

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. 13
COMPANY,	)	Award No. 13
	)	
Carrier.	)	

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

MEMBERS OF THE BOARD

Employees' 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's decision to suspend Bridge & Building Foreman D. L. Davis for a period of forty five (45) days commencing February 27, 1985 through March 28, 1985 was in violation of terms of the current Agreement, unjust and in abuse of discretion.

2. That the Carrier be directed to compensate Claimant for all wage loss suffered during the period of suspension and that all charges be expunged from his record.

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.

Before convening a formal investigation, the Carrier offered Claimant a chance to exercise his right to waive a Rule 20 hearing and accept fifteen demerits (on his personal record) for operating on the main line track without proper protection on December 17, 1984 resulting in a near collision with Train SP RG-3106 Eastbound. Claimant rejected the offer. Thus, the Carrier held an investigation on February 12, 1985 to develop the facts surrounding the December 17, 1984 incident. Following the investigation, the Carrier imposed (on Claimant) a thirty day actual suspension and a fifteen day deferred suspension.

The pertinent facts adduced at the hearing are undisputed. Claimant, a Bridge and Building Foreman, mounted Hi-rail No. 982 on the main line track near Hunter, Nevada at about 9:00 a.m. on December 17, 1984. Transporting his gang, Claimant proceeded eastbound on the main line against the flow of traffic.

As Claimant operated the hi-rail vehicle down the main line, he spotted a train moving on the track towards his vehicle. Simultaneously, the train engineer observed the hi-rail vehicle. Claimant immediately reversed his movement and the engineer brought the train to a stop. Fortunately, Claimant and the engineer avoided a tragic collision. Claimant continued his

reverse movement until he could clear the main line allowing the train to proceed westbound. The Foreman of Gang No. 4317, who was driving on a nearby freeway, observed the incident. Claimant failed to report the close call to the appropriate Carrier officials.

Claimant operated the hi-rail vehicle without having possession of a current train lineup and without complying with proper protection procedures. Claimant disregarded the safety rules because he thought that all trains had been barred from moving down the main line pursuant to a window which was allegedly effective from 5:00 a.m. to 3:00 p.m. The window had been established to permit workers to perform uninterrupted maintenance and repairs on a tunnel. However, the 8:30 a.m. train lineup (which Claimant failed to procure) showed that Train SP RG-3106 Eastbound had been cleared for movement down the main line. Evidently, the authorized main line movement on December 17, 1984 was an exception to the window.

Because of Claimant's failure to report the incident, Carrier officials did not learn of the near accident until a few weeks later. Although Claimant's representative contested the timeliness of the hearing, Rule 20 provides that: "Ordinarily such investigation will be held within ten days after the alleged offense has been committed..." [Emphasis added.] The term "ordinarily" means that as a general proposition the hearing will be conducted within ten days of the date an alleged infraction occurred but the term also implicitly recognizes that there may be some exceptions to the ten day time limit. Therefore, the ten

day limitation period is not a rigid, absolute time constraint. This case falls within the exception since the Carrier had only sketchy, incomplete reports of the incident and could not convene an investigation until it gathered pertinent evidence concerning the December 17, 1984 incident.

Turning to the merits of this case, the Carrier presented substantial evidence that Claimant operated the hi-railer in a careless, almost reckless, fashion. Claimant admitted that he lacked a current train lineup and that he failed to follow proper flagging procedures before occupying the main track. Claimant should not have relied on the existence of a blanket window. Rather, Claimant should have procured a lineup and checked with train dispatchers to verify that the window remained in effect before mounting the vehicle on the track. Furthermore, Claimant admitted using poor judgment. Claimant's only explanation for failing to report the incident was that no harm had occurred. However, Claimant's safety rule violations placed him and his men in great jeopardy and only due to good visibility was a tragedy averted. As a Foreman, Claimant also knew it was his duty to report any irregular or unusual occurrences as well as safety rule violations.

This Board notes the disparity between the discipline assessed following the investigation and the lenient penalty previously offered to Claimant if he had agreed to waive the investigation. When Claimant refused to waive an investigation, the Carrier was not bound to impose the amount of discipline that it offered as a condition to the investigation waiver. The

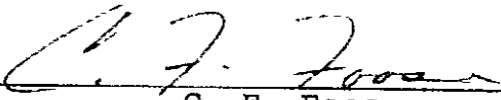
Carrier could increase the quantum of discipline or, on the other hand, reduce the penalty proposed prior to the investigation. However, if the Carrier elects to more severely punish a worker who did not accept lesser discipline as part of a waiver, the Carrier must justify the greater amount of discipline based on the evidence in the record. If the Carrier engages in a pattern of imposing more discipline after a formal investigation in comparison to the amount of discipline offered as a condition to waiving the investigation, the Carrier may effectively chill the employee's contractual right to a fair and impartial investigation. Put differently, an employee should not be penalized simply because he elects to exercise his contractual right to an investigation. On the contrary, the measure of discipline must be premised on the seriousness of an employee's misconduct. Therefore, we must scrutinize the record on a case by case basis, to determine if the Carrier was justified in assessing a quantum of discipline greater than the penalty which would have been imposed if a worker agreed to waive a Rule 20 hearing. In this particular case, we find that the Carrier could impose a greater amount of discipline on Claimant because the facts developed at the investigation showed that his carelessness had the great potential for causing fatalities.

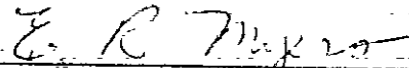
Thus, we must affirm the discipline assessed after the investigation.

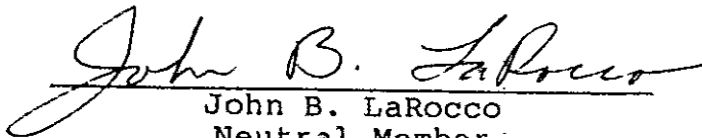
AWARD AND ORDER

Claim denied.

DATED: November 9, 1987


C. F. Foose
Employees' Member


E. R. Meyers
Carrier Member


John B. LaRocco
Neutral Member