

SPECIAL BOARD OF ADJUSTMENT NO. 947

Case No. 138  
Award No. 138

Claimant: Roderick Tinsley

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 for a period of twenty-nine (29) working 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.

Around noon on December 15, 1992, the Claimant was working as an adzer operator on RGLB near Hiland, California, when he sustained a personal injury. As a result, he was sent a certified letter requesting he appear at a formal hearing to be held on January 13, 1993, in order to develop the facts and determine whether he was responsible for violating the following Rules and Regulations of the Chief Engineers Instructions for the Maintenance of Way and Structures and Engineering.

Rule 1: Employees must exercise care to prevent injury to themselves or others. They must be alert and attentive at all times when performing their duties and plan their work to avoid injury.

Rule 607: CONDUCT: Employees must not be;

1. Careless of the safety of themselves or others;
2. Negligent;

Rule 1.1.6: It is the responsibility of each employee noting or causing any hazardous condition to correct or report it promptly. Steps must be taken to prevent possibility of injury to themselves until the hazardous condition is corrected.

Rule 1.1.54: Employees must inspect tools, machinery and equipment for defects before using.

Rule 1.2.19.2: They will be held responsible for the safety, care maintenance and performance of the machines to which they are assigned. If the machine cannot be operated safely it will be removed from service and reported to the Work Equipment Supervisor and District Engineer.

After reviewing the record established at hearing, the Carrier determined that the Claimant had indeed violated the aforementioned rules and suspended him for a period of twenty-nine days. The suspension was effective Tuesday, February 23, 1993 to and including Monday, April 5, 1993.

On the day of the incident, December 15, 1992, the Claimant went on duty at 7:00 a.m. in Hiland, California. His assignment was as a Tie adzer operator. An adze machine was used to cut off the top of a tie in order to level it for the attachment of a tie plate. While he was operating the machine a rock was kicked out from under the machine and hit him in the foot. He was injured sufficiently to require medical attention.

When the machine was checked, it was noted that a foot guard had been chained to the handle in such a way it could not float along the ties. Therefore, the guard did not serve as the protection it was meant to be. If the guard had been adjusted to the proper position, the stones which hit the Claimant would have been deflected by the guard.

The Carrier argues, that the Claimant had an obligation, as the operator, to make sure his machine was in good working order.

By his failure to adjust the guard properly, or, have a mechanic adjust the guard, he violated the rules of safety. In addition, the cant of the machine was not working properly and he failed to attend to that, as well. He knew or should have known that he could refuse to operate the machine if it could not be adjusted to operate safely.

The Organization contends the Claimant operated the machine in the condition it was when it arrived at the work site. He operated the machine for quite a while before the incident, proving that he was operating the machine safely. Besides, he did not have the proper tools to drop the guard on the machine and the mechanics were too busy fixing a spike driver to provide any timely assistance. There was a Roadmaster, a Division Engineer, an Assistant Foreman and two mechanics on the job, and, with the exception of the Roadmaster who helped the Claimant adjust the cant, not one person assisted him in adjusting the guard. Furthermore, at no time did any one tell him not to operate the machine the way it was. Instead, he was simply told to do what he had to do. Since the gang was short-handed, because of vacation schedules, the Claimant felt a great deal of pressure to complete the work. Besides, he believed if he refused to run the machine, he would be charged with insubordination and pulled out of service.

#### DECISION

There is strong evidence that, for whatever reason, the Claimant failed to assure the safety of his machine before he began using it in his work. His own testimony reveals he chose to ignore the shortcomings. The transcript reveals this exchange between the hearing officer and the Claimant:

Hearing Officer: so now we have a guard that we recognize as being dysfunctional and we have a ----- adjustment on the machine to get the cut of the cant that we want is dysfunctional, is that correct?

Claimant: Yes

Hearing Officer: Did you report the broken cant adjuster to anybody?

Claimant: The mechanic the same morning.

In view of the fact the Claimant had full knowledge of the

machines deficiencies, he had an obligation to either wait to

have the problems taken care of or refuse to run the machine. He did neither. As a result, the guard did not protect him from injury. Furthermore, the Board believes the Organization's contention that the Claimant had been running the machine safely up to the point of injury, is flawed. Again, his own testimony reveals otherwise:

Hearing Officer: Had you had any problem prior to this with the rocks striking your foot?

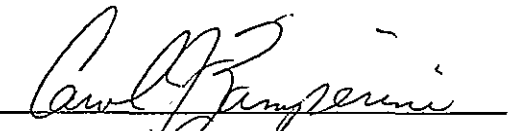
Claimant: Not this severe, no. (emphasis added)

Despite the fact, the previous incidents were not as severe as the eventual injury, the Claimant should have realized the potential danger in continuing the operation of the machine.

Clearly, the Claimant is culpable in this case. However, the Board is not convinced he is the only one who should bear responsibility. Certainly, the roadmaster who assisted the Claimant in adjusting the cant had an obligation to notice the deficiencies in the machine and provide the Claimant with some authoritative direction. In addition, it would seem that the defects were obvious enough that other supervisory personnel should have noticed the position of the guard and should have communicated their concerns to the Claimant. However, while the Board may find these factors mitigating, they do not absolve the Claimant from his responsibility not to operate the machine in an unsafe manner

## AWARD

The claim is sustained only to this extent, the penalty of a twenty-nine (29) day suspension is to be reduced to a fifteen (15) day suspension. The Claimant is to be reimbursed for any wages and benefits lost as a result of the suspension in excess of fifteen (15) days.

  
Carol J. Zamperini,  
Impartial Neutral

Submitted:

July 13, 1993  
Denver, Colorado