

Public Law Board No. 4747

Claimant - J. J. Williams

Award No. 1

Case No. 1

PARTIES
TO
DISPUTE

Brotherhood of Maintenance of Way Employees
and
Union Pacific Railroad

STATEMENT
OF CLAIM

The dismissal assessed Bridge Welder J. J. Williams for alleged violation of various company rules as indicated in Mr. Tholen's letter of July 24, 1989 is arbitrary, capricious and unwarranted.

The claimant's record shall be cleared of the discipline referred to in Part (1) and he shall be returned to service and compensated for all time lost.

FINDINGS

Upon reviewing the record, as submitted, the Board finds that the Parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended, and that this Special Board of Adjustment is duly constituted and has jurisdiction of the Parties and the subject matter; with this arbitrator being sole signatory.

The Claimant was advised by letter dated June 19, 1989, to report to the Fort Sidney Motel in Sidney, Nebraska at 10:00 a.m. on Friday, July 7, 1989 for the purpose of an investigation into the charges that he lit a torch using a match on June 7, 1989 despite being directed not to do so and he was

insubordinate on June 9, 1989 when he failed to follow instructions issued by his Foreman, R. S. Lamb. He also was charged with operating equipment in an unsafe manner on June 14, 1989.

During the investigation the following facts were presented. On June 7, 1989, the Claimant was to cut some steel shims. He misplaced his striker, but advised the Foreman that he did have a match with which to light the torch. The Foreman told him not to use the match because it would be unsafe. He further indicated he would find a striker for the Claimant. While the Foreman went to secure a striker, the Claimant managed to light the torch. Although no one observed him lighting the torch, he indicated to the Foreman that he used a match.

During a safety meeting on June 9, 1989, the Claimant became irritated with the Foreman. According to the testimony, when he was asked if he had anything to say, he called the Foreman a prick, not once, but twice.

On June 14, 1989, the Foreman walked over to a work site to speak with Employee, McIntosh. During his discussion, he watched the Claimant operating the boom. In his opinion, the Claimant was swinging the ball of the boom dangerously close to a co-worker. He ordered the Claimant to cease the operation of the equipment because he was operating it in a dangerous manner. The Claimant complied.

Following these incidents, the Claimant received the charge letter and the investigation was conducted. The Carrier reviewed the evidence presented at the hearing and determined

the Claimant was guilty of the charges. As a result, he was dismissed from service on July 24, 1989.

Under all of the circumstances there is not one of the incidents for which the Claimant is charged which would warrant discharge. And while the collective actions may have been sufficient to support such discipline, there are several mitigating factors in this case. For one thing, the evidence suggests that at no time following these incidents did the Foreman ever counsel the Claimant and indicate to him his actions were going to be made a part of his record which could lead to disciplinary actions. For instance, on June 7, 1989, when the Foreman found out the Claimant used a match to light the torch, he said to the Claimant, "I told you not to do it. Don't do it again. If the Foreman believed the Claimant's behavior was serious enough to warrant significant discipline, he should have made some attempt to counsel the Claimant at the time. In fact, the Foreman wasn't even sure at the time of the hearing whether lighting a torch with a match was a violation of any rule. While that doesn't excuse the Claimant's failure to follow the directive of the Foreman, it does show confusion as to whether such a rule exists.

In the second incident, the Claimant, who appeared to the Foreman to be agitated during a safety meeting, was asked if he had anything to say. At that time he erupted and during his tirade called the Foreman a prick. It is difficult to say whether the Claimant would have said anything to the Foreman if he had not been invited to respond. However, it appears the

conversation between the two men was more or less private. The only witness to the incident heard nothing until the Claimant was asked to repeat what he had said. And while the Claimant's actions in this case are inexcusable, the Board believes it was incumbent upon the Foreman to indicate to the Claimant at the time, that he considered his behavior abusive and unacceptable. And he should have done this before asking him to repeat what he had said for the benefit of a witness. While abusive language towards a supervisor generally warrants discharge, here, it is difficult to overlook the part the Foreman played in the exchange. Furthermore, the testimony shows that the Claimant commenced his actual work when told to do so. There is no reason to believe he would not have done so from the start.

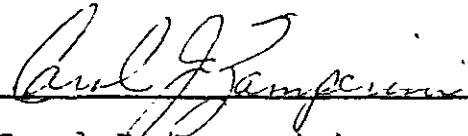
As to the last offense on June 14, it appears to this Board that once again, the Foreman will have to bear some of the blame. The Foreman should have conducted his conversation with McIntosh in an area away from the immediate work site. Absent that, he should have made sure the equipment ceased operating before he put the ground person in the position of having his back to the operating equipment. Beyond that there is simply not enough corroborating evidence to prove the Claimant was actually operating the equipment in an unsafe manner. Even the man who may have been affected most, McIntosh, who was right there, could not testify for certain the Claimant was operating the equipment in a dangerous manner. Plus the testimony of McIntosh is less than clear concerning whether or not the team had completed its work or were right in the middle of it.

It is clear to this Board, for whatever reasons, the Foreman and the Claimant do not get along. As is often the case, it is difficult to get a clear picture of the problems experienced between the two men. It would be wise for the Company and the Union, if at all possible, to look at the possibility of arranging for the Claimant to work under a different Foreman. However, if the Claimant is having a problem with the Foreman which he believes to be unfair treatment, it is incumbent upon him to raise the issue with his Union and/or with the appropriate authorities. He cannot allow the matter to fester or use it as an excuse to function on the fringe of being an acceptable employee. He must recognize he has a responsibility to control his demeanor and to follow instructions explicitly, unless doing so would be dangerous to him or others. On the other hand, it is important for the Foreman to counsel his workers in a timely manner. He cannot allow what he considers the misdeeds of his employees to accumulate without advising them of what he considers unacceptable behavior and without forewarning them of the possible consequences.

The Employee's record indicates he was disciplined for another violation which occurred subsequent to the events at issue here. This Board has not considered those allegations since they were not before it.

AWARD

The Claimant's discharge is to be converted to a suspension. He is to be reinstated conditionally and without backpay. If his behavior warrants discipline in the future, he will be subject to immediate discharge.

A handwritten signature in cursive script, appearing to read "Carol J. Zamperini", is written over a horizontal line.

Carol J. Zamperini
Neutral

Submitted:

November 28, 1989
Denver, Colorado