

PUBLIC LAW BOARD NO. 3241

In the Matter of:)	National Mediation Board
)	Administrator
BROTHERHOOD OF MAINTENANCE)	
OF WAY EMPLOYES,)	
)	
Organization,)	
)	
and)	
)	
UNION PACIFIC RAILROAD)	Case No. 11
COMPANY,)	Award No. 11
)	
Carrier.)	

Hearing Date: March 18, 1986
Hearing Location: Sacramento, California
Date of Award: November 9, 1987

MEMBERS OF THE BOARD

Employees' Member: Mr. C. F. Foose
Carrier Member: Mr. E. R. Meyers
Neutral Member: Mr. John B. LaRocco

STATEMENT OF THE CLAIM

1. That the Carrier's decision to suspend Track Foreman L. I. Mallette for a period of six (6) months was in violation of the current Agreement, excessive and based on unproven charges.

2. The Carrier shall be required to reimburse Claimant for all wage loss suffered and his personal record shall be cleared of all charges.

OPINION OF THE BOARD

This Board, after hearing upon the whole record and all evidence, finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act as amended; that this Board has jurisdiction over the parties and the subject matter of the dispute herein; that this Board is duly constituted by an Agreement dated July 23, 1982; and that all parties were given due notice of the hearing held on this matter.

I. BACKGROUND AND SUMMARY OF THE FACTS

As the result of a June 21, 1984 investigation, the Carrier suspended Claimant, a Track Foreman, from service for six months for: 1.) improper operation of a motor car causing personal injury to Laborer Heard; and 2.) engaging in an altercation with a United States Marshal and a member of the public. The six month suspension included the time that Claimant spent out of service pending the investigation. After serving the long suspension, Claimant requested a medical leave of absence. However, on July 3, 1985, Claimant forfeited his seniority because he failed to furnish medical documentation supporting his leave of absence request.

At the investigation, only Claimant and his supervisor, the Roadmaster, testified concerning the events which transpired on May 30, 1984 near Little Valley, California. Since the Roadmaster did not observe or participate in any of the events, the Organization vigorously objected to the fairness of the investigation. The Organization emphasizes that the Roadmaster's testimony consisted entirely of hearsay and, at times, double hearsay. Also, the Hearing Officer denied the Organization's request for a hearing postponement due to the absence of Laborer Heard.

As Claimant was preparing to go to work on May 30, 1984, U.S. Marshals and a Sheriff's S.W.A.T. team surrounded Claimant's trailer. Evidently, the authorities detained Claimant for a short while until they realized that they had assailed the wrong residence. Later in the day, the authorities apparently arrested a dangerous fugitive at a nearby trailer.

When Claimant was finally able to depart for work, he was stopped en route at a police roadblock. He was cited for carrying a concealed weapon although Claimant declared that the pistol was in plain view on the seat of his vehicle. Again, the law enforcement authorities released Claimant. He reported to work.

During the work day, Claimant became increasingly upset with the rough and unwarranted treatment that he had received from law enforcement officials earlier in the day. Claimant and his helper, Laborer Heard, concluded their duties early and began traveling back to Little Valley on their motor car. Due to his anger, Claimant conceded that he operated the motor car at an excessive speed. As they approached a Little Valley grade crossing, Claimant observed a logging truck blocking the track. Laborer Heard later told the Roadmaster that he thought the motor car would strike the logging truck and thus he jumped from the motor car before it reached the crossing. Claimant stopped the motor car without hitting the truck. Coincidentally, a private citizen and a U.S. Marshal, who Claimant had encountered earlier in the day, occupied the vehicle immediately behind the logging truck. Claimant testified that he did not talk to either the

Federal Marshal or the private citizen. He denied that any altercation occurred at the crossing.

The Roadmaster declared that Laborer Heard feared that Claimant might take drastic action against the occupants of the vehicle. According to the Roadmaster, Heard told the private citizen that he did not want to be near him because he thought Claimant might try to kill the citizen and the Marshal. Claimant confirmed that he was charged with the assault and battery of a Federal officer but he speculated that the charges arose because the Federal authorities had earlier raided the wrong trailer. Claimant emphasized that all charges against him were eventually dropped.

Aside from the above described facts, the Carrier did not submit any other evidence at the June 21, 1984 investigation.

The Carrier presented the Organization with additional evidence during an April 18, 1985 conference on this claim. Specifically, the Carrier gave the Organization a newspaper article dated June 6, 1984 which reported Claimant's alleged altercation with a Federal Marshal at the Little Valley grade crossing. In addition, the Carrier submitted a June 12, 1984 security report compiled by one of its Special Agents. According to Special Agent Ford's investigation, Claimant created a confrontation at the crossing on May 30, 1984. He took a large bar from the motor car and approached the private citizen and U.S. Marshal in a threatening manner. He was later arrested for the alleged assault. Claimant also allegedly assaulted his attorney whom he had retained to take possible legal action

against the law enforcement authorities for the alleged false arrest on the morning of May 30, 1984.

In its submission, the Carrier informed this Board that Claimant was sentenced for an unspecified offense by the Lassen County Superior Court on August 27, 1984. Also, as of January 31, 1986, there were outstanding arrest warrants against Claimant for vandalism and assault.

II. THE POSITIONS OF THE PARTIES

The Carrier contends that Claimant was guilty of committing not just reckless conduct but criminal conduct which endangered the safety of the public and a fellow employee. The public records and the Special Agent's report corroborated the Roadmaster's testimony that Claimant engaged in a physical altercation with a law enforcement officer at the Little Valley grade crossing. Claimant was charged, arrested and sentenced for his criminal activity. Someone could have been seriously hurt during Claimant's fit of rage. Even if his offenses are considered off duty misconduct, the Carrier had an obligation to protect its workers. Moreover, the Carrier cannot tolerate an employee who assaults a Federal officer.

