

PUBLIC LAW BOARD NO. 3241

In the Matter of:	)	National Mediation Board
	)	Administrator
BROTHERHOOD OF MAINTENANCE OF	)	
WAY EMPLOYES,	)	
	)	
Organization,	)	
and	)	
	)	
UNION PACIFIC RAILROAD COMPANY	)	Case No. 65
(former Western Pacific Railroad),	)	Award No. 65
	)	
Carrier.	)	
	)	

Hearing Date: November 18, 1997  
Hearing Location: Sacramento, California  
Date of Award: February 5, 1998

MEMBERS OF THE BOARD

Employees' Member: Rick Wehrli  
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 Ballast Regulator Operator Mr. A. M. Guerrero. 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. (960111)

**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 July 7, 1995, the Carrier sent Claimant a letter via certified mail, return receipt requested. In the letter, the Carrier informed Claimant that, since he had been absent from Gang 7562 without authorization since June 26, 1995, he had forfeited his seniority unless he requested a Rule 20 hearing within 30 days.

On July 14, 1995, the Organization's General Chairman, on behalf of Claimant, requested a Rule 20 hearing. In his correspondence, the General Chairman asked for the date, time and location of the hearing.

On July 25, 1995, the Carrier notified Claimant that the Rule 20 hearing was scheduled for August 7, 1995. The July 25, 1995 correspondence specifically alluded to the July 7, 1995 certified letter. However, the July 25, 1995 notice did not set forth a statement of the charges against Claimant.

At the August 7, 1995 investigation, the Director of Track Maintenance related that Claimant, a Ballast Regulator Operator, requested time off in June to attend to personal problems. Thus, the Director and the Manager of Track Maintenance allowed Claimant to take the remainder of his vacation. Claimant was to return from vacation on June 26, 1995. Claimant did not report to duty on that date. He was continually absent through July 7, 1995.

On or about June 27, 1995, Claimant's wife asked the Director of Track Maintenance if Claimant could obtain a leave of absence. The wife informed the Director that Claimant was unable to report to work because he was incarcerated in jail. The Director told Claimant's wife that Claimant

could apply for a leave of absence but, it would undoubtedly be denied because incarceration in a penal institution is not an acceptable reason for taking a leave of absence.

Claimant's wife submitted a leave of absence request. The Carrier denied the request.

Claimant testified that he was in jail from June 14 to July 7, 1995.

Following the investigation, the Carrier dismissed Claimant for being continuously absent without proper authority from June 26 to July 7, 1995.

The Organization argues that the Carrier violated Rule 20 because it failed to notify Claimant of the charges against him in the July 25, 1995 notice of hearing. The first sentence of the second paragraph of Rule 20 reads, "If an investigation is conducted however, the employee shall be apprized in advance of the charges against him."

In this case, the Carrier complied with Rule 20. Pursuant to the July 24, 1990 Letter Agreement, the Carrier properly notified Claimant that he was voluntarily surrendering his seniority for being absent from work without written permission but giving him an opportunity to request a Rule 20 hearing. The charge (absence without proper authority) was clearly set forth in the July 7, 1995 certified letter. Indeed, certified letters sent pursuant to the July 24, 1990 Letter Agreement are invariably going to refer to a continuous, unauthorized absence. Because the July 25, 1995 notice of hearing specifically mentioned the July 7, 1995 certified letter, the statement of the charge specified in the July 7, 1995 letter was incorporated by reference into the July 25, 1995 letter. Therefore, the Carrier apprized Claimant of the unauthorized absence charge in advance of the hearing as required by the first sentence of the second paragraph of Rule 20.<sup>1</sup>

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<sup>1</sup> The Board also notes that in his July 14, 1995 correspondence to request a Rule 20 hearing, the General Chairman did not ask the Carrier to specify the charges. Obviously, as a result of the Carrier's July 7, 1995 letter, the General Chairman, as well as Claimant, were fully aware that the Carrier was charging Claimant with being absent without proper authority.

Turning to the merits, the Carrier submitted substantial evidence that Claimant was absent without authority from June 26, 1995 until July 7, 1995. At the investigation, Claimant and two supervisors related that Claimant was incarcerated in a custodial facility during that two-week period. Claimant had not received permission to be absent and, he aggravated the matter, by failing to call the Carrier to mark off absent. In addition, Claimant did not procure a leave of absence and thus, he did not have permission to be away from work.

Incarceration in a penal institution is not a recognized, legitimate excuse for being detained from work. The absence was under Claimant's control. If he had abided by the law, he would not have been incarcerated.

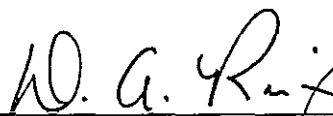
**AWARD AND ORDER**

Claim denied.

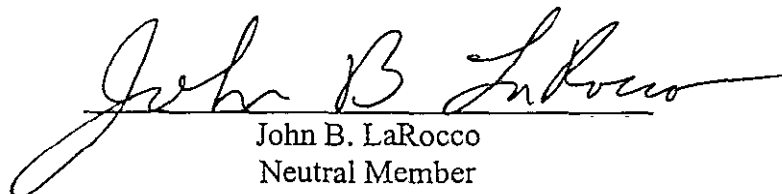
Dated: February 5, 1998



Rick Wehrli  
Employees' Member



D. A. Ring  
Carrier Member



John B. LaRocco  
Neutral Member