

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. 68
(former Western Pacific Railroad),	)	Award No. 68
	)	
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 Welder, Mr. Daniel Canela was assessed with a Level 5 dismissal. 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. (960151)

**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.

Pursuant to proper notice, dated August 24, 1995, the Carrier charged Claimant, a Welder, with allegedly engaging in a physical altercation with a laborer while on duty and on the property on August 22, 1995.<sup>1</sup> Following an investigation, the Carrier determined that Claimant was guilty of the charge and it dismissed Claimant from service.

At the September 1, 1995 hearing, Claimant candidly admitted that he and the laborer fought in the maintenance of way office on August 22, 1995. While the Section Foreman testified that Claimant threw a punch at the laborer, Claimant could not recall punching the other employee but Claimant admitted that he grabbed the laborer and wrestled him to the floor. After a couple of minutes, the Section Foreman separated the two employees. Fortunately, neither was injured.

The record is vague concerning exactly how the altercation developed. Claimant testified that he told the laborer to "shut up" after the laborer had made a snide remark to Claimant. Another laborer, as well as Claimant, related that the laborer was about to leave the office twice but he angrily turned around to resume arguing with Claimant. The verbal confrontation quickly escalated into a physical altercation.

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<sup>1</sup> The Carrier also brought an identical charge against the laborer. [See *Public Law Board No. 3241, Award No. 70.*]

The record contains substantial evidence that Claimant committed the charged offense. Claimant's admission, standing alone, conclusively demonstrates that he fought the laborer while on duty and on Carrier property.

Although the record is unclear regarding which employee was the aggressor, Claimant nonetheless bears some responsibility for causing the fight for two reasons. First, even if the laborer was the aggressor, there was no evidence that he provoked Claimant to enter into the altercation. A snide or satirical remark is hardly grounds to resort to fisticuffs. Second, neither employee made any move to diffuse the situation by leaving the office or otherwise retreating when fisticuffs ensued. While Claimant asserted that he acted defensively, wrestling the laborer to the ground is aggressive action rather than a protective maneuver.

The Organization argues that the fight would not have occurred if the Section Foreman had quickly intervened. Inexplicably, the Foreman did not intercede as the verbal argument escalated. He failed to restore order until after both employees were wrestling on the floor. Certainly, for the safety of all involved, the Foreman should have quickly made reasonable efforts to stop the fight. Even though the Foreman did not act as promptly as he should have, any negligence by the Foreman (which is not before this Board) does not operate to exonerate Claimant's culpability for the fight. Claimant could have avoided the fight even in the absence of the Section Foreman.

Fighting is a serious offense. While Claimant and the laborer were not injured, they could have seriously hurt each other. Moreover, fighting foments a hostile working atmosphere. Thus, the Carrier must impose severe discipline on employees for fighting while on duty.

However, Claimant has been employed for six years with the Carrier and is an excellent Welder. In the past, he has not shown any propensity toward violence. These circumstances convince this Board to mitigate the discipline to a long suspension measured by the time Claimant has been out of service. We hope the discipline impresses upon Claimant his obligation to handle disagreements with his fellow workers in a peaceful fashion.

So that the record is clear, the Carrier may place Claimant at Level 3 Upgrade upon his reinstatement.

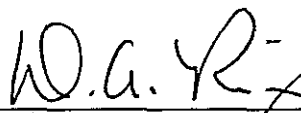
**AWARD AND ORDER**

Claim sustained but only to the extent consistent with our findings. The Carrier shall reinstate Claimant to service with his seniority unimpaired but without pay for time lost. Upon reinstating Claimant, the Carrier may place Claimant at Level 3 Upgrade. The Carrier shall comply with this Award within 30 days of the date stated below.

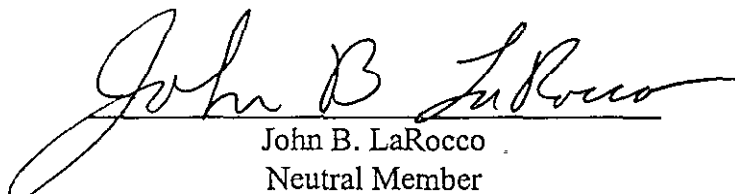
Dated: February 5, 1998



Rick Wehrli  
Employees' Member



D. A. Ring  
Carrier Member



John B. LaRocco  
Neutral Member