

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. 9
COMPANY,)	Award No. 9
)	
Carrier.)	

Hearing Date: March 18, 1986
Hearing Location: Sacramento, California
Date of Award: November 9, 1987

MEMBERS OF THE BOARD

Employes' Member: Mr. C. F. Foose
Carrier Member: Mr. E. R. Meyers
Neutral Member: Mr. John B. LaRocco

STATEMENT OF THE CLAIM

1. That the Carrier violated the provisions of the current Agreement when on December 14, 1984 Track Laborer D. L. Cranor was suspended for a period of thirty (30) days commencing November 17, 1984 through December 16, 1984, said action being unduly harsh, excessive and in abuse of discretion.

2. Claimant's record shall now be cleared of all charges with no reference thereto in the future with compensation for all wage loss suffered.

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.

The Carrier held an investigation on September 19, 1984 to determine if Claimant, a Laborer on Gang No. 8864, violated several safety rules causing an injury to his back while he was handling tie plates at Turlock, California on September 4, 1984. At the investigation, there was a substantial discrepancy between Claimant's testimony and the rendition of events given by the Gang Foreman.

September 4, 1984 was the first work day after the Labor Day weekend. Claimant testified that he told some of his fellow gang members that he had sprained his finger while playing football over the holiday weekend. Evidently, the sprained finger did not prevent Claimant from performing his Laborer duties. Claimant further declared that while he was throwing tie plates on the morning of September 4, he stood up to stretch and felt a sharp pain in his back. To rest his back, Claimant traded tasks with another worker. Instead of throwing tie plates, Claimant aligned the plates. The next day, Claimant again experienced back pain when he picked up a tie plugger. He immediately notified his Foreman that his back hurt and he wanted medical attention. Since the gang was short handed, the Foreman allegedly asked Claimant to complete the rest of the day but to refrain from performing any arduous work. At the end of the day,

the Foreman gave Claimant permission to take September 6 off to seek medical treatment for his back. On September 6, Claimant was examined by a physician at Oroville, California who determined that Claimant was unfit for service because a vertebra had pinched a disc. Claimant completed the appropriate accident report at the Oroville Motor Car Shop noting that he had incurred an on duty injury on September 4, 1984. Claimant contended that he did not report the injury to the Foreman on September 4 because he thought it was a minor back ailment. At the time, Claimant did not think he was seriously injured.

The Foreman's testimony differed substantially from Claimant's declarations. According to the Foreman, he noticed Claimant using the lining bar on September 4 and the Foreman was puzzled as to why Claimant was not throwing plates. Claimant told the Foreman his back hurt. The Foreman suggested that Claimant fill out an accident report. Claimant responded that a report was unnecessary because he had injured his back over the holiday weekend. Another Laborer overheard Claimant tell the Foreman that he must have hurt himself over the weekend. Another Laborer and an Assistant Foreman attested that Claimant complained about a sore back on September 4 but neither witness testified as to whether or not Claimant had sustained an on or off duty injury. The Foreman accepted Claimant's explanation that he suffered an off duty injury and thus did not insist that Claimant fill out an accident report. On September 5, the Foreman put Claimant on light duty. Contrary to Claimant's assertions, the Foreman related that Claimant also worked on

September 6 but not September 7, 1984. As of the date of the investigation, Claimant was still out of service due to his back ailment.

On October 5, 1984, the Carrier suspended Claimant from service for thirty days because he failed to promptly report an on duty personal injury and because he reported an injury which occurred off duty. Claimant served the suspension after he obtained a medical release to resume active duty.

At the onset, the Board finds that the Carrier found Claimant guilty of two contradictory offenses. On the one hand, the Carrier disciplined Claimant for failing to immediately report an on duty personal injury (on September 4, 1984). On the other hand, the Carrier found Claimant guilty of falsely filing a personal injury report because Claimant incurred a back injury when he was off duty and off Carrier property. On the other hand, disciplining Claimant for failing to promptly report his injury presumed that Claimant suffered an on duty injury. If Claimant hurt his back over the Labor Day holiday, Claimant could not be guilty of failing to immediately report an on duty injury. In this case, the Hearing Officer, who resolves conflicts in testimony, should have definitively found that Claimant either injured his back on duty or off duty. The Carrier cannot have it both ways. Assuming the Carrier had determined that Claimant's injury occurred off duty, the Carrier should have disciplined him solely for falsely filing an on duty accident report. If Claimant's injury occurred on duty, the Carrier should have penalized Claimant for failing to immediately

file an accident report. In summary, it was impossible for Claimant to commit both offenses. Perhaps, Claimant was guilty of one offense or the other. However, the Carrier should have determined which one of the two offenses Claimant committed. Since the discipline was premised on the inconsistent finding that Claimant committed both offenses, it would be inappropriate for this Board to affirm the discipline.

Therefore, the Carrier shall make Claimant whole for the time he spent out of service.


AWARD AND ORDER

Claim sustained. The Carrier shall pay Claimant back pay for time lost during the thirty day suspension at the rate of pay in effect when Claimant served the suspension. The Carrier shall expunge the disciplinary mark from Claimant's personal record. The Carrier shall comply with this Award within thirty days of the date stated below.

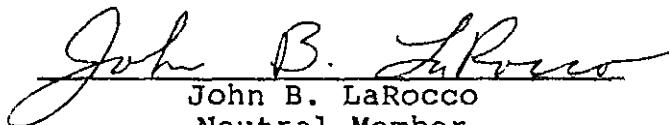
DATED: November 9, 1987



C. F. Foose
Employees' Member



E. R. Meyers
Carrier Member



John B. LaRocco
Neutral Member