

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. 75
(former Western Pacific Railroad),)	Award No. 75
)	
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 a Level 5 dismissal to Track Laborer Matthew T. Klink. Said action being excessive, unduly harsh and in abuse of discretion.
2. That the Carrier now reinstate Claimant to his former position with the Carrier with seniority and all other rights restored unimpaired, and with pay for all loss suffered and his record cleared of all charges.
(1031110)

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 June 4, 1996, the Carrier charged Claimant, a Laborer, with insubordination, quarrelsome conduct and being verbally abusive toward his Foreman.

All of the charges arose out of an incident that occurred at about 11:00 p.m. on June 3, 1996.

Claimant, the Foreman and several other employees were working late into the evening due to an emergency on a rail curve at milepost 40 near Tracy, California.¹ It had been a long, hot day which had started at 7:30 a.m. The gang members did not receive a second meal break. Their last meal was 10 hours earlier.

At about 11:00 p.m., while another Laborer was cutting the rail, Claimant held his shovel to catch sparks from the sawing. The Section Foreman instructed Claimant to reposition his shovel to the other side of the track. At the June 10, 1996 hearing, Claimant and the Foreman gave differing renditions of exactly what transpired next.

According to the Foreman, Claimant vigorously objected to the instruction, asserting that he was catching most of the sparks where he was located. The Foreman explained that he wanted Claimant to catch sparks on the other side of the rail because he did not want to start a fire in the nearby dry brush.² Thus, the Foreman repeated the instruction. The Foreman declared that Claimant started yelling about sparks flying everywhere, became abusive and announced that he was leaving

¹ Trains were held until the maintenance of way gang could de-stress the rail.

² The Foreman thought that a fire would not likely occur from sparks hitting the bare ground behind Claimant.

the property.³ The Foreman further related that Claimant pinned him to the truck as he was getting his lunch pail. Claimant also began taunting the Foreman and daring the Foreman to hit Claimant with his flashlight. Claimant then left the property but, he later returned with the Manager of Track Maintenance.

Claimant denied becoming argumentative with the Foreman. Claimant asserted that the Foreman's instruction was wrong because he was in the best position to catch a majority of the sparks.⁴ Claimant further testified that the Foreman started to yell at him when he tried to explain to the Foreman why he (Claimant) should not move to the other side of the track. Claimant then declared that he left the job site because the Foreman physically and verbally assaulted him. Claimant said that the Foreman brushed him with his flashlight although Claimant acknowledged that the Foreman may have accidentally hit him with the flashlight as Claimant reached into the truck for his lunch bucket.

The Laborer who was cutting the rail testified that both Claimant and the Foreman were yelling after the Foreman had repeatedly directed Claimant to move his shovel to the other side of the rail. The Laborer concurred with Claimant that he was getting most of the sparks where he was situated.

The Manager of Track Maintenance testified that when he talked to Claimant after he had left the property, Claimant allegedly admitted "blowing up" at the Foreman. Claimant purportedly told the Manager that he was not going to take it anymore.

³ Claimant never complied with the Foreman's instruction.

⁴ Relying on his experiences in the Navy, Claimant asserted that he knew more about how to prevent fires than the Foreman.

During the hearing, the Carrier introduced evidence that Claimant had been verbally counseled in April and given a written letter of counseling in May about being verbally abusive and disrespectful to his foremen. The Carrier acknowledged that it did not discipline Claimant for either of these prior two events.

Subsequent to the hearing, the Carrier dismissed Claimant from service.

The Carrier presented substantial evidence that Claimant was insubordinate, quarrelsome and verbally abusive toward his Foreman. By his own testimony, Claimant resisted the Foreman's instruction to reposition his shovel to the other side of the rail. Workers, of course, are free to ask their supervisors for clarification of an order or even to question the reasonableness of the order. However, when they do so, they must converse with their superiors calmly and maintain a civilized demeanor. In the meantime, employees must obey the orders. By his own admission, Claimant became angry and started yelling at the Foreman regardless of whether the Foreman shouted back at Claimant. Claimant was clearly upset because he stormed off the work site. He improvidently abandoned his work assignment.

Even if workers sincerely disagree with an order, they still must follow the order, especially when, as here, the Foreman repeated the order. If Claimant disagreed with the order, he should have complied with the instruction and then later, utilized the claim procedure to redress any unreasonableness.⁵

Therefore, Claimant committed insubordination.

The record is replete with evidence that Claimant was verbally abusive to the Foreman. Instead of calmly disagreeing with the Foreman and accepting the order, Claimant started a verbal

⁵ Claimant's contention that he knew more about fire prevention than the Foreman is irrelevant. Even if true, Claimant should have worked now and grieved later.

argument. Claimant was clearly the aggressor. Moreover, it appears as though the Foreman may have accidentally allowed his flashlight to come in contact with Claimant but only because Claimant had pinned the Foreman to the side of the truck as Claimant was reaching for his lunch bucket.

There are some mitigating circumstances surrounding this incident. Claimant had been working for many hours on a hot day. More than 10 hours had elapsed since the last meal break. However, these mitigating circumstances are insufficient to justify a reduction in the discipline given that Claimant had less than six months of service. Moreover, he was aware of how he was to interact with his Foreman. While the Carrier had refrained from disciplining him for the April and May incidents, Claimant was clearly on notice that he had to maintain control over his temper. Given the seriousness of the confrontation that he had with his Foreman on the evening of June 3 as well as his brief length of service, this Board must uphold the disciplinary sanction.

AWARD AND ORDER

Claim denied.

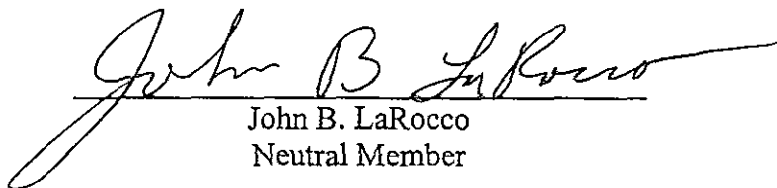
Dated: February 5, 1998



Rick Wehrli
Employees' Member



D. A. Ring
Carrier Member



John B. LaRocco
Neutral Member