

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. 71
(former Western Pacific Railroad),)	Award No. 71
)	
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 assessed Foreman Sid Aguirre a Level 5 dismissal based on unproven charges. 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. (102241)

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 written notice dated April 12, 1996, the Carrier charged Claimant, a Foreman, with using heavy equipment rented by the Carrier for Claimant's own purposes while he was off the property and off duty.

At the April 19, 1996 hearing, both Claimant and the Carrier produced voluminous testimony in support of their respective positions. At the onset, this Board notes that, the Carrier attempted to hold Claimant responsible for damages to a dump truck but Claimant's culpability for such damages was not set forth in the charges. The Carrier may not impose discipline on Claimant for an infraction for which he was not charged. Therefore, this Board must disregard this purported, uncharged misconduct.

Turning to the evidence pertinent to the charged offense, Claimant, acting as an agent for the Carrier, rented a dump truck from U. S. Rental for one week intervals on three separate occasions between March 15 and April 8, 1996. Claimant and his gang used the dump truck in conjunction with their assignment to repair and maintain grade crossings.

There was some question over whether or not Claimant needed to rent the dump truck for a week at a time. A Track Gang Foreman testified that he had a dump truck available for use on most days but Claimant declined to use it. Claimant intimated that the Carrier's dump truck was not suitable for his gang's assignment. A Supervisor testified that if Claimant had rented the dump truck

and another piece of equipment (a roller) on a daily instead of a weekly basis, Claimant would have saved the Carrier \$2,690.¹ Claimant related that he was actually saving the Carrier money by renting on a weekly basis. Moreover, by not stopping the rent over the weekend, he was assured of being able to continue using the same equipment the following week. Claimant declared that if he had turned in the equipment on Fridays, someone else might have rented the equipment over the weekend making it unavailable on the following Monday.

The Carrier submitted receipts from U. S. Rental showing that the dump truck was rented in the Carrier's name by Claimant. The Carrier paid for fuel as well as the rental fee. In the appropriate box, Claimant waived liability insurance which meant that the Carrier was responsible to U.S. Rental if the truck was damaged or stolen.

Claimant conceded that he used the truck for personal tasks at his home over several weekends. In each instance, Claimant insisted that he called the U. S. Rental clerk and asked for the rental to be placed in his name for the weekend. According to Claimant, the clerk declined to do so to avoid filling out paperwork.² Thus, the rental remained in the Carrier's name. Nevertheless, Claimant asserted that he tendered a personal check to U. S. Rental for deposit and collateral on the truck but he could only produce one uncanceled check to corroborate his assertion.

The Manager of U. S. Rental confirmed that the Company gave Claimant gratuitous rentals over several weekends. However, U. S. Rental records show that the Carrier, not Claimant, paid for

¹ The odometer on the dump truck and the hours used recorder on the roller showed that the equipment was not used very much during the three weeks that Claimant rented the equipment. Laborers on Claimant's gang confirmed that, on several days, the dump truck and roller sat idle.

² While Claimant's explanation was somewhat vague, he intimated that it was easier for the clerk to do nothing rather than fill out papers transferring the vehicle to Claimant on Friday evening and then complete more documents to return the lease to the Carrier on Monday.

all fuel charges. At the hearing, Claimant pleaded for an opportunity to reimburse the Carrier for all fuel charges stemming from his use of rental equipment over the weekends.

Finally, on April 1, 1996, another Foreman informed the Manager of Track Maintenance that Claimant had used equipment rented by the Carrier for his personal purposes over the preceding weekend. On April 2, the Manager told Claimant not to use the equipment at home over the next weekend or Claimant would be in trouble. Claimant responded that the Carrier was only charged for five days of rent and so, the weekend was free. Nevertheless, the Manager reiterated his admonition that Claimant should not use rented equipment at home.

The following weekend, Claimant used the dump truck at home and such usage was observed by the Carrier's special agent. The special agent's report to the Manager triggered the charges herein. After the hearing, the Carrier determined that Claimant was guilty of the charge and it dismissed him from service.

The Carrier submitted a substantial amount of circumstantial evidence which weaves a web of guilt around Claimant. Stated differently, the probative evidence of record demonstrates that Claimant engaged in a scheme to deceive the Carrier for his personal benefit. Claimant's conduct was far more serious than Claimant inappropriately accepting a gratuity from his employer's supplier. Rather, Claimant set up a situation so that he would not only have free use of rental equipment over the weekend but, if the equipment suffered damage, the Carrier would be liable. In addition, Claimant knowingly permitted the Carrier to pay the bills for fuel charges.

