

SPECIAL ADJUSTMENT BOARD NO. 947

Award No. 15  
Case No. 15  
Daniel B. Novella

PARTIES  
TO  
DISPUTE

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

STATEMENT  
OF CLAIM

1. That the Carrier's decision to disqualify Claimant as Foreman and to assess a twenty (20) day suspension was unduly harsh, in abuse of discretion and in violation of the current Agreement.
2. That because the Carrier failed to prove the charges by introducing substantial evidence that it now be required to compensate Claimant for all wage loss suffered and remove all charges 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.

According to the record produced at the formal hearing on September 17, 1984, Mr. D. Novella was serving as Crossing Gang Foreman at the Benicia yard at MP 34.5 on August 15, 1984. At approximately 12:30 a.m. on that date there was a derailment which was attributed to the fact Mr. Novella had not properly protected a track which was impassable. Later the same day, Mr. Novella's Supervisor, Mr. Flores, upon inspecting the same track, determined it was unsafe for passage even though it had been released by Mr. Novella. Mr. Novella was offered and signed a waiver for the first incident on August 15, 1984, but did not sign a waiver pertaining to the second incident that day. Although his personnel record reflects he did agree to the second waiver.

Track derailments are extremely serious not only because they could be life threatening, but also because of the cost to the Company in materials, wages, and delays. Mr. Novella in unrefuted testimony, stated he had been advised by Mr. Flores to utilize a 75 pound rail to match up to an 85 pound rail. To fasten the rails together he used a regular pair of angle bars rather than a pair of compromise joints. What needs to be examined is the Company's responsibility to an employee once a waiver is offered. In addition, it is necessary to make sure Mr. Flores was not punished for the same rule infraction twice. Assuming he wasn't, it is important the disciplinary actions against him were progressive.

The Company in any discipline matter has the burden of proving the employee's guilt. They have proved to my satisfaction, the Grievant was disciplined for two different incidents on August 15, 1984. This was supported by the Grievant's own testimony when he said ". . . and to make sure I had proper flagging and not to let myself open as I did the day prior, and he would talk to me later." Clearly, the Grievant was admonished for his failure to properly protect the track the day before which resulted in a derailment at about 12:30 a.m., August 15, 1984. The Grievant was therefore aware of the rule violation. However, on August 15, 1984 at about 3:30 p.m., he was cited again for the same rule violation, in addition to Rule M530 and Rule 801. Here, although the Grievant may have used poor judgement in releasing the track, there is no evidence he failed to properly protect the track. The Grievant believed the track was ready for use. It is also obvious the Grievant cannot be faulted for using a 75 pound rail which he was told to use. Mr. Novella did make a serious error in not using a pair of compromising joints in connecting the track. The regular pair of angle bars would not compensate for the difference in rail size. Mr. Novella should have known this. This is not a violation of Rule M202, but is a violation of M530.

In reviewing the discipline issued in this case, we find Management jumped from the issuance of 45 demerits (waiver

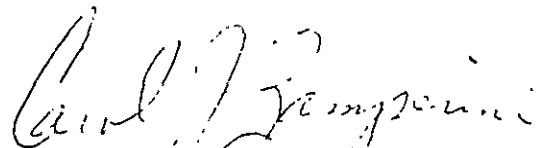
accepted August 15, 1984). for the first instance on August 15, 1984, to a twenty (20) day suspension and a disqualification for the second instance in which there was a violation of Rule M530. Although Mr. Novella does deserve to be disciplined, it should be corrective or progressive discipline. At any rate, a disqualification that is tantamount to discharge is too severe. This is true for several reasons. There is no substantiation Mr. Novella cannot do his work as foreman. The use of disqualification is probably inappropriate; it does not fit the crime. Secondly, the Company issued two types of discipline for the same offense; a twenty-day suspension and a disqualification. In view of the strong industrial practice of corrective, progressive discipline, it is unfair to issue two disciplines, each more intense than previous discipline, for the same offense. Also, as mentioned above, it was not proved Mr. Novella was guilty of all the violations attributed to him. Finally, according to Mr. Novella's personnel record, the Company did accept a waiver which returned Mr. Novella to Assistant Track Foreman. He cannot now be more severely punished for the violation.

#### AWARD

Mr. Novella is to be reinstated to a position of Track Foreman effective September 4, 1984. The twenty-day suspension is to stand.

ORDER

The Company is directed to comply with the above Award within thirty (30) days of its issuance.

  
Carol J. Zamperini, Neutral

Submitted:

June 19, 1985  
Denver, Colorado