

PUBLIC LAW BOARD NO. 3241

In the Matter of:)	National Mediation Board
)	Administrator
BROTHERHOOD OF MAINTENANCE OF)	
WAY EMPLOYES,)	
)	
Organization,)	
)	
and)	Case No. 33
)	Award No. 33
UNION PACIFIC RAILROAD)	
COMPANY,)	
)	
Carrier.)	
)	

Hearing Date: January 26, 1989
Hearing Location: Sacramento, California
Date of Award: December 13, 1989

MEMBERS OF THE COMMITTEE

Employees' Member: C. F. Foose
Carrier Member: L. E. Smith
Neutral Member: John B. LaRocco

ORGANIZATION'S STATEMENT OF THE CLAIM

1. That the Carrier violated the current Agreement when it dismissed Crane Operator C. F. Conn. Said action being excessive, unduly harsh and in abuse of discretion.
2. That the Carrier reinstate Claimant to his former Carrier position with seniority and all other rights restored unimpaired with pay for all loss of earnings suffered, and his record cleared of all charges.

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 charged Claimant, a Crane Operator with more than nineteen years of service, with misappropriation of Carrier funds. After an investigation held on May 12, 1988, the Carrier dismissed Claimant from service.

At the investigation, a Carrier Special Agent related the results of the investigation he conducted into Claimant's alleged theft. On Sunday, April 17, 1988, Claimant purchased some air, fuel and oil filters from Oroville Auto Supply. He paid for the items by billing the Carrier's account. A few days after the transaction, the auto supply store manager contacted the Carrier's Work Equipment Supervisor regarding a discrepancy between the items Claimant actually purchased and the items listed on the sales receipt. The store manager told both the Work Equipment Supervisor and the Special Agent that a store clerk had falsified the receipt. The store clerk had prepared an invoice listing filters different from the filters Claimant bought. The store manager realized the discrepancy because, for inventory purposes, the manager had to enter into the computer, which maintained the store's inventory, the actual filters purchased by Claimant. Since the items on the receipt were different from the items actually purchased, the store manager

thought something was wrong and so he contacted the Carrier. The Oroville Auto Supply documents tendered at the investigation by the Special Agent show that Claimant actually purchased filters for a 6.9 liter Ford diesel engine. The filters could not be installed on a 471 Detroit engine (the motor in Claimant's crane).

Claimant contradicted the store manager's rendition (given to the Special Agent) of the transaction. Most notably, Claimant specifically denied purchasing filters other than those fitting his crane. Claimant related, and the Work Equipment Supervisor confirmed, that Claimant had permission to purchase filters for his crane at Oroville Auto Supply. Claimant owned a 6.9 liter Ford diesel pick-up truck. He thought about purchasing a filter for his truck on the day in question. Claimant speculated that the store clerk was confused concerning what products he actually bought. Claimant raised the possibility that the clerk wrote the wrong items on the invoice.

Prior to the investigation, the Special Agent accused Claimant of embezzlement. When confronted with the accusation, Claimant told the Special Agent that the filters were in the crane. On the day of the investigation, Claimant stated that, except for two filters (which he had installed in the crane), the filters were in the back of his pick-up truck. No check was made to determine what type of filters and how many filters, if any, were in Claimant's pick-up truck on the day of the investigation.

The Organization vigorously objected to the fairness of the hearing, contending that Claimant's dismissal was premised solely

on hearsay and double hearsay evidence. The Organization argued that Claimant was prejudiced because neither the store manager nor his clerk appeared at the investigation. Thus, it was impossible for Claimant's representative to cross-examine them about the statements they had given to the Special Agent. The Organization correctly labels the Special Agent's investigation as entirely hearsay. However, a Rule 20 investigation is not conducted like a criminal trial in a court of law. In disciplinary investigations, hearsay evidence is routinely admissible although the deciding official must accord less weight to hearsay evidence than to direct, empirical evidence, that is, testimony by witnesses who personally observed or have personal knowledge of an incident. While most, if not all, of the evidence against Claimant is circumstantial, such evidence can be as reliable as direct evidence. Put simply, there is nothing in the applicable Agreement that prevents the Carrier from basing its decisions to discipline employees on hearsay and circumstantial evidence.

The record contains substantial evidence proving that Claimant attempted to purchase items for his personal use with Carrier funds. Although hearsay, the store manager's statements to the Special Agent were inherently credible. It is highly unlikely that the store manager would have contacted a Carrier official unless there truly had been a discrepancy between the receipt and the product sold to Claimant. The store manager knew something was amiss and he did not want to be implicated in a fraud, involving a forged document, to extract money from the

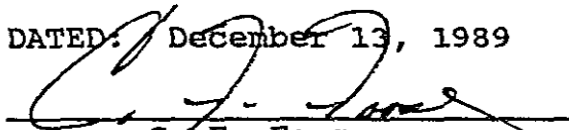
Carrier. The record contains the store clerk's handwritten notes of the items Claimant really purchased from Oroville Auto Supply. These items do not correspond to the formal invoice. Moreover, Claimant could not tell the Special Agent where the filters were located when the Special Agent first confronted Claimant. Claimant may have procured filters for his crane from another source prior to the investigation. Thus, it would be only marginally relevant to determine the type of filters, if any, in Claimant's truck on the day of the investigation. Finally, Claimant owned a vehicle that used exactly the same filters which Oroville Auto Supply records show that Claimant purchased. In summary, the web of circumstantial evidence, including the auto store records, constituted sufficient proof that Claimant committed the charged offense.

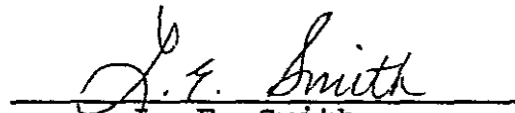
Dishonesty is a serious offense. Claimant violated the trust that the Carrier placed in him to properly expend Carrier funds. However, discipline should not only be punitive but also rehabilitative. We note Claimant has one prior blemish on his work record but he has otherwise been an outstanding employee for almost twenty years. Based on his lengthy service, we will reduce the discipline to the time Claimant has spent out of service. The long suspension should impress upon Claimant that he has a duty to honestly serve the Carrier. Therefore, the Carrier shall reinstate Claimant to service with his seniority unimpaired but without compensation for time lost.

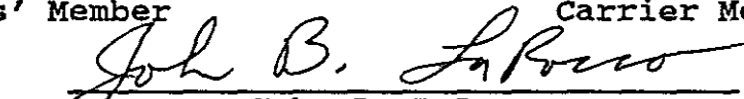
AWARD AND ORDER

Claim sustained but only to the extent consistent with our Opinion. The Carrier shall reinstate Claimant to service with his seniority unimpaired but without pay for time lost. If it has not already done so, the Carrier shall comply with this decision within thirty days of the date stated below.

DATED: December 13, 1989


C. F. Foose
Employees' Member


L. E. Smith
Carrier Member


John B. LaRocco
Neutral Member