

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. 52
COMPANY,)	Award No. 52
)	
Carrier.)	

Hearing Date: March 9, 1994
Hearing Location: Sacramento, California
Date of Award: March 2, 1995

MEMBERS OF THE BOARD

Employees' Member: C. F. Foose
Carrier Member: D. A. Ring
Neutral Member: John B. LaRocco

ORGANIZATION'S STATEMENT OF THE CLAIM

1. That the Carrier violated the provisions of the current Agreement when it dismissed Foreman J. L. Kluge. Said action being based on unproven charges, is capricious and in abuse of discretion of discretion.
2. The Carrier shall now be required to reinstate Claimant to his former Carrier position with seniority and all other rights restored unimpaired with compensation for all wage loss suffered and his record be cleared[sic] of all charges. (930271).

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.

On Thursday, September 24, 1992, Claimant was the Foreman on Spot Gang 7308. The gang was assigned to work from 6:30 a.m. to 5:00 p.m. with Thursday being the last day of their four day work week.

During the morning hours of September 24, the gang members participated in a safety meeting at Milpitas Yard. More specifically, the meeting was actually a torch class involving the study and review of welding rules. The goal of the meeting was to train gang members so that as many as possible would pass the upcoming torch test. The torch class ended shortly after lunchtime, that is, before 2:00 p.m.

Shortly before 1:00 p.m., the Manager of Field Engineering asked Claimant what work his gang would perform at the conclusion of the torch class. Claimant responded that he intended for the gang to work at the Highway 101 job site.

From 1:00 p.m. to 2:30 p.m., the Manager waited at the Highway 101 job site but nobody appeared. The Manager returned to Milpitas Yard where he discovered that all the gang members as well as Claimant were gone.

The Manager of Field Engineering and the Manager of Track Maintenance subsequently learned from several Laborers on Claimant's gang that, at the end of the torch class, Claimant instructed them to fuel up the bus and then go home. Five or six gang members rode with the bus driver to obtain gas for the bus. When they returned to the Yard, Claimant was not present

and so, the gang members quit early (sometime between 2:30 p.m. and 3:00 p.m.). The Assistant Foreman confirmed that Claimant instructed himself and the gang members to go home after finishing with a few small tasks. Claimant did not direct the gang to proceed to the Highway 101 job site although Claimant told several gang members to go to the job site to retrieve some equipment, including a portable toilet, and then adjourn to the bunk cars in the Yard. Claimant told another Laborer to check for a butane line leak. After finishing this task, the Laborer was unable to find Claimant to receive additional instructions. After talking to other gang members (who told him that they were quitting early), this Laborer went to the bunk car at about 3:00 p.m.

On the time roll, Claimant filled in 10 hours next to his name and the names of all his gang members for September 24, 1992.¹

Sometime in early October, the Manager of Field Engineering had a telephone conversation with Claimant. The Manager asked Claimant why he and his men had quit early on September 24. Claimant responded that his employees were working hard and deserved to go home early. The Manager replied that Claimant lacked the authority to allow an early quit.

By written notice dated October 1, 1992, the Carrier charged Claimant with improperly absenting himself from Gang 7308 on September 24, 1992 and with falsification of the time rolls. The investigation was postponed several times. Like the original notice, the Carrier sent Claimant notices of the postponement via certified mail. The Carrier received a return receipt for each notice including the last notice which set the investigation for November 20, 1992.

¹ The Managers later corrected the time roll before it reached the payroll department. The Carrier deducted two hours pay from Claimant's paycheck as well as the gang members' paychecks.

When the hearing was convened on November 20, 1992, Claimant did not appear. Over the objection of Claimant's representative, the Hearing Officer held the investigation in Claimant's absence.

The Manager of Field Engineering, the Manager of Track Maintenance and seven members of Gang 7308 testified at the investigation. They related the facts set forth earlier in this Opinion. On December 1, 1992, the Carrier dismissed Claimant from service.

