

SPECIAL BOARD OF ADJUSTMENT NO. 947

Case No. 136  
Award No. 136

Claimant: David L. Gillings

PARTIES            Brotherhood of Maintenance of Way Employees  
TO                                 and  
DISPUTE           Southern Pacific Transportation Company

STATEMENT  
OF CLAIM

1. That the Carrier's decision to suspend Claimant David L. Gillings for a period of sixty (60) calendar days was excessive, unduly harsh and in abuse of discretion and in violation of the terms and provisions of the Collective Bargaining Agreement.
2. 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 reinstate and 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 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.

On August 24, 1992, the Carrier notified the Claimant to be present at the Office of the District Engineer, 9499 Atkinson Street, Roseville, California (Conference Car), at 9:00 a.m., for a formal investigation. The purpose of the hearing was to determine whether the Claimant had violated the rules cited below on August 19, 1992, when the TKO Tie Insertor Remover, he was operating ran into two Spike Pullers at Norden, California near MP 192.1.

The rules allegedly violated are:

- Rule 2.13.3      Equipment shall not be operated in a manner to endanger life, limb or property. No equipment shall be set in motion until it is known that the way is clear.
- Rule 2.13.32     Track machines must be operated at a safe speed at all times, subject to conditions, especially on grades, both while working and while running light.
- Rule 2.13.34     Operators of track machines, roadway machines or equipment are charged with the responsibility of knowing that their machines or equipment are in safe operative condition before starting, and must assure themselves that proper protection is being afforded their operations.

The hearing was postponed until September 2, 1992.

The Carrier reviewed the evidence presented at the hearing and decided it was sufficient to find the Claimant guilty of the rules violations. By letter dated September 16, 1992, the Company suspended the Claimant for sixty (60) calendar days, commencing 12:01 a.m., September 17, 1992 through 11:59 p.m., November 15, 1992. On October 13, 1992, the Carrier notified the Claimant that the suspension was reduced to thirty-two (32) days, concluding at 11:59 p.m. on Sunday, October 18, 1992.

On the morning of August 19, 1992, Rail Gang No. 5 was scheduled to do track repair work on the No. 1 main track. They were to wait in the clear on the turn table lead at Norden, California at MP 192.10, and then, follow Rail Gang No. 1 onto the main track. After the Rail Gang No. 1 began moving in an easterly direction on the main track, two of the operators from Rail Gang No. 5 moved their Spike Pullers into the spur. Two or three minutes later, the Claimant moved his machine, the T.K.O. tie inserter and remover, coupled to a tie handler, toward the main track. He failed to see the spike pullers in time and ran into them. One spike puller operator had jumped from his machine, but the other did not foresee the collision and suffered a back injury.

## DECISION

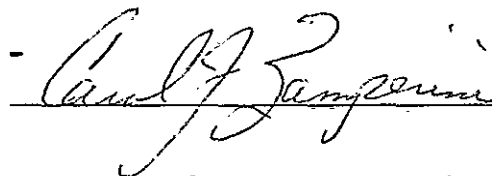
There are two things, in particular, which make the Claimant's position untenable. First of all, the two Spike Pullers of Tie Gang No. 5 had proceeded through the spur, without incident, and were waiting to enter the main track once it was clear. Secondly, there was unrefuted evidence that the sight distance from the Spike Puller to the T.K.O., at the start of the run was 340 feet. Tests were run the day after the accident and it was determined that if the T.K.O. attached to the Tie Handler had been going 4-5 mph as the crew claimed, it should have been able to stop within twenty-eight feet after the Claimant applied the brakes. The Claimant said he applied the brakes at the 200 foot point, therefore, he should have been able to stop approximately 170 feet from the Spike Pullers. As revealed by the tests, even if the T.K.O. had been traveling at a speed of 6-7 mph, it should have been able to stop short of the Spike Pullers.

There is insufficient evidence to support the Claimant's contention regarding faulty brakes. Since this amounted to an affirmative defense, the burden falls on the Claimant to provide sufficient proof the brakes did not work properly. Furthermore, if the lighting was as bad as the Claimant contends, he should have proceeded at a speed which would have allowed him to stop short of the Spike Pullers. Finally, in the tests run the day after the accident, it became apparent that the Tie Handler which was coupled to the T.K.O. seemed to decrease the stopping distance required by the T.K.O. rather than increase the acceleration.

Since the evidence indicates the Claimant was culpable in the incident, the only remaining question is whether his record can be used to mitigate the penalty. Even though the penalty was reduced from a 60 calendar day suspension to a 32 calendar day suspension, the fact remains this appears to be a substantial penalty in view of the Claimant's record. Therefore, the Board believes the penalty should be reduced to a 20 calendar suspension, effective 12:01 a.m., September 17, 1992 through 11:59 p.m., October 6, 1992.

## AWARD

The claim is upheld to the extent outlined above. The Claimant is to be reimbursed for any loss of wages and benefits lost by his suspension which exceeded twenty calendar days.

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

Carol J. Zamperini  
Neutral

Submitted:

May 12, 1992  
Denver, Colorado