

PUBLIC LAW BOARD NO. 3241

In the Matter of:	)	National Mediation Board
	)	Administrator
	)	
BROTHERHOOD OF MAINTENANCE OF	)	
WAY EMPLOYEES,	)	
	)	
Organization,	)	
and	)	
	)	
UNION PACIFIC RAILROAD	)	Case No. 53
COMPANY,	)	Award No. 53
	)	
Carrier.	)	

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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 current Agreement when it dismissed Laborer R. Pompa. Said action being excessive, unduly harsh and an 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.

By notice dated December 4, 1992, the Carrier charged Claimant with failure to follow instructions and with putting himself in an unsafe position which caused his own personal injury. At the investigation held on December 8, 1992, there was a substantial conflict in the testimony between Claimant, on the one hand, and the Assistant Foreman and a fellow Laborer, on the other hand.

The Assistant Foreman of Gang 9018 testified that the gang was waiting at the East Switch at Blairsdén at about 3:10 p.m. on December 2, 1992, for a segment of another gang to join them. It was snowing and the gang was working in mountainous terrain. As the other gang approached via rail, it quickly became apparent that the welding truck was not going to be able to stop short of Gang 9018's equipment which was setting on the track.

Claimant, the Assistant Foreman and the other gang members heard the Assistant Foreman on the approaching welding truck say over the radio that the truck was not going to stop short of the stationary equipment and so the gang needed to move the equipment. Claimant and two other Laborers began running for the machines.

Claimant testified that not only did he overhear the radio message but also, his own Assistant Foreman directed the Laborers to move the machines. The Assistant Foreman denied giving instructions for the Laborers to move the machines testifying that they simply ran towards the machines when they saw the fast approaching welding truck.

Determining that there was insufficient time to board and move the machines before the truck collided with the equipment, the Assistant Foreman yelled at the Laborers to stand clear of the equipment. Another Laborer who was further away from the Assistant Foreman than Claimant, emphatically testified that he heard and abided by the Assistant Foreman's order to stand clear. Claimant denies that he heard the Foreman give an order to stand clear of the equipment.

Claimant boarded his Hydro-spiker and attempted to move the machine down the track. In the meantime, the welding truck hit the equipment and, in a chain reaction, bumped Claimant's hydro-spiker with Claimant aboard. Claimant seemed uninjured.

Immediately after the incident, the Assistant Foreman did not admonish Claimant for his alleged insubordination. Later that evening, Claimant reported that his back was bothering him and he went to a local hospital for treatment. As a result, the Carrier convened an investigation.

It is not the province of this Board to resolve conflicts in testimony. The Hearing Officer could reasonably conclude from all of the evidence that Claimant heard the Assistant Foreman's instructions to stand clear.<sup>1</sup> Therefore, the Carrier presented substantial evidence that Claimant did not follow the Assistant Foreman's instructions.

However, the Carrier did not submit substantial evidence that Claimant put himself in a position to cause his injury. While Claimant took an unnecessary risk and may have exercised poor judgment by boarding his Hydro-spiker, Claimant was not deliberately trying to place himself in a hazardous situation. Rather, due to the exigent circumstances, Claimant was trying to protect the Carrier's property. There is no evidence that Claimant boarded the Hydro-spiker

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<sup>1</sup> The Organization submitted some evidence that Claimant had a hearing impairment but if he could overhear the radio message, Claimant must have heard the Foreman's instructions.

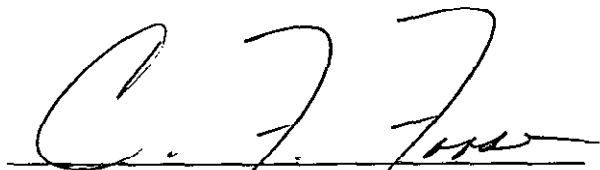
specifically to place himself in immediate jeopardy of bodily harm. Indeed, if Claimant had been successful in moving the equipment, he may have been applauded for averting a major collision. Due to the confusion, Claimant did not have sufficient time to adequately assess all the possible dangers and whether or not his actions were unsafe.<sup>2</sup>

Although insubordination is a serious offense, this Board will reduce the discipline to the time Claimant has spent out of service since the Carrier did not prove that Claimant placed himself in an unsafe position causing the alleged personal injury.

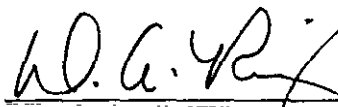
**AWARD AND ORDER**

The claim is sustained to the extent consistent with our findings. The Carrier shall reinstate Claimant to service with his seniority unimpaired but without pay for time lost. The Carrier shall comply with this Award within 30 days of the date stated below.

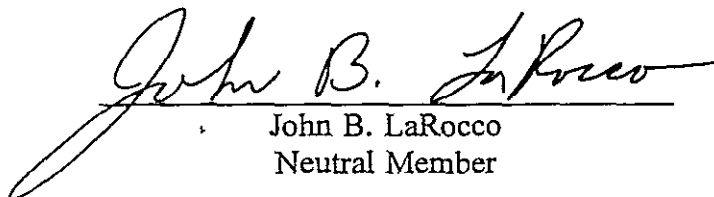
Dated: March 2, 1995



C. F. Foose  
Employees' Member



D. A. Ring  
Carrier Member



John B. LaRocco  
Neutral Member

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<sup>2</sup> However, the emergency does not excuse Claimant from disobeying the Assistant Foreman's order.