

**PUBLIC LAW BOARD NO. 7633**

Case No.: 02/Award No. 02  
System File No.: UP297WF12/1564532  
Claimant: Manuel H. Abrego

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

**Statement of Claim:**

1. The discipline [Level 4 ten (10) day suspension] imposed on Mr. M. Abrego by letter dated March 14, 2012 for alleged violation of Rule 121 Protections For Gangs From Trains On Adjacent Tracks in connection with allegations that the Claimant failed to secure the boom on a speed swing after reporting clear for an approaching train on January 11, 2012 was without just and sufficient cause, unwarranted and in violation of the Agreement (System File UP297WF12/15644532)
2. As a consequence of the violation noted in Part 1 above, the Carrier must remove the discipline from Mr. Abrego's record with seniority and other benefits unimpaired and compensate him at the straight time and overtime rates of pay for all wage loss suffered as a result of the Carrier's unjust and improper discipline.

**Facts:**

By letter dated February 8, 2012 the Carrier directed Claimant Abrego to report on February 24, 2012: “for investigation and hearing on charges to develop the facts and place responsibility, if any, that while employed as Machine Operator, on Gang 9102, at Orange, Texas, near Milepost 261, at approximately 1030 hours, on January 11, 2012, you allegedly failed to secure your boon (sic) on the speed swing you were operating after reporting clear for approaching train on the Lafayette Subdivision.” The notice identified Rule 121 as contained in the Chief Engineer Bulletins as the rule allegedly violated.

**Carrier Position:**

There is substantial evidence that the Claimant violated Rule 121.3.1 Protection from Trains on the Adjacent Track. As a 31-year employee and the responsible operator for the speed swing, which included a boom, the Claimant should have known of the need to provide for his own and others' safety at the worksite. Manager Howard heard the Claimant's radio acknowledgement that he was in the clear, saw him stop work momentarily and then saw him continue to work. The morning safety briefing had indicated that trains would be cleared. The Claimant failed to secure his equipment and fouled the track by his continuous work. His responsibilities under Rule 121.3.1 were not diminished because he was not a subgroup coordinator, nor do the approximate times of when the train was cleared through the territory exonerate the Claimant or mitigate the violation.

The offense was a serious one, deserving of Level 4 UPGRADE discipline, which the Board lacks the authority to overturn. This is supported by SBA 279, Award No. 1009, which also involved a violation related to Form B work. The discipline was not arbitrary and capricious and there were no due process or procedural defects. Therefore, the discipline must stand.

**Organization Position:**

The Carrier has failed to meet the burden of proof that it bears in this discipline case. Manager Howard testified about the role of subgroup coordinator in clearing trains through track covered by a Form B, but the Claimant was not a subgroup coordinator on January 11, 2012. Furthermore, he neither reported clear of track nor was told to clear the track. The Claimant testified that he did not know whether the train had been cleared or not. And, there is a discrepancy between the time of the incident and the time the train was cleared.

If a rule violation is found, inconsistent enforcement shows that the discipline was unwarranted; all the more so in view of the Claimant's 30 years and unblemished record. Discipline was not progressive.

**Findings:**

With regard to the evidence, the Board notes that it has not considered Attachments 1 and 2 to Employees' Exhibit A-2. These exhibits, submitted post investigation, could have been submitted during the investigation allowing the other party the opportunity to elicit testimony and comment on the same.

The Organization has not alleged due process or procedural defects in this case and thus the Board finds no need to address these areas.

The Board does not find the discrepancy in times determinative. And, while the Board finds that the Claimant was not a subgroup coordinator on January 11, 2012, that finding is an insufficient basis for a conclusion that he did not violate Rule 121.3.1. This case essentially involves a credibility determination between polar opposite versions of what occurred: the Carrier's claim that the Claimant acknowledged being in the clear and then continued to work and the Claimant's denial. The Board finds no reason to reject the Carrier's determination that Manager Howard and Director White gave credible testimony that Claimant acknowledged that he was in the clear and that they then observed him continue to work. While the Organization suggests that these were false reports, no supporting justification has been provided for such a determination.


The substantial evidence shows that the Claimant violated Rule 121.3.1. His allegation of inconsistent enforcement of the rule, made in his closing statement and not in the form of testimony, is insufficient to allow the Organization to meet the burden of proof that it shoulders when it makes an affirmative defense. Insofar as Level 4 UPGRADE discipline is concerned, leniency is the province of the Carrier and not the Board. Rule 121 is listed under Level 4 violations and thus the Board does not find that the Carrier has been arbitrary and capricious in the imposition of discipline so that the action should be set aside.

**Award:**

Claim denied.

**Order:**

The Board, after consideration of the dispute identified above, hereby orders that no award favorable to the Claimant be entered.

  
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Kevin D. Evanski, Organization Member  
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Katherine N. Novak, Carrier Member  
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I. B. Helburn, Neutral Referee

Austin, Texas  
February 28, 2014