The Organization argues that Claimant was legitimately upset and thus he probably operated the motor car at an excessive rate of speed. Although Claimant drove the motor car at a high rate of speed, it did not cause any adverse consequences. Aside from this violation, however, the Carrier has not proven that Claimant committed any other offense. Laborer Heard exercised poor judgment by jumping from the moving motor car and thus he is

responsible for any injuries which he suffered. Since Laborer Heard did not testify at the hearing, the Board does not have any evidence before it concerning why he jumped from the moving motor car. It is obvious that law enforcement authorities concocted the concealed weapon and altercation charges to cover up their prior mistake, i.e., surrounding Claimant's house earlier in the day. Finally, the Carrier furnished the newspaper articles and the Special Agent's report long after the conclusion of the investigation. The Organization urges this Board to disregard this evidence since it was not presented at the hearing.

III. DISCUSSION

Even though Claimant subsequently forfeited his seniority, the claim herein is not moot. Absent a special severance arrangement whereby Claimant relinquished all his prior claims against the Carrier, Claimant's subsequent seniority termination did not bar Claimant from progressing his case to this tribunal.

Rule 20 disciplinary hearings are not conducted according to the rules of evidence applicable in a court of law. Hearsay evidence is admissible even though the opposing party is deprived of an opportunity to cross-examine the declarant. However, the Carrier officer assessing discipline should have considered the reliability of the hearsay evidence when he evaluated the record to determine if it contained substantial evidence proving Claimant committed the charged offenses.

Looking first at Claimant's operation of the motor car, we find that while the Carrier proffered substantial evidence that Claimant drove the motor car above the designated speed limit, it

fell short of proving that his negligence resulted in an injury to Laborer Heard. Even if we credit the Roadmaster's testimony that Laborer Heard feared that the motor car was about to collide with the truck, the record still contains a glaring gap. There is no evidence that Laborer Heard suffered an injury. Indeed, the evidence strongly suggests that the Laborer was not injured because he immediately walked away from the scene. Nonetheless, based on Claimant's admission, some discipline was warranted because he operated the motor car at an excessive speed. Claimant almost lost control of the motor car.

Turning to the alleged altercation between Claimant and the Federal Marshal, the Carrier did not present sufficient evidence (at the investigation) proving that Claimant was guilty of the charge. While the Carrier presented relevant evidence (suggesting that Claimant was guilty) during the on the property conference, the Carrier may not discipline an employee and then later come forward with the evidence justifying the discipline which has been already assessed. See NRAB Third Division Award Nos. 11308, 17595 and 18899. The newspaper clippings and the Special Agent's report were available to the Carrier prior to the June 21, 1984 investigation. Inexplicably, neither the Roadmaster nor the Hearing Officer incorporated the newspaper articles and security report into the investigation record. The Carrier was barred from using the Special Agent's report to buttress the case against Claimant since Claimant was deprived of an opportunity to rebut the contents of the report. Moreover, after the investigation was closed, Claimant's representative

could no longer call the Special Agent to the witness stand to question him about the facts related in the report.

While the Hearing Officer has the discretion to grant or deny the Organization's request for a postponement, the Hearing Officer's insistence on continuing with the June 21, 1984 hearing in the absence of key witnesses contributed to the Carrier's failure to submit substantial evidence to prove the charges against Claimant. In a supplemental report dated June 25, 1984, the Carrier's Special Agent specifically noted that neither he nor the Federal Marshal were called to the June 21, 1984 investigation. The Federal Marshal had volunteered to testify (and attend the investigation at his own expense). The Carrier's failure to call the Special Agent and Laborer Heard made it virtually impossible for the Carrier to prove most of the charges leveled at Claimant. Claimant's assertion that all charges against him were dropped was not refuted by any witness at the investigation. Claimant may very well have been guilty of the charges but such guilt is not found within the four corners of the investigation transcript.

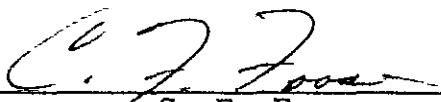
Since we must disregard the evidence that the Carrier later submitted on the property, we find only sufficient record evidence proving Claimant violated proper motor car operation procedures. The Carrier failed to substantiate the charge that Claimant's negligence caused an injury to Laborer Heard and that he engaged in an altercation with the Federal Marshal and a private citizen.

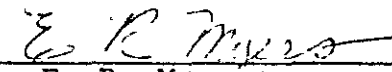
Because the Carrier proved a portion of only one charge, we must reduce the six month suspension to a thirty day suspension.

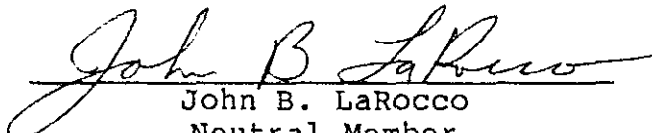
AWARD AND ORDER

Claim sustained to the extent consistent with our Opinion. Claimant's suspension is reduced from six months to thirty days. The Carrier shall pay Claimant five months of back pay at the rate in effect when he served the suspension. The Carrier shall comply with this Award within thirty days of the date stated below.

DATED: November 9, 1987


C. F. Foose
Employee's Member


E. R. Meyers
Carrier Member


John B. LaRocco
Neutral Member