

**PUBLIC LAW BOARD NO. 7633**

Case No.: 06/Award No. 06  
System File No.: UP510JF12/1568983  
Claimant: Jeremy R. Hampton

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

**Statement of Claim:**

1. The discipline [Level 3 – Five (5) day suspension] imposed on Claimant J. Hampton by letter dated June 13, 2012 for alleged violation of Rule 1.13 (Reporting and Complying with Instructions), Rule 1.1.2 (Alert and Attentive), Rule 7.1 (Switching Safely and Efficiently, Rule 8.2 (Position of Switches), Rule 8.15 (Switches Run Through), Rule 41.2 (Operators) and Rule 42.11.1 (Speed when Passing Through Switches or Derails) in connection with allegations that he ran the machine he was operating through a switch, which derailed the machine and damaged the switch, was without just and sufficient cause, unwarranted and in violation of the Agreement (System File UP510JF12/1568983).
2. As a consequence of the violation referred to in Part 1 above, the Carrier must expunge these charges from the Claimant's record and compensate him for all wage and benefit loss suffered as a result of the Carrier's improper discipline.

### Facts:

By letter dated May 18, 2012 the Claimant was directed to attend a May 30, 2012 :“investigation and hearing on charges to develop the facts and place responsibility if any, that while employed as a Machine Operator on Gang 9160, at Houston, Texas, approximately 1530 hours, on April 28, 2012, in the Englewood Yard, on the west end of Group One Bowl Tracks, you allegedly ran the machine you were operating, the SPDD 0306, through a switch, derailing your machine and damaging the switch.”

The Notice went on to list the above-noted Rules that were allegedly violated.

**Carrier Position:**

The Carrier has met with substantial evidence the burden of proving the above-noted rules violations. The Claimant acknowledged running through the switch when he elected to proceed while in control of his machine. He had not been directed to start the move at the time. The required continuous gesture and communication was absent during the move, therefore as the responsible operator, Claimant should have stopped the movement. Furthermore, he should have observed the switch to ensure that it was properly aligned.

The violations warranted discipline, which was not arbitrary and capricious and should not be disturbed by the Board, particularly since the UPGRADE policy has been upheld in prior Board decisions. There were no defects in the hearing or in due process afforded the Claimant that would require the Board to set aside the discipline.

**Organization Position:**

The investigation was not fair and impartial because the Carrier relied on statements and did not present the authors so that they could be cross examined. Because it has the burden of proof, it is the Carrier's responsibility to present all pertinent witnesses, as attested to by numerous NRAB and PLB decisions. The Carrier's denial of the Organization's request to produce Foreman English deprived the Claimant of a fair and impartial hearing.

The above contention notwithstanding, the Carrier did not provide substantial evidence of rules' violations, as Foreman English's statement should be stricken from the record and Superintendent Ritch's testimony had no probative value. The Claimant's testimony must be accepted. It is a matter of record that Claimant did not damage the switch, although the Carrier alleged otherwise. The rules alleged to have been violated are misdirected, absurd or irrelevant. Foreman English should have been aware of how the switch was aligned before directing the Claimant to proceed.

Even if the Board finds a violation, the discipline was punitive and excessive. If the Claimant is found to have violated only some of the above-noted rules, the discipline must be reduced.

**Findings:**

Rule 22(a)(1) states that dismissal or other discipline will be assessed only after the Claimant has been "accorded a fair and impartial hearing." During the hearing the Organization protested the absence of Foreman English as a witness. It is undisputed that Foreman English had direct, first-hand knowledge of the events under investigation. Because the Carrier failed to call a material witness, it denied the Claimant his right to a fair and impartial hearing and was unable to properly refute the Claimant's testimony. Thus it failed to meet its burden of proof.

**Award:**

Claim sustained.

**Order:**

The Level 3 UPGRADE discipline is to be rescinded and the Claimant is to be afforded the remedy prescribed by Rule 22(f). 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  
February 28, 2014