

## PUBLIC LAW BOARD NO. 7633

Case No.: 11/Award No. 11  
System File No.: UP309WF12/1570458  
Claimant: Peter Glostén, Sr.

UNION PACIFIC RAILWAY COMPANY )  
 )  
 -and- )  
 )  
 BROTHERHOOD OF MAINTENANCE )  
 OF WAY EMPLOYEES DIVISION )

**Organization's Statement of Claim:**

1. The discipline (Level 4) imposed on Mr. P. Gloston, Sr. by letter dated July 17, 2012 for alleged violation of Rule 136.7.3 of the General Code of Operating Rules in connection with allegations that the Claimant failed to make sure the track was clear before moving his machine, resulting in running over a derail on June 5, 2012 was without just and sufficient cause, unwarranted and in violation of the Agreement (System File UP309WF12/1570458).
2. As a consequence of the violation referred to in Part 1 above, the Carrier must remove the discipline from Mr. Gloston's record with seniority and other benefits unimpaired and compensate him for all wage and other losses suffered as a result of the Carrier's unjust and improper discipline.

**Facts:**

By letter dated June 21, 2012, the Claimant was directed to attend on June 28, 2012 “a formal investigation to develop the facts and place your responsibility, if any, in connection with a report that you allegedly failed to ensure that track was clear before moving your machine, resulting in your running over a derail and subsequently derailling your machine, on June 5, 2012, at Galveston, Texas, near Milepost 46.7, on the Galveston Subdivision, while working as a Trackman.”

The letter further indicated that a substantiated charge would constitute a violation of Rule 136.7.3 Work Zone Around Machines, that the Claimant could be assessed Level 4 UPGRADE discipline and that he was being withheld from service pending the results of the investigation.

**Carrier Position:**

Rule 136.7.3 required the Claimant to make sure that the way was clear before he moved the Spiker or Spike Puller that he was operating. Substantial evidence shows that the Claimant failed to do so because he did not observe the derail marked by a red flag 10' behind the machine. The Organization's contentions all ignore the Claimant's responsibility, which was his regardless of whether he was assigned to the machine, to check around the Spiker before moving it. The responsibility extended to the track around and under the machine. The Board must accept the credibility determination of the Hearing Officer.

The Claimant received a fair and impartial hearing with no procedural irregularities that would justify sustaining the claim. The substantial evidence establishes the Claimant's poor judgment and the resulting safety rule violation that was a serious offense. Imposition of the Level 3 UPGRADE discipline was not arbitrary and capricious, particularly in view of the Claimant's disciplinary history that shows a failure to follow basic rules and instructions. There is no basis for substitution of the Board's judgment for that of the Carrier.

**Organization Position:**

The Carrier has not met the burden of proof as the Claimant testified that he walked around the Spike Puller and saw no derail or flag. Furthermore, the machine was not his as the Claimant, a Trackman, was moving the Spiker at the Foreman's request. The Claimant was charged with running over the derail to the rear of the machine while a Carrier witness placed the derail in front of the Spiker. The evidence does not show where the derail and flag were, with the Claimant indicating that the derail had to have been under the machine and out of his sight.

The Level 4 UPGRADE discipline was excessive and unwarranted if for no other reason than the prior Level 3 five-day suspension relied upon by the Carrier was overturned on November 11, 2012. Additional mitigation flows from the Claimant's tenure of over 20 years, his position as a Trackman moving the Spiker at the Foreman's request and that at the briefing that morning, he had been told that all derails had been removed. Even if the Claimant violated the rule, the discipline was punitive rather than corrective.

**Findings:**

The Organization has not alleged that the hearing was not fair and impartial and thus the Board need not concern itself with matters of procedure. The Board finds the Organization's contention that the Claimant was a Trackman moving the Spiker at the Foreman's request unavailing. Simply because the Claimant was temporarily involved with the Spiker rather than functioning under a permanent assignment as a Machine Operator did not relieve him of responsibility of complying with all relevant rules and particularly those related to safety, which must always be a paramount consideration in

an industry in which safety lapses have the potential to create disaster, including loss of life. Furthermore, the Claimant acknowledged his awareness and understanding of Rule 136.7.3 and had prior experience as a Machine Operator.

There are a multitude of Public Law Board and Third Division awards that stand for the principle that in this appellate procedure, the Board, whether it would have reached the same conclusion or not, must accept the credibility determination of the Hearing Officer. This Board finds no reason in this case to depart from that principle. The testimony of Foreman Taylor shows that the morning briefing indicated that all derails and flags had been removed—information that was obviously incorrect. The incorrect information did not eliminate the Claimant's responsibility to comply with Rule 136.7.3 and make sure that the way was clear before moving the Spiker. Evidence establishes that he did not see the remaining derail and flag.

The Organization's reliance on Contract Employee Lucero's written statement that "I was about 10' in Front (sic) of Machine (sic) when I saw it with the Flag (sic) on it (Carrier's Exhibit B) is misplaced. Mr. Lucero wrote that he was in front of the machine when he saw the derail and flag and not that the derail and flag were in front of the machine. Moreover, Mr. Lucero's written statement and testimony indicate with far more certainty than the Claimant's testimony that the derail and flag were not under the Spike Puller when the backward movement began. If Mr. Lucero could see the derail and flag when he was about 10' in front of the machine, the Board does not understand why the Claimant did not see the derail and flag, wherever it was, with a careful and observant walk around the machine.

Supervisor Munge and Trackman Pitre, the latter on the machine when it derailed, estimated that the machine moved 5'-10' before it derailed, adding to the likelihood that the derail and flag were not under the Spiker before movement began. Whether the Claimant walked around the machine or not before movement, he did not exercise sufficient caution and must be held accountable for the derailment. The Board has no basis for rejecting the Hearing Officer's credibility determination.

Even though the Claimant violated Rule 136.7.3, the Level 4 UPGRADE discipline was excessive. Level 4 rather than Level 3 discipline had been assessed because another Level 3 disciplinary action was on the Claimant's record at the time, having been levied on July 28, 2011. Had the earlier discipline not been on the Claimant's record, he would have received Level 3 discipline for the derailment. On November 11, 2012, a claim to remove the earlier Level 3 UPGRADE discipline was sustained in P.L.B. No 6402, Award No. 186. Once that award was finalized, the basis for the Level 4 UPGRADE discipline no longer existed. At that point the Carrier was remiss in not reconsidering the July 17, 2012 Level 4 discipline. Had reconsideration taken place, surely the only reasonable conclusion the Carrier could have reached was that Level 4 discipline was unjustified and required modification. The Board now takes the action that the Carrier should have taken earlier.

**Award:**

Claim sustained in part and denied in part.

**Order:**

The Board, after consideration of the dispute identified above, hereby orders that the Level 4 UPGRADE discipline be expunged from the Claimant's record and that it be replaced with Level 3 UPGRADE discipline. The Claimant is to be made whole for losses related to the imposition of the Level 4 UPGRADE discipline. The Carrier is to make the award effective on or before thirty (30) days after the award is adopted.



Kevin D. Evanski, Organization Member



Katherine N. Novak, Carrier Member



I. B. Helburn, Neutral Referee

Austin, Texas  
March 10, 2014