

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. 4
COMPANY,)	Award No. 4
)	
Carrier.)	

Date of Hearing: March 7, 1985
Place of Hearing: Sacramento, California
Date of Award: January 8, 1986

MEMBERS OF THE BOARD

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

STATEMENT OF THE CLAIM

The assessment of 45 demerits against the record of Track Laborer F. V. Ayala on March 8, 1984, was without just and sufficient cause and in violation of the Agreement.

That the Carrier be required to expunge the demerits and charge from his record.

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 a February 27, 1984 investigation, there were sharp factual conflicts between Claimant's testimony and the rendition of events given by the Roadmaster, the Section Foreman and Laborer.

On January 30, 1984, Claimant, a Track Laborer, returned to service on Extra Gang 4321 following a disciplinary suspension. The Section Foreman testified that he showed Claimant how to start and operate a rail saw on January 30, February 3, February 7, and on February 13, 1984. The Foreman told Claimant to operate the saw in a kneeling position with one hand in the stirrup (which also contained the throttle) and the other hand on the cross arm. The Foreman emphasized that Claimant should always firmly grip the machine with both hands. When Claimant allegedly misused the saw on February 13, 1984, the Carrier charged Claimant with unsafe operation of the rail saw. Claimant admitted that he placed his foot in the stirrup while starting the saw on the ground on February 13, 1984. However, he denied receiving any safety instructions prior to February 13, 1984. Another Laborer corroborated the Section Foreman's testimony and specifically asserted that he told Claimant, in Spanish, on several occasions that it was unsafe to operate the rail saw with his foot. Also, the Laborer and Foreman related that because

Claimant ran the saw on cement, the blade came loose and the motor began to smoke. On another day, Claimant continued to operate the saw with a broken belt. Subsequent to February 13, 1984, Claimant operated the saw in accord with proper safety procedures.

At the onset, the Organization urges this Board to summarily sustain this claim because the Hearing Officer reviewed Claimant's personal record and gave Claimant an opportunity to correct any errors at the beginning of the hearing.

Entering the charged employe's personal record into the investigation transcript creates the possibility that the officer who ultimately decides if discipline is warranted will be improperly influenced by the past record in determining the employe's guilt or innocence. The charged employe's personal record cannot be used to demonstrate that the employe has a propensity for engaging in a course of misconduct. Rather, the Carrier retains the burden of proving with substantial evidence that the charged employe committed the offense specified in the particular Rule 20 investigation notice. However, the Carrier may consider Claimant's personal record when it passes on the appropriate measure of discipline. In this case, the Board finds that the Carrier did not abuse the relevancy of Claimant's personal record merely because it was introduced into the investigation transcript. Thus, the Carrier properly limited its use of Claimant's record to ascertaining the level of discipline after it had first independently concluded that Claimant had unsafely operated the saw.

The Section Foreman's testimony, which was confirmed by another Laborer, conclusively shows that Claimant was told, on at least four separate occasions, exactly how to safely operate the rail saw. In resolving the factual dispute regarding whether or not Claimant received lessons on safe saw operation, the Hearing Officer could place more weight on the testimony proffered by the Foreman and the other Laborer as opposed to Claimant's blanket denials. Despite the instructions, Claimant carelessly started and held the saw with his foot. With only his foot in the handle opening, Claimant lacked any control over the saw. Mishandling of the saw not only caused the blade to loosen but also jeopardized the safety of nearby workers.

It is unfortunate that the Carrier had to resort to disciplinary action to impress upon Claimant his duty to safely operate the saw. The record reflects that the threat of discipline was apparently successful in rehabilitating Claimant since Claimant safely operated the saw subsequent to February 13, 1984. Nonetheless, some discipline was warranted to insure his continued compliance with safety instructions.

Due to his poor prior record, we must uphold the assessment of forty-five demerits on Claimant's personal record.

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AWARD AND ORDER

Claim denied.

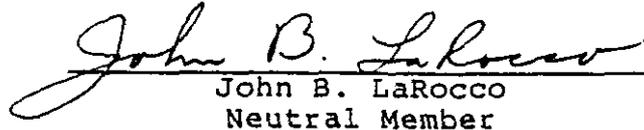
DATED: January 8, 1986



C. F. Foote
Employes' Member



E. R. Meyers
Carrier Member



John B. LaRocco
Neutral Member