Initially, Claimant made certain that the dump truck would be available for use over the weekend by renting the vehicle on a weekly instead of a daily basis. While he was not charged with

abusing his discretion to rent equipment or for renting the truck for an excessive amount of time, Claimant would not have gotten free use of the dump truck over the weekend if he had rented the equipment, as needed, on a daily lease. Therefore, if Claimant had strictly conformed to Carrier policy, by turning in leased equipment when it was no longer needed, he would not have had access to the dump truck on the weekends. Thus, Claimant, himself, set in motion the circumstance that insured that he could use the equipment on the weekends.

Next, even if Claimant's assertion that the clerk refused to change the name on the rental agreement from the Carrier to Claimant is credible, the record shows that the Carrier remained liable for any losses or damage to the truck. Claimant produced an uncanceled check to cover only one weekend's use. If the truck had been damaged while Claimant used it on the other weekends, U. S. Rental could have held the Carrier liable for the repairs.³ The Carrier may also have been liable to persons injured due to Claimant's negligent operation of the truck. More importantly, U. S. Rental charged the Carrier for fuel while he used the truck over the weekends. If Claimant had truly transferred the rental from the Carrier to himself, he would have paid for gasoline. Although Claimant offered, during the hearing, to refund the Carrier for the fuel charges, his offer came only after he was caught using Carrier rented equipment for his personal use. Because the Carrier paid for fuel and was responsible for damages to the dump truck, the rented vehicle was tantamount to the Carrier's personal property. Thus, Claimant wrongly converted property, in the rightful possession of the Carrier, for his own purposes.⁴

³ Also, the check was unlikely to cover an accident involving substantial damage.

⁴ Claimant unpersuasively argued that he should be exonerated because the truck belong to U. S. Rental as opposed to the Carrier. Ownership is irrelevant. The lease gave rightful possession exclusively to the Carrier, not Claimant.

Lastly, Claimant used the truck at home during the first weekend in April, 1996, in direct contravention of the Manager's instructions. Twice on April 2, 1996, the Manager warned Claimant against using any rental equipment at home. Claimant flouted these warnings. Claimant boldly thought he was protected merely because the Carrier was not being charged rent. However, by devising the plan to lease the truck on a weekly basis, the Carrier was paying a weekly rental which includes Saturdays and Sundays. Thus, there is some doubt that the truck was truly free. Claimant should have prudently heeded the Manager's warnings. If so, he might have avoided discipline.⁵

In sum, Claimant committed dishonesty, a very serious offense. Therefore, the Carrier was justified in dismissing Claimant from service.

The Organization raised a number of procedural objections to the April 12, 1996 notice and the Carrier's handling of the Rule 20 hearing. This Board carefully perused the record and we find that Claimant had sufficient notice of the charges brought against him and the Carrier did not impair his contractual due process rights. While we will not discuss all of these alleged procedural defects in detail, Claimant's primary concern was that he was unprepared to defend himself because the charges were vague. We disagree. The charges precisely stated that Claimant was accused of using equipment rented in the name of the Carrier for his personal use over a weekend. The notice specified, in great detail, that Claimant had used rented equipment over one weekend in direct contravention to his Supervisor's instructions. Claimant knew that he had been warned on April 2, not to take rental equipment home with him and so, he was fully apprized of the substance of the

⁵ Claimant contends that inasmuch as he made no secret that he was using the equipment at home, he lacked a deceitful intent. However, Claimant's deliberate use of the unnecessary weekly rentals belies this contention. Also, if Claimant's contention were credible, he would have stopped using the truck at home after being warned by the Manager.

charge. Even if Claimant was unprepared to defend himself, the Carrier's Hearing Officer offered Claimant a chance to postpone the hearing so that he could collect additional evidence or call additional witnesses. Claimant declined this offer. Nevertheless, the Carrier recessed the hearing for a couple of hours so that Claimant could search his home for any evidence demonstrating that he rented the truck from U. S. Rental. Due to the recess, Claimant was able to produce one uncanceled check but unfortunately, he could not produce checks for all weekends and he could not produce any evidence that he intended to pay for fuel charges or assume complete responsibility for the vehicle.

In conclusion, Claimant had ample opportunity to bring in exculpatory evidence. He failed to do so and thus, he failed to rebut the Carrier's circumstantial evidence proving that he committed the charged offense.

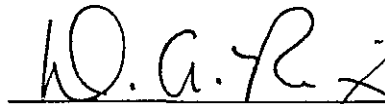
AWARD AND ORDER

Claim denied.

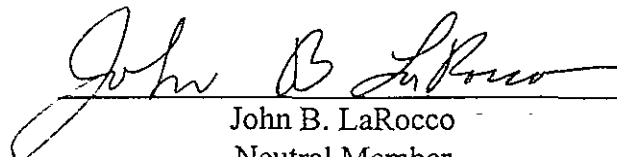
Dated: February 5, 1998



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Employees' Member



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