

PUBLIC LAW BOARD NO. 3241

In the Matter of:)	National Mediation Board
)	Administrator
BROTHERHOOD OF MAINTENANCE OF)	
WAY EMPLOYES,)	
)	
Organization,)	
)	
and)	Case No. 28
)	Award No. 28
UNION PACIFIC RAILROAD)	
COMPANY,)	
)	
Carrier.)	

Hearing Date: January 26, 1989
Hearing Location: Sacramento, California
Date of Award: December 13, 1989

MEMBERS OF THE COMMITTEE

Employes' Member: C. F. Foose
Carrier Member: L. E. Smith
Neutral Member: John B. LaRocco

ORGANIZATION'S STATEMENT OF THE CLAIM

1. That the Carrier's decision to dismiss Foreman C.E. Carlock was without just and sufficient cause and in violation of the current Agreement.
2. Claimant will now be placed in his former position with seniority and all other rights restored with compensation for all wage loss suffered.

Carrier File No. 860059

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.

Both parties presented extensive evidence at a July 28, 1986 investigation held to determine if Claimant, the Foreman on Gang 8971, had embezzled money from the Carrier by using Carrier issued GELCO Rapid Drafts to purchase fuel for his personal vehicle. With one exception, the facts adduced at the investigation were undisputed.

A Special Agent's inquiry into Claimant's use of rapid drafts was triggered when two gang members reported to the Relief Foreman that they had observed Claimant purchase gasoline for his own automobile with a rapid draft at a Sacramento, California Shell station. Claimant readily acknowledged that he not only engaged in the transaction observed by the two workers but he also filled his automobile with gas, and paid for the fuel with a rapid draft on many other occasions. When Claimant made these purchases, he usually wrote down the code number for the gang fuel truck on the rapid draft. One gang member testified that when he drove a Carrier truck to a service station, Claimant sometimes followed him in his personal vehicle. At the service station, they would fill both vehicles with gas and use one rapid draft, charged to the truck, in payment for all the fuel. Claimant declared that, wherever he drove his vehicle on Carrier

business, he used the rapid drafts to buy fuel for his personal vehicle in lieu of filing a mileage expense account for reimbursement at twenty cents per mile. Indeed, for many years, Claimant had not filed an expense account for mileage reimbursement yet several witnesses, including supervisory personnel, confirmed that Claimant often used his own vehicle for Carrier business.

The sole disputed fact concerns whether Claimant had express permission to purchase fuel oil for his personal vehicle with rapid drafts. The Bridge and Building Supervisor emphasized that he did not authorize Claimant or any other employee to use rapid drafts to purchase gas for their personal vehicles. The proper procedure, he asserted, was to file an expense form claiming twenty cents for each mile that Claimant used his personal car for Carrier business. On the other hand, Claimant asserted that the Bridge and Building Supervisor had granted him continuing permission to use rapid drafts to buy gasoline for his personal vehicle provided Claimant did not file a mileage reimbursement expense form. In any event, Claimant would have received more money had he filed a mileage expense account than he did by purchasing the gas with the rapid drafts.

Finally, the investigation record reveals that the Carrier lacked an adequate system for auditing rapid draft expenditures. Since the Special Agent did not or could not compare the drafts processed through GELCO, the evidence was vague concerning precisely how often Claimant used such drafts to purchase gas for his personal vehicle. Also, there was some testimony that a few

drafts were missing from the draft booklet but there was no evidence linking Claimant to the misplaced or stolen drafts.

On August 8, 1986, the Carrier dismissed Claimant from service.

After carefully reviewing and evaluating the record, this Board concludes that the Carrier failed to sustain its burden of proving Claimant intended to convert Carrier funds to his personal benefit. For three reasons, the Carrier fell short of proving that Claimant committed defalcation.

First, it was undisputed that Claimant frequently drove his personal vehicle to conduct Carrier business. Without attempting to conceal his actions, Claimant filled up the gas tank in his personal auto whenever he had used it for Company business and he paid for the fuel with a rapid draft. None of Claimant's supervisors ever questioned why Claimant did not turn in a mileage expense accounts even though they were aware that Claimant utilized his own automobile for Carrier business. Thus, even if the Hearing Officer credited the Bridge and Building Supervisor's denial that he had given Claimant express permission to purchase fuel with the rapid drafts, Carrier officials implicitly condoned Claimant's method of reimbursing himself. The Carrier's condonation of Claimant's longstanding and open practice of purchasing fuel with rapid drafts, instead of submitting mileage expense claims, bars the Carrier from now accusing Claimant of larceny.

Second, the Carrier did not demonstrate that Claimant derived any personal gain or benefit from his use of the rapid drafts. Claimant did not receive duplicative reimbursements. On the contrary, the Carrier actually saved money because the value of the amount of fuel Claimant received was less than the amount of money he would have received had he filed mileage expense accounts. Because Claimant did not benefit from the practice, the Carrier did not show Claimant had a larcenous intent when he used the rapid drafts.

Third, absent a more accurate rapid draft recordkeeping system, the Carrier was unable to show any abuse of rapid drafts. It would be speculative to attribute the missing rapid drafts to Claimant. Many persons had access to the drafts. Furthermore, the Carrier did not produce any evidence that Claimant filled the gasoline tank of his personal auto at any time when he had not been using his vehicle for Carrier business.

Claimant shall be reinstated to service with his seniority unimpaired and paid for his net wage loss, if any, pursuant to Rule 20.

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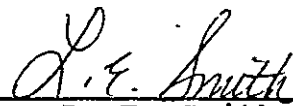
AWARD AND ORDER

Claim sustained. If it has not already done so, the Carrier shall reinstate Claimant to service with his seniority unimpaired. The Carrier shall pay Claimant his net wage loss, if any, in accord with Rule 20. The Carrier shall comply with this Award within thirty days of the date stated below.

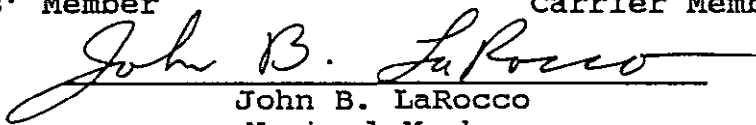
DATED: December 13, 1989



C. F. Foose
Employees' Member



L. E. Smith
Carrier Member



John B. LaRocco
Neutral Member