

PUBLIC LAW BOARD NO. 3241

In the Matter of:

BROTHERHOOD OF MAINTENANCE
OF WAY EMPLOYES,

Organization,

and

UNION PACIFIC RAILROAD
COMPANY,

Carrier.

)
)
) National Mediation Board
) Administrator
)

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) Case No. 18
) Award No. 18
)
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)

Hearing Date: April 28, 1987
Hearing Location: Sacramento, California
Date of Award: September 28, 1988

MEMBERS OF THE BOARD

Employes' Member: C. F. Foose
Carrier's Member: J. J. Shannon
Neutral Member: John B. LaRocco

STATEMENT OF THE CLAIM

- "1. That the Carrier's decision to dismiss Track Patrolman Mr. G. R. Bodoh was without just and sufficient cause and in violation of the current agreement.
- "2. Claimant will now be placed on his former position with seniority and all other rights restored 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.

On or about February 13, 1984, the Carrier discovered that, two days before, Claimant (a Track Patrolman) had been arrested for allegedly driving while under the influence of alcohol. When he was arrested, Claimant was driving a company vehicle near Quincy, California. As a result, the Carrier charged Claimant with being under the influence of alcohol while on duty and operating a company vehicle.

On February 25, 1984, Claimant waived his right to a Rule 20 investigation and he accepted a one year suspension for his misconduct. Rule 20 of the applicable Western Pacific Agreement allows employees to voluntarily forego a disciplinary investigation provided the disciplinary penalty does not exceed a one year suspension and the employee is afforded an opportunity to consult with his union representative prior to waiving his contractual due process rights.

Thereafter, Claimant successfully completed an alcohol counseling and rehabilitation residency program. Next, he enrolled in the Carrier's Employee Assistance Program. Because Claimant evinced satisfactory progress in the Program, the Carrier's Chief Engineer advised the Organization's General Chairman on August 23,

1984 that Claimant could return to work, on a leniency basis, even though he had not finished serving his one year suspension. During the next six months, both the Organization and Carrier exerted diligent efforts to contact Claimant concerning the reinstatement offer. They were unsuccessful. Furthermore, the record does not contain any evidence that Claimant contacted the Carrier upon the expiration of his one year suspension.

On August 5, 1985, an Employee Assistance Counselor informed the Chief Engineer and the Organization that Claimant had not attended any counseling session during the last ten months. As a result, the Carrier closed its employment file on Claimant which triggered the instant claim.

After the hearing before this Board, we issued a bench decision. We ruled that while the Board took Claimant's request for back pay under consideration, the Carrier should reinstate Claimant to service provided an Employee Assistance Counselor deemed it safe for Claimant to resume working. On May 8, 1987, the Board sent Claimant a certified letter (return receipt requested) informing Claimant of our reinstatement order. In its correspondence, the Board directed Claimant to contact the Carrier's Division Engineer within thirty days from the date he received the letter. We clearly warned Claimant that his failure to contact the designated Carrier officer would be construed as a seniority forfeiture terminating his employment relationship with the Carrier. The receipt shows that Claimant or his spouse

received the certified letter on May 13, 1987. On June 30, 1987, the Carrier advised the Board that Claimant had failed to contact any Carrier officer within the thirty day time period. Thus, Claimant forfeited all his seniority rights. His claim for back pay remains.

This Board afforded Claimant an opportunity to resume working for the Carrier because he had successfully participated in two alcohol rehabilitation programs. Claimant made outstanding progress in these programs, and he even became an officer in a local Alcoholics Anonymous group. Thus, although Claimant inexplicably failed to take advantage of the Chief Engineer's August 23, 1984 early reinstatement offer, we found that Claimant deserved one more opportunity to return to service. For whatever reason, Claimant, however, implicitly declined to avail himself of this final opportunity.

With regard to Claimant's request for back wages, there is no evidence in the record that the Carrier coerced Claimant into waiving his Rule 20 right to an investigation. Claimant also surrendered his right to consult with his Union representative since he signed a February 25, 1985 letter acknowledging that he relinquished all his rights to representation in his disciplinary case. Therefore, this Board upholds the one year suspension.

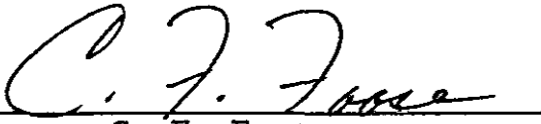
Furthermore, Claimant is not entitled to back pay for the period after the one year suspension expired. The Carrier reasonably offered Claimant a chance to return to service after

serving a little more than fifty percent of the disciplinary penalty. Claimant was clearly dilatory in asserting his right to resume service by not accepting the early reinstatement offer and by failing to contact the Carrier even after the end of the suspension. In summary, Claimant failed to mitigate his damages.

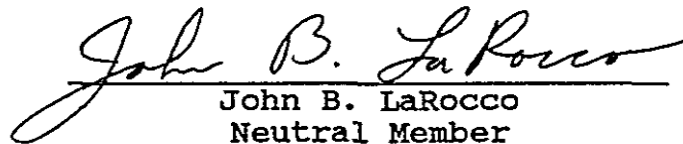
AWARD AND ORDER

The Claim is sustained in part and denied in part. Claimant's request for back pay is denied. The claim for reinstatement is sustained pursuant to this Board's May 8, 1987 letter. The Board finds that the Carrier has fully complied with this Award. Claimant forfeited his seniority with the Carrier effective June 30, 1987.

Dated: September 28, 1988


C. F. Foose
Employees' Member


J. J. Shannon
Carrier's Member


John B. LaRocco
Neutral Member