

SPECIAL ADJUSTMENT BOARD NO. 947

Claimant - Alvaro M. Mendez
Award No. 104
Case No. 104

PARTIES
TO
DISPUTE

Brotherhood of Maintenance of Way Employes
and
Southern Pacific Transportation Company (Western
Lines)

STATEMENT
OF CLAIM

That the Carrier's decision to assess Claimant forty-five (45) demerits was excessive, unduly harsh and in abuse of discretion, and in violation of the terms and provisions of the current Collective Bargaining Agreement.

That because of the Carrier's failure to prove and support the charges by introduction of substantial bona fide evidence, that Carrier now be required to compensate Claimant for any and all loss of earnings suffered, and that the charges be removed from his record.

FINDINGS

Upon reviewing the record, as submitted, I find that the Parties herein are Carrier and Employes 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.

A. M. Mendez was notified by letter July 14, 1989, that he was to be present for a formal investigation on July 18, 1989. The purpose of the hearing was to determine whether he had violated Rules 963 and 5031 of the Rules and Regulations for the

governing of the Maintenance of Way and Structures, when the Spike Puller he was operating, July 6, 1989, ran into a Spike Puller which had stopped in front of him on the track. The Rules the Claimant allegedly violated read as follows:

Rule 963: TRACK CAR SPEED:

Track cars must be operated at a safe speed, taking into account track condition, visibility and all other conditions which may affect operation of the vehicle. . . .

Track cars must be operated so that they can stop within one half their range of vision.

Rule 5031: Employes handling or operating moving equipment must be prepared to stop short of persons or objects.

After reviewing the transcript from the investigation, the Carrier assessed the Claimant's record forty-five (45) demerits.

On the morning in question, the Tie Gang on which the Claimant was working, waited in a siding about four miles from the work site until they were able to clear the track and begin their descent to the work area. There were nineteen (19) machines in their gang headed by two Spike Pullers, the second one driven by the Claimant.

Within a short time of arriving at the work location, the Foreman, who was riding on the lead Spike Puller, heard the Claimant yelling "No brakes, no brakes" immediately before the Claimant's machine collided with the first Spike Puller. While the three occupants were "shook-up", none was seriously injured. There was only minor damage to the two machines.

When the Company checked the Spike Puller driven by the Claimant, they found everything in working order. However, it

was obvious the machine took longer to stop once the brakes were applied than other Spike Pullers.

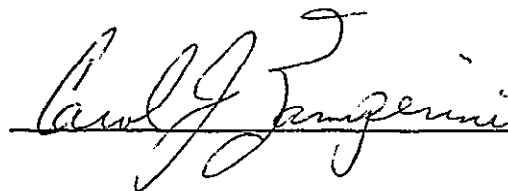
There are several facts which favor the Claimant in this case. For one thing, he was not totally aware of the exact location of the work site and was not given any signals when the machine in front of him stopped. In addition, he has a lengthy tenure and an excellent record, not counting personal injury incidents. It is obvious he is a good worker and has been a good employee. Finally, according to unrefuted testimony, the Claimant had reported a malfunction in the brakes of the Spike Puller to the appropriate mechanic, but apparently each time the machine was tested it seemed all right.

Presumably, one could argue that the Claimant should have been more alert to the possibility of the brakes not working properly. It could also be argued that the Claimant should have attempted to slow down sooner, especially since he could not see very far in front of him. Both of these positions have some merit. But what cannot be lost in the examination of this case, is the fact that accidents can often be blamed merely on equipment failure. It is not always possible to anticipate problems. In this case, the Claimant deserves a benefit of a doubt, especially since the machine proved to require an abnormal stopping distance when tested after the accident. It is also important to note the damage was minimal. This would certainly not support an argument that the Claimant was being negligent or driving hazardously. If he had been, there most probably would have been greater damage to the two machines.

When these facts are reviewed in the light of twenty-eight (28) years of excellent service and in view of the purpose of progressive discipline, the Board believes the Carrier and Claimant are better served by merely counseling the Claimant as to being more alert in the future. This is not to say, there are not times when issuing forty-five (45) demerits is reasonable when accidents of this nature occur. But, in this case, the Claimant's record convinces the Board that he will respond positively to counseling. As further support of this position, it should be noted that in his entire career with the Company, the Claimant has only been counseled once. That was in 1976. The discussion at that time concerned personal injuries. Since then, he has had only one recorded injury and that was in 1981.

AWARD

The forty-five (45) demerits are to be removed from the Claimant's record. The Carrier is free to counsel the Claimant relative to the accident at issue in this case and make that a part of his record. He is to be reimbursed for any wages and/or benefits lost as a result of the issuance of these demerits, if there were any such losses.

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

Carol J. Zamperini
Neutral

Submitted:
March 29, 1990
Denver, Colorado