

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. 58
COMPANY,	)	Award No. 58
	)	
Carrier.	)	
	)	

---

Hearing Date: May 7, 1996  
Hearing Location: Sacramento, California  
Date of Award: July 22, 1996

MEMBERS OF THE BOARD

Employes' 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 W. Brown with out [sic] according him the benefit of a fair and impartial investigation. Said action being excessive, unduly harsh and in abuse of discretion.
2. That the Carrier now reinstate Claimant to his former Carrier position with seniority and all other rights restored unimpaired, with pay for all loss 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.

On September 16, 1993, the Carrier held three separate disciplinary investigations to determine if Claimant, a Gang Foreman, engaged in several episodes of serious misconduct. Following the three investigations, the Carrier concluded that Claimant was guilty of all of the charged offenses and, consequently, the Carrier dismissed Claimant from service. More specifically, the Carrier assessed Claimant Level 5 discipline under the UPGRADE Policy without separately disciplining him for each offense underlying the three investigations. Thus, the Board does not know whether the Carrier would have dismissed Claimant if he had been found guilty of only one or two of the offenses.<sup>1</sup> This Board only knows that the aggregate discipline imposed was Level 5 (discharge).

Nevertheless, the Board must review each investigation independently because the Carrier bears the burden of coming forward with substantial evidence against Claimant in each record. We may not assume that merely because Claimant is guilty of an offense in one investigation that he must have committed the infractions involved in the other two investigations.

The first investigation concerned Claimant's alleged failure to protect a switch at milepost 13.25 with an appropriate slow order after Claimant's gang had changed out some cross ties on

---

<sup>1</sup> Alternatively, the record does not disclose what level in UPGRADE Claimant would have been assessed if the discipline was less than Level 5.

July 9, 1993.<sup>2</sup> Claimant explained that after installing the cross ties he decided, after consulting with his Assistant Foreman, not to place a slow order on the track because the temperature was only about 75°. The applicable safety rule, set forth in C. E. Bulletin 91-001 (1991), vests the foreman with some latitude in deciding whether a speed restriction is necessary when switch tie installation disturbs track structure. Claimant contended that he reasonably exercised his discretion under the Bulletin.

The Carrier determined that Claimant had nonetheless, left the track in an unsafe condition because the Carrier argued that, during the daily conference call held that morning, the Manager of Engineering and Maintenance directly instructed Claimant to put a slow order on the track after Claimant's gang installed ties at the switch.

However, a close reading of the Manager's testimony reveals that his instructions were not unequivocal. The Manager actually testified that he directed Claimant to put on a slow order per the C. E. Bulletin. Claimant could legitimately interpret this instruction to mean that he could exercise the latitude afforded him under the rule in the Bulletin. Given the lack of specificity in the Manager's instructions, the Carrier did not come forward with substantial evidence that Claimant either failed to expressly follow the Manager's instructions or committed a safety violation. Furthermore, the Board notes that on July 10, 1993, which was considerably warmer than the preceding day, Claimant placed a slow order at the switch not only because of the higher temperatures but also, that morning, the Manager unequivocally instructed Claimant to place the slow order (thus, taking away Claimant's discretion under the Bulletin).

---

<sup>2</sup> The record does not reflect exactly how many new ties the gang installed.

In summary, Claimant is exonerated on the first investigation.

In the second investigation, the Carrier charged Claimant with failing to report to work at the designated time and place on July 15, 1993 and, more critically, improperly reporting to payroll that he had worked an entire eight-hour shift when, in reality, he worked only seven and one-half hours.

Claimant conceded that he was 30 minutes late reporting to work on July 15. Claimant explained that he encountered heavy traffic caused by a freeway accident during his long commute to the Oakland Yard Office. Claimant further testified, without refutation by the Carrier, that an hour before his shift commenced, he called the Yardmaster. Claimant asked the Yardmaster to tell his Assistant Gang Foreman that he would be late. Presumably, the Assistant Gang Foreman could then inform the Manager of Engineering and Maintenance of Claimant's tardiness during the daily start of shift conference telephone call. For some unexplained reason, the Yardmaster neglected to tell the Assistant Foreman about the telephone call the Yardmaster received from Claimant.

Although Claimant tried to contact the Carrier, he is still guilty of the minor infraction of being tardy for work. Due to his long commute, Claimant knew that traffic was unpredictable but it could be heavy on some days. Claimant was obligated to anticipate traffic congestion by leaving his residence early enough to arrive at work on time.

