

PUBLIC LAW BOARD NO. 3241

In the Matter of: ) National Mediation Board  
 ) Administrator  
BROTHERHOOD OF MAINTENANCE OF )  
WAY EMPLOYEES, )  
 )  
Organization, )  
and )  
 )  
UNION PACIFIC RAILROAD ) Case No. 61  
COMPANY, ) Award No. 61  
 )  
Carrier. )

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Hearing Date: May 7, 1996  
Hearing Location: Sacramento, California  
Date of Award: July 22, 1996

MEMBERS OF THE BOARD

Employes' Member: C. F. Foose  
Carrier Member: D. A. Ring  
Neutral Member: John B. LaRocco

ORGANIZATION'S STATEMENT OF THE CLAIM

1. That the Carrier violated the provisions of the current Agreement when it dismissed Track Laborer G. L. Cayaditto without first according Claimant a fair and impartial investigation. Said action being excessive, unduly harsh and in abuse of discretion.
2. That the Carrier now reinstate Claimant to his former Carrier position with seniority and all other rights restored unimpaired, with pay for all loss 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.

By registered letter dated, January 13, 1994, the Carrier notified Claimant that it was convening an investigation to determine if he was absent without proper authority for five days, committed insubordination and failed to timely report an on duty personal injury. The investigation was scheduled to begin at 10:00 a.m. on January 25, 1994. Approximately 30 minutes before the start of the investigation, Claimant contacted his Union representative and stated that he was a five-hour drive from the investigation site. Since Claimant wanted to attend the investigation, the Hearing Officer delayed the hearing for five and one-half hours. At 3:30 p.m., Claimant still had not arrived and had not further contacted the Carrier or his representative. As a result, the Hearing Officer decided to hold the investigation with Claimant *in absentia*.

Since Claimant did not attend the investigation, the testimonies of the General Track Foreman and the System General Foreman were uncontested.

The Assistant General Foreman explained that the members of Gang 9067, including Claimant, decided to take two weeks off during the Christmas and New Year's holidays. The gang members were directed to report to Oroville, California, on January 4, 1994. Claimant did not appear for work. On January 6, Claimant contacted the Carrier and claimed that he could not work due to a sore back. With the General Track Foreman listening on the speakerphone, the System General Foreman spoke with Claimant on January 8. Claimant stated that his back had bothered him since he injured it while working during the previous August. Claimant

conceded that he did not report the personal injury. The System General Foreman specifically instructed Claimant to report to work on January 10. The System General Foreman made it clear that he was issuing an order and that Claimant's failure to comply would constitute insubordination. He assured Claimant that if he reported to duty on January 10 and his back still hurt, the Carrier would take him to a medical practitioner. Claimant responded that he would like to resign from service for about six months. The General Track Foreman corroborated the System General Foreman's rendition of the January 8 telephone conversation.

Claimant did not report to work with the gang on January 10, 1994. A few days later, Claimant called the Carrier to say that he was still having back trouble and was being treated by a chiropractor. Nevertheless, the Carrier sent the January 13, 1994 notice charging Claimant with three separate offenses.

On January 17, 1994, Claimant attempted to report to work but he was withheld from service pursuant to the January 13 notice. On January 17, Claimant filled out a personal injury report alleging that he hurt his back from repeated bending and lifting sometime between August and December, 1993. Claimant also submitted to the System General Foreman a medical note stating that his back had been examined on January 11, 1994. The form did not state when, if ever, Claimant could return to work.<sup>1</sup>

Following the investigation, the Carrier dismissed Claimant from service.

The Carrier proffered substantial evidence that Claimant failed to promptly report an alleged on duty personal injury. By his own admission, Claimant purportedly suffered a back

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<sup>1</sup> On another copy of the same medical form, "January 13" was placed in the blank for the return to work date. The record does not disclose the genesis of the second copy of the form. Suffice it to state, on the form Claimant furnished the System General Foreman, the return to work date was blank.

injury sometime in the summer or fall of 1993. He did not verbally report the back injury to his supervisors until January 8, 1994, and he did not complete the required personal injury report until January 17, 1994.

Employees must report a personal injury as soon as they are physically able so that the Carrier may investigate the circumstances of the injury, correct any hazardous condition and, most important, make certain that the employee receives appropriate medical treatment. If Claimant incurred a back injury in August, 1993, Claimant may very well have aggravated the injury by continuing to work. Also, by waiting so long to report the injury, it is difficult to verify the injury and the injured worker may not recall exactly how the injury occurred. In this case, Claimant was unable to pinpoint the day he injured his back. Thus, a delayed injury report is a less accurate report.

Claimant was also guilty of committing insubordination. The System General Foreman unequivocally ordered Claimant to report to the gang on January 10, 1994. Even if Claimant's back was still painful, Claimant should have complied with the order since the System General Foreman assured Claimant that he would get medical treatment if necessary. Claimant did not come forward with any evidence showing that his physical condition prevented him from traveling to Oroville. Also, if Claimant thought that the order was improper, he should have obeyed the order and then filed a claim to redress any problem.

Lastly, Claimant was absent without proper authority on January 4 and 5, plus the period subsequent to January 10, 1994. Claimant knew that he was to return to work following the holiday hiatus on January 4. Claimant failed to contact either the General Track Foreman or the System General Foreman until two days later, on January 6.

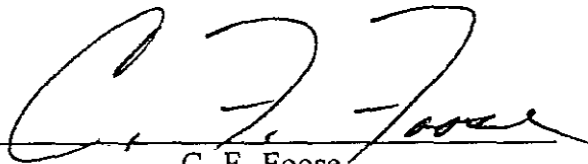
Even if the System General Foreman implicitly excused him from work from January 6 to January 10, Claimant engaged in an unauthorized absence from January 10 to January 17 because the System General Foreman unequivocally ordered Claimant to return to work on January 10.

Claimant committed three serious infractions that, taken together, are ample justification for upholding his dismissal. Perhaps, when Claimant expressed his desire to resign from service, Claimant truly expressed how he felt about his employment relationship.

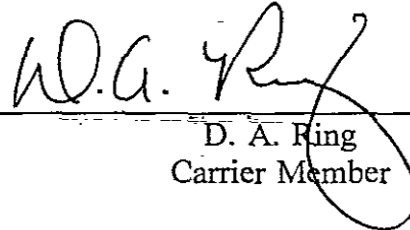
**AWARD AND ORDER**

Claim denied.

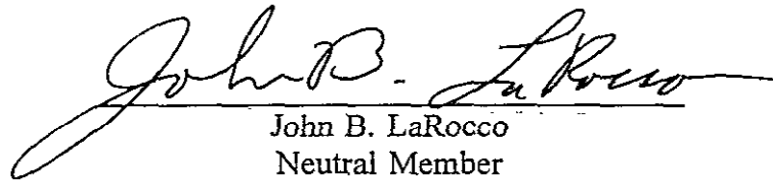
Dated: July 22, 1996



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Employees' Member



D. A. Ring  
Carrier Member



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