

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. 2
COMPANY,)	Award No. 2
)	
Carrier.)	

Date of Hearing: March 7, 1985
Place of Hearing: Sacramento, California
Date of Award: January 8, 1986

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

The dismissal of Crane Operator T. J. Watson on February 6, 1984, was without just and sufficient cause, excessive, unduly harsh, an abuse of discretion, and in violation of the Agreement.

That the Carrier be required to restore Mr. T. J. Watson to service with pay for all time lost and expunge the charge 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.

I. BACKGROUND AND SUMMARY OF THE FACTS

Claimant entered service with the former Union Pacific Railroad on March 18, 1977. He was promoted from a Section Laborer to a Roadway Equipment Operator in 1980. In early 1983, Claimant was working as a Laborer and periodically, as a Crane Operator on the Carrier's Nebraska division. On July 13, 1983, Claimant was furloughed, but he was subsequently recalled in April 1983 to a System Gang in Idaho. The gang began performing service on the former Western Pacific property. Unable to hold a position on the Union Pacific, Claimant established a new seniority date and assumed a position subject to the Western Pacific Schedule Agreement on or about September 15, 1983. Claimant retained his Union Pacific seniority.

Pursuant to notice dated December 9, 1983, the Carrier charged Claimant with the unauthorized possession of company property at his personal residence in North Loup, Nebraska. After two postponements, the investigation was convened on January 23, 1984. Prior to convening the investigation on January 23, 1984, the Carrier charged Claimant with the identical offense under the schedule rules of the Union Pacific Agreement.

At the investigation, the Carrier's Special Agent testified, in great detail, concerning an investigation that he

investigation. Claimant's wife did not personally appear at the hearing.

Claimant learned on January 13, 1983 that his outfit car was to be condemned. Before it was scrapped, he unloaded equipment and supplies from the car and transported it to his personal residence for storage. Claimant emphatically testified that he intended to use the items to equip his new outfit car when he returned to service. He acknowledged, however, that he did not have written authorization to possess the items at his home. Instead, he said it was a common practice for workers to keep company property at their homes under similar circumstances.

Following the investigation, the Carrier discharged Claimant from service.

II. THE POSITIONS OF THE PARTIES

The Carrier contends that Claimant not only committed larceny but he also possessed company property without permission. The Special Agent found the Carrier's property at Claimant's personal residence. Claimant's wife confirmed that her husband had committed numerous thefts. No supervisor had given Claimant authority to take the contents of his outfit car home when he was furloughed in January, 1983. Moreover, many of the Carrier's materials confiscated from Claimant's personal residence are not usually found on an outfit car. Claimant failed to return the property or to contact the Carrier after he was recalled to service in Idaho. Claimant was not tried twice for the same offense. The investigation held on January 23, 1984

conducted at North Loup. In early November, 1983, while Claimant was working in California, Claimant's estranged wife informed the Carrier that some of its personal property was at her residence. On November 11, 1983, the Special Agent, accompanied by the local sheriff, searched Claimant's residence and compiled an itemized inventory which, according to Claimant's wife, belonged to the Carrier. The inventory included two propane tanks, eight washbasins, motor oil, various tools, a hard hat, metal fence and fence posts, electrical cable, miscellaneous paper products, and other items which are commonly found in outfit cars and at rail yards. The estimated value of the property on the list was \$800. The Carrier's insignia appeared on some of the materials discovered at Claimant's home.

In a November 11, 1983 statement, Claimant's spouse related that Claimant stole the items from the Carrier. On November 14, 1983, she reiterated her accusations against her husband when the Special Agent electronically recorded her answers to his questions. Claimant's wife declared that Claimant took property from the Carrier over a long period of time prior to January 23, 1983. He used the diesel fuel in his personal pickup truck and installed the chemical toilet in his camper. The wife voluntarily gave the written statement and the oral responses to the Special Agent's questions. Both the November 11, 1983 written statement and the transcript of the November 14, 1983 recording were introduced into the record of the January 23, 1984

was only to determine if he should remain in the employ of the Carrier under the auspices of the Western Pacific Agreement.

At the onset, the Organization argues that the Carrier failed to provide Claimant with a fair and impartial Rule 20 hearing because: 1.) Claimant's wife did not attend the investigation and; 2.) Claimant was place in double jeopardy. The Carrier improperly relied on the statements of an absent witness to prove the charges against Claimant. The Organization was deprived of its right to cross-examine Claimant's wife on the substance of her statements. The Carrier had two alternatives. First, it could have arranged for Claimant's wife to appear. Second, if it could not mandate her attendance at the hearing, then the Carrier should have disregarded the written statements. Claimant was not only unable to confront his accuser but also the Carrier intended to discipline him again for the same alleged misconduct. By scheduling another investigation under the Union Pacific Agreement, the Carrier improperly set up a procedure to dismiss Claimant twice for a single offense. Double punishment constituted double jeopardy. Turning to the merits, the Organization argues that the narrative provided by Claimant's wife has no probative value inasmuch as she had a motive for harming Claimant. Claimant and his wife were separated and she was obviously vindictive toward Claimant. Claimant explained why he was storing the Carrier's property at his residence.

III. DISCUSSION

We must first address the Organization's procedural arguments. Under the peculiar circumstances of this case, Claimant was not placed in double jeopardy. The January 23, 1984 hearing was restricted to determining his employment status under the Western Pacific Agreement. Claimant was not tried twice under Rule 20 (of the Western Pacific Agreement) for the same alleged offense. Hearings under Rule 20 are not conducted like a trial in a court of law. Written statements of absent witness are admissible at the hearing. However, since the Organization was deprived of cross-examining a witness, the officer assessing the discipline should have given less weight to the statement and transcription. In sum, the absence of Claimant's wife reduced the probative value of her statements but did not render her statements inadmissible.

After carefully evaluating the merits of this case, we conclude that the Carrier proffered substantial evidence proving that Claimant had unauthorized possession of company property at his personal residence. Even if we discount the serious allegations leveled against Claimant by his spouse, the Special Agent observed the Carrier's personal property at Claimant's residence. Some of the items were imprinted with the Carrier's identifying marks. Claimant had converted much of the property to his personal use which demonstrates his intent to permanently deprive the Carrier of its property. The length of time which Claimant held the property belies his assertion that he was only temporarily storing the property until he was assigned to a new

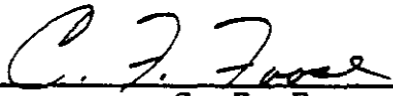
outfit car. Moreover, at the hearing, Claimant conceded that he lacked specific permission to possess the property. It was not necessary for the Carrier to show that Claimant actually took the property. Discovery of stolen or misappropriated goods at Claimant's residence raises the presumption that the property was wrongfully taken.

The Carrier trusts its employees to safeguard its valuable property. In this instance, Claimant breached the trust the Carrier placed in him. Dishonesty is a grave offense warranting severe discipline. Based on his short tenure under the Western Pacific Agreement, we must affirm the penalty.

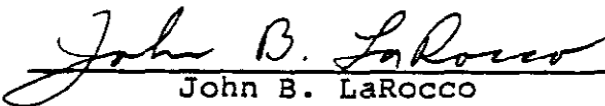
AWARD AND ORDER

Claim denied.

DATED: January 8, 1986


C. F. Foose
Employees' Member


E. R. Meyers
Carrier Member


John B. LaRocco
Neutral Member