

SPECIAL BOARD OF ADJUSTMENT NO. 947

Case No. 143  
Award No. 143

Claimant: A. Nunez

PARTIES  
TO  
DISPUTE

Brotherhood of Maintenance of Way Employees  
and  
Southern Pacific Transportation Company

STATEMENT  
OF CLAIM

1. That the Carrier's decision to suspend Claimant from its service for a period of thirty (30) 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.

By letter dated May 24, 1993, the Claimant was notified to be present at a formal hearing to investigate charges that he violated Rule 963, Rule 2.13.3, and Rule 2.13.32, on May 19, 1993 when the Ballast Regulator he was operating ran into the back of Work Train #7675, near MP 222.5, Floriston, California. The rules allegedly violated read as follows:

Rule 963:      Track Car Speed: 4. . .Track cars must be operated so that they can stop within one-half their range of vision.

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.

While traveling, machines must be separated from other machines in such a way as to avoid any undesired contact between any two machines.

After reviewing the evidence adduced at the hearing, the Carrier determined the Claimant was guilty of the rule violations. He was suspended for a period of thirty (30) days.

The Union argues that the penalty was not justified. After all, not only was the Claimant unaware that the Work Train was in the area, but, it was obvious that the Work Train also had difficulty stopping. Therefore, it cannot be said with certainty the Claimant would not have stopped one-half the distance of his vision, if the Work Train had not been skidding toward him.

The Carrier counters that the Work Train had authority to be in the location and were listed on the line-up. Every indication suggested the Ballast Regulator operator had good vision of the Work Train and should have been able to stop without hitting the train if the proper speed had been maintained.

#### DECISION

The Claimant has worked for the Carrier for over sixteen (16) years. According to his employment record, which was submitted along with the transcript, he has an absolutely spotless record, with the exception of this matter. Although it is true he had one minor eye injury, he never missed a day of work as a result. Therefore, it appears to this Board, that the charges against such an employee must be supported by more than guess work. This is especially true, here, where testimony revealed that the Work Train had included a black box, however, no actual evidence was produced from the black box. Everything presented was based on estimates, with the exception of the testimony of the Work Train Crew, who presented hearsay evidence regarding the content of the black box. Furthermore, the

Organization raises a valid point when they argue that the train may also have contributed to the accident by its inability to stop within one-half the distance of the oncoming Ballast Regulator. Certainly the testimony leaves a lot of doubt in this regard. Consider the following excerpts from the hearing. First the Assistant Roadmaster:

Q: So they (Work Train) could have been going ten?

A: They could have. That has been an estimate by one, from 5 to 10.

Q: Could they have been going any, by your estimate, by talking to other individuals going any faster than that?

A: By my estimate and from measurements and stuff, I took measurements afterwards and stuff, I don't really believe they could be going any faster because they did, they had engine and 5 cars on a work train and from what I seen they came to a stop. From the time they seen, showed me where they'd seen the ballast regulator to the time that they were at a complete stop, was less than 200 feet and handling the train I don't think they could be going much more between the 5 and 10 to come to that stop. . . .

Q: Now if you're going just. . . If you're going head on with a car, just say you're driving the freeway head on, could you tell how fast that person is going just by looking at it at about 400 feet away from the car? You're going a head on collision? Could you tell the estimate or what? You might think its fast. You may think its fast but you know, it happens at such a momentarily could you tell. Be honest.

A: To be honest, I wouldn't want to have to give a speed and I would feel it would just be a guess at anything because. . .

Q: Is all these other things are guesses?

A: All of them are going to be estimates, you know. When I asked for a speed that's, you know, their main. . . What they all stressed, they said mainly they did not think at the time that the regulator could have stopped even if they were at a complete stop with the train. But then when I asked them, "Can you give me an estimate?" None of them wanted to

jump up with a speed right away but I asked them if they could give me just an estimate for information wise and that's what they came up with. And probably due to the circumstances that you're bringing there, you know, its hard to guess.

Q: . . .You went up there and took pictures. Right? Of the . . .When you took a picture and you gave an estimate of 375 feet, you would need, I mean as far as view, is that what you gave?

A: At 375 feet that's what I gave for a view.

Then later during the interrogation of the Conductor of the work train:

Q: I know but I'm just trying to see if the train was going a faster speed or what. It could have been.

A: The speed of the train is all documented on tape.

Q: Okay. What was the speed or do you know?

A: At the time he (the engineer) plugged the train we were going 15 and we went 252 feet after he plugged the train.

Q: Oh, you were going 15 MPH?

A: Fifteen when he plugged the train. . . .

Q: Okay. But at the point of impact it was 15 MPH?

A: No. No. I got off it. When I got off the caboose we were going less than 10. We only went 4 car lengths. That's how long it took us to stop.

Then during the questioning of the Engineer, the following exchange took place:

Q: How fast were you going?

A: Its documented. They said on the tape 15 MPH.

If nothing else the testimony, plus the lack of concrete evidence presented at the hearing, creates doubt that the case against the Claimant should be allowed to stand. If the Work

Train was going 15 MPH, as the Crew members were advised the black box indicated, and if, the Work Train traveled 200' or more from the time the Engineer "plugged" the train until when it came to a complete stop, then the Claimant should not be held solely responsible for the accident. This is especially true if the Assistant Roadmaster was correct in his conclusion that the Work Train was visible to the Ballast Regulator at 375'.

In any event, the case against the Claimant simply lacks substantiation. There is no evidence the accident was avoidable under the circumstances. Even if there was such evidence, there was no evidence to show that the Claimant was any more responsible than the members of the Work Train Crew.

Another issue which is not before this Board may involve the question of whether the Claimant violated any rules by operating his Ballast Regulator outside his target area. However, the Claimant was only charged with violating the aforementioned rules. Those alleged rule violations, as well as, the evidence used to support them, were the only issues considered by this Board.

AWARD

The claim is sustained.

  
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Carol J. Zamperini  
Impartial Neutral

Submitted:

July 30, 1993  
Denver, Colorado