Claimant received a fair hearing in accordance with Rule 20. The Carrier properly provided Claimant with advance written notice of each scheduled hearing and each postponement. The Carrier sent all notices by certified mail. Inasmuch as Claimant's signature appears on the certified mail receipts, Claimant received actual notice of the November 20, 1992 hearing.

Claimant's representative reported to the Hearing Officer that Claimant had indicated that he could not attend the hearing due to an alleged disability. However, despite receiving the notices, Claimant never substantiated the existence of his disability. Moreover, Claimant neither requested a change in the hearing location nor asked for a postponement until he recovered sufficiently to travel to the designated site of the investigation. In view of the particular circumstances of this case, the Hearing Officer could legitimately exercise his discretion to deny Claimant's representatives request for a hearing postponement.² Stated differently, the Hearing Officer did not abuse his discretion by proceeding with the hearing *in absentia* of Claimant.

The record contains substantial evidence that Claimant was absent from his assignment without authority on the afternoon of September 24, 1992. In addition, he attempted to steal time

² There is nothing in the record to suggest that Claimant would have attended a hearing at another date given that he ignored all the previous notices.

from the Carrier for himself and his gang members. Instead of sending his gang down to the Highway 101 job site for the remainder of the day, Claimant directed his workers to perform some innocuous cleanup tasks and then told them to go home because, apparently, Claimant had already decided that he was leaving early.³

Claimant told his subordinates to quit early.⁴ Yet, Claimant lacked the authority to allow his gang to go home before the assigned quitting time. Similarly, Claimant never asked his Supervisor if he could leave early. Quite to the contrary, at midday, Claimant lead the Manager of Field Engineering to believe that the gang was going to work the remainder of the day at the Highway 101 job site. Claimant misled the Manager. Claimant had no intention of putting in a full day's work. After the incident, Claimant tried to justify his actions by saying the gang deserved some time off since they had been working hard.⁵ If true, Claimant should have procured permission from proper authority for the early quit.

Besides absenting himself from the property without proper authority, Claimant dishonestly claimed pay for hours that he and his gang did not work. He perpetuated his scheme by telling his Supervisor that the gang would actually be working all day. Since nobody worked beyond 3:00 p.m., Claimant placed false information on the time roll. Therefore, Claimant intentionally deceived the Carrier in effect to extract payment for time not worked.

³ There was certainly no need for five employees to obtain fuel for the bus.

⁴ Of course, the gang members did not commit any misconduct because they merely complied with Claimant's instructions that they could go home after performing the cleanup tasks and fueling the bus.

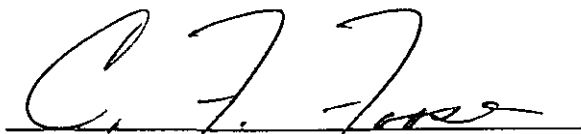
⁵ Implicit in Claimant's excuse is an admission that he did instruct the Assistant Foreman and gang members to go home early.

Claimant committed two serious offenses. In view of his prior work record, this Board does not find any justification for reducing the assessed discipline.

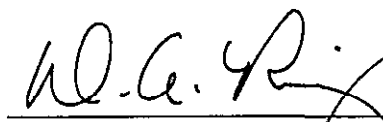
AWARD AND ORDER

Claim denied.

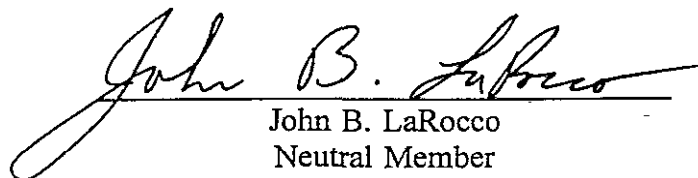
Dated: March 2, 1995



C. F. Foose
Employees' Member



D. A. Ring
Carrier Member



John B. LaRocco
Neutral Member