

PUBLIC LAW BOARD NO. 3241

In the Matter of:)	National Mediation Board
)	Administrator
BROTHERHOOD OF MAINTENANCE OF)	
WAY EMPLOYES,)	
)	
Organization,)	
)	
and)	Case No. 34
)	Award No. 34
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 violated the current Agreement when it dismissed B & B Carpenter Derrick Dixon. Said action being excessive, unduly harsh and in abuse of discretion.
2. That the Carrier reinstate Claimant to his former Carrier position with seniority and all other rights restored unimpaired with pay for all loss of earnings suffered, and his record 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.

At approximately 1:30 p.m. on December 15, 1986, the Acting Bridge and Building Foreman on Gang 7423 instructed Claimant, a B & B Carpenter, and a fellow employee to obtain a bottle of acetylene from a company tool car (located some distance down the track from where the gang was working). After placing the bottle of acetylene on the push car, Claimant picked up a Carrier chain saw from the tool car and remarked to his fellow worker that the saw now belonged to him. According to Claimant, his fellow worker tacitly approved of Claimant's conduct. Claimant's co-worker, however, denied that he assisted Claimant in taking the saw. A little ways down the track, Claimant hid the saw away from the right of way saying that he would take it away later. The two workers returned to the gang.

At the end of the shift, the employee who had observed Claimant take the saw reported the incident to the Acting Foreman. The Foreman notified his supervisors who, in turn, contacted a Special Agent. The Special Agent, accompanied by a county law enforcement officer, appeared at Claimant's house on December 21, 1986. Claimant signed a statement attesting that he took the saw. However, he stated that he intended to borrow the saw for one week. Either Claimant or Claimant's friend was

purportedly going to use the saw to earn extra money by cutting wood. On January 12, 1988, Claimant pleaded nolo contendere to a charge of receiving stolen property.

At a January 19, 1988 investigation, Claimant reiterated his assertion that he had merely borrowed the saw and intended to return it to the Carrier after one week. Following the investigation, the Carrier discharged Claimant from service.

At the onset, the Organization urges this Board to summarily sustain the claim because Claimant was not accorded a fair and impartial hearing. The Organization points out that the Hearing Officer preferred the charges against Claimant, presided over the hearing, gave evidence as a witness during the hearing and imposed the disciplinary penalty. At page 5 of the investigation transcript, the Hearing Officer stated that the Acting Foreman reported the incident to the Hearing Officer on December 16, 1987. The Hearing Officer then announced that as far as he knew, Claimant did not have permission to take the saw. The last remark smacks of prejudgment. In addition, a Hearing Officer engages in multiple roles at the Carrier's peril. It is very easy for a hearing officer who performs investigative, prosecutorial and adjudicatory functions to violate an employee's Rule 20 due process rights. This Board discourages hearing officers from engaging in multiple roles and forming a judgment about the case before the evidentiary record is closed. Although the Hearing Officer's conduct in this case was improper, his multiple roles did not prejudice Claimant's case. Claimant and his representative presented a vigorous, albeit unsuccessful,

defense. The Hearing Officer permitted Claimant's representative to explore all reasonable avenues of inquiry with the various witnesses. Thus, under the particular circumstances of this case, we find that Claimant received a fair investigation. Our decision is restricted to this particular case.

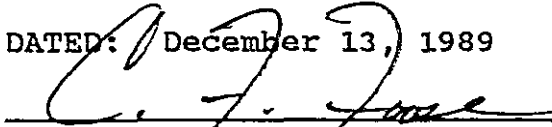
Turning to the merits, the record contains substantial evidence that Claimant took and carried away a Carrier chain saw with the specific intent to permanently deprive the Carrier of its ownership over the saw. Before taking the saw, Claimant failed to ask the acting Foreman or any other appropriate authority if he could borrow the saw. In addition, the manner in which Claimant took the saw demonstrates that he did not want the Carrier to know who possessed the saw. Claimant left the saw in a concealed location where only he could retrieve it. He remarked to his fellow worker that the saw now belonged to Claimant. This impromptu utterance evinces Claimant's state of mind at the time he took the saw. He intended to permanently keep the saw. Claimant's contention that he simply borrowed the saw was an afterthought. He only raised this defense after the Special Agent came to his home.

Since the Carrier proved that the Claimant committed larceny, we find no justification to reduce the assessed discipline.

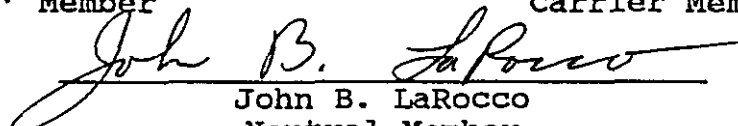
AWARD AND ORDER

Claim denied.

DATED: December 13, 1989


C. F. Foose
Employees' Member


L. E. Smith
Carrier Member


John B. LaRocco
Neutral Member