> "11-28-89--LETTER OF WARNING. Missed a call to deadhead to Yermo at 0130 November 26th.
>
> 03-23-90--LETTER OF WARNING. Missed a call to deadhead to Yermo at 12:01 PM March 20th.
>
> 03-27-90--30 DAY DEFERRED SUSPENSION. Missed a call for train APLA1 at 0100 March 23rd.

There is no question that Claimant was a recidivist with a recent history of missed calls. If he had been proven culpable for August 10, 1990, the penalty imposed would not be disturbed by this Board. But Carrier has the overall burden of persuasion of guilt of the "triggering incident". Carrier must shoulder this burden without the benefit of any assumption that Claimant "did it again". When all is said and done, Carrier has not sufficiently rebutted or discredited Claimant's evidence that the missed call of August 10, 1990 was attributable to a faulty pager and not directly his fault. Although the case is a close one, the burden of proof and the presumption of innocent until proven guilty require us to reverse Carrier's finding of culpability and to sustain this claim.

AWARD

1) Claim sustained.

2) Carrier must expunge the 31-day actual suspension for the improven allegations regarding August 10, 1990 and also reverse the 30-day actual suspension triggered by the findings relative to August 10, 1990. Thus, Carrier must make Claimant whole for the 61-day actual suspension imposed August 27, 1990.

3) Carrier shall implement this decision within 30 days of its execution by a majority of the Board.

Dana Edward Eischen, Chairman

Dated at Ithaca, New York on DEC 01 1991

R. E. Dean
Union Member

Dated at Dec 27 1991
on

Company Member

Dated at 2-21-92 OMAHA NE
on