Claimant also admitted that to the best of his recollection he reported his time worked as eight hours for July 15, 1993. Claimant realized that he should have only reported seven and one-half hours because he was 30 minutes late reporting to work. While the Carrier proved that Claimant inaccurately reported the time he worked on July 15, the Carrier failed to muster

sufficient evidence that Claimant held dishonest or devious intentions when he reported that he worked a full eight-hour shift. Rather, the record shows that Claimant inadvertently overstated the number of hours that he worked. Since Claimant did not deliberately falsify the time record, he is not guilty of dishonesty but, he is guilty of the lesser offense of negligently recording inaccurate time worked. As Foreman, Claimant is responsible for accurately turning in the time that he and members of his gang work.

With regard to the second investigation, the Board finds that Claimant committed some misconduct but not dishonesty.

In the third investigation, Claimant was charged with attempting to provoke a fight with a Track Inspector. The record of this investigation contains several conflicts in facts regarding what occurred between Claimant and the Track Inspector at 7:00 a.m. on July 8, 1993 at the Oakland Yard Office.

Claimant testified that over the last several weeks he became increasingly annoyed with the Track Inspector because the Inspector was allegedly telling lies to Claimant's superior about his gang's inadequate performance. Specifically, Claimant was upset because the Track Inspector was badgering him about installing ties at the milepost 13.25 switch.

Claimant related that when he arrived at the Yard Office, he asked to speak with the Track Inspector privately. Claimant further declared that while the two men exchanged angry words, Claimant never physically touched the Track Inspector and he denied that he tried to instigate a physical altercation.

The Track Inspector testified that when Claimant came into the office, Claimant challenged the Inspector to go behind the building and settle their difference. The Inspector

admitted that he told Claimant something to the effect that if you want a piece of me come and get it. The Track Inspector testified that Claimant bumped him but they did not fight. Next, the Track Inspector took off his glasses and called Claimant a loser.

Another Foreman in the office observed at least some of the confrontation between Claimant and the Track Inspector. According to this Foreman, Claimant asked the Track Inspector to go outside so they could speak privately. The Foreman further related that, after they went outside, he heard Claimant and the Inspector arguing about the tie installation. The two men then reentered the building and came into the Foreman's view. The Foreman declared that he saw the Track Inspector take off his glasses and tell Claimant to take his best shot. Claimant then bumped the Track Inspector with his chest and the Inspector retorted that Claimant was a loser.

In this case, the Hearing Officer could reasonably credit the rendition given by an independent eyewitness as opposed to Claimant's self-serving denial that he never physically touched the Track Inspector. Claimant's bump could have easily escalated a verbal confrontation into a physical fight that could have resulted in injury to one or both employees. Claimant was clearly the aggressor. He invited the Inspector to go outside which implicitly connoted that Claimant wanted to argue and possibly fight.

It is true that the Track Inspector should have retreated rather than goading Claimant to hit him. Thus, the Track Inspector bears some culpability for the heated exchange but primary responsibility lies with Claimant.

In sum, the Board finds that Claimant was guilty of attempting to instigate a fight. Fighting with a fellow employee is a serious offense and deserves severe discipline. However,

since this Board has exonerated Claimant of the first investigation offense and found that he committed only a minor infraction concerning the second investigation, we conclude that *permanent dismissal for the offenses that he committed was excessive and unduly harsh.*

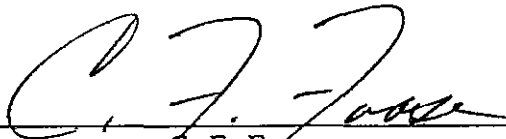
Nevertheless, Claimant deserves stiff punishment for trying to instigate a fight. This Board finds that the lengthy interval that Claimant spent out of service should serve to impress upon him his duty to peacefully resolve disagreements with his fellow workers. As a Foreman, he must set the appropriate example for his gang members.

Therefore, the Board reduces the assessed discipline to the time Claimant spent out of service. Upon his reinstatement, Claimant shall be placed at Level 3 in the UPGRADE disciplinary program. Thus, if Claimant commits another infraction, he may be elevated to Level 4 or 5.

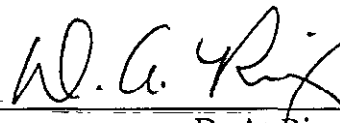
**AWARD AND ORDER**

The claim is sustained in part and denied in part in accord with our Opinion. The Carrier shall reinstate Claimant to service with his seniority unimpaired but without pay for time lost. The Carrier shall place Claimant at Level 3 on the UPGRADE disciplinary program. The Carrier shall comply with this Award within 30 days of the date stated below.

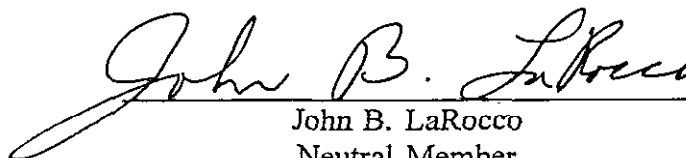
Dated: July 22, 1996



C. F. Foose  
Employees' Member



D. A. Ring  
Carrier Member



John B. LaRocco  
Neutral Member