

SPECIAL BOARD OF ADJUSTMENT NO. 947

Case No. 156
Award No. 156

Claimant: R. M. Saldivar

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

STATEMENT
OF CLAIM

1. That the Carrier's decision to assess Claimant a ten (10) working days suspension without pay 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.

The Claimant was notified, by letter dated September 12, 1994, to be present at the Office of the Assistant Division Engineer, 5750 Sacramento Avenue, Dunsmuir, California, at 9:00 a.m., Tuesday, September 27, 1994, for a formal hearing. The purpose of the hearing was to determine his responsibility, if any, with his alleged failure to comply with instructions from Mr. Andy Gonzales, Rail Production Supervisor, who directed him to put away Maintenance of Way equipment. Secondly, the Claimant allegedly failed to return the spur switch to the normal position on September 1, 1994, at 4:05 p.m., at Sims, California.

The Carrier contended in the charge letter, that the Claimant's actions may possibly have been violations of Rule 1.6, Items 1 & 2 and Rule 1.13 of the Safety and General Rules For All Employees, which read as follows:

Rule 1.6 CONDUCT, Item 1: CARELESS, that part reading:

Employees must not be. . .CARELESS OF THE SAFETY OF THEMSELVES OR OTHERS

Item 2: NEGLIGENT, that part reading:

Employees must not be ...NEGLIGENT

Any act of hostility, misconduct or willful disregard or negligence affecting the interests of the Company or its employees is sufficient cause for dismissal and must be reported.

Indifference to duty, or to the performance of duty, will not be condoned. Boisterous, profane or vulgar language is forbidden.

Rule 1.13: REPORTING AND COMPLYING WITH INSTRUCTIONS

Employees will report to and comply with instructions from supervisors who have the proper jurisdiction. Employees will comply with instructions issued by managers of various departments when the instructions apply to their duties.

The charge letter also cited Rule 17.3(M) of the Chief Engineers Instructions of the Rules and Instructions for Maintenance of Way and Engineering as revised April 10, 1994, that portion reading:

Rule 17.3(M): LINING OF SWITCHES

When switches are lined by maintenance (sic) of way employees for inspection, maintenance or movement of heavy track cars, it must be done under the personal supervision of the employee in charge. Switches so used must be immediately returned to the proper positions and locked.

The hearing was postponed and held on October 13, 1994.

The Carrier reviewed the evidence presented at the hearing and determined the Claimant was guilty of the charges. He was

issued a ten (10) working day suspension without pay, effective 12:01 a.m., Monday, November 7, 1994 through 11:59 p.m., Tuesday, November 22, 1994.

The Claimant was an Assistant Foreman on Extra Gang RG-2, a System Gang. He has worked for the Carrier since January 15, 1971, and was promoted to Assistant Foreman in 1979. His record indicates he was disqualified as an Assistant Foreman in December, 1990, but was apparently reinstated in the interim. On the date of the incident, September 1, 1994, he was serving as the Assistant Foreman on Gang RG-2. He went on duty at Dunsmuir in the morning and went off duty at Sim, California at approximately 4:45 p.m..

On September 1, 1994, around 2:00 p.m., the RG-2 Gang was finishing up spiking near Sims, California. Mr. Gonzales, Rail Gang Supervisor, System, directed the Claimant to continue working the equipment five more minutes and then to take it all into the spur track at Sims and to clear the track for the day. The Supervisor testified he told the Claimant to call him once the track was cleared and the switch was lined and locked or to have the speed swing operator call him. When he received such notification, the Supervisor would know he could release the track. When the Claimant had not moved the equipment after fifteen minutes, the Supervisor reminded him to begin the movement. Fifteen minutes after that the speed swing notified the Supervisor that the equipment was in the clear. Nothing was said about the switch being lined and locked. The Supervisor released track and time at that point. The dispatcher acknowledged the Supervisor's call, but said nothing.

Around 6:00 p.m., the Supervisor received a call indicating the spur switch had never been lined back, therefore, trains would have been diverted into the spur. Consequently, the Carrier filed the present charges against the Claimant. The Claimant in turn filed the Claim we are now considering.

The Organization contends the problem is a lack of communication. The Supervisor told a machine operator over the phone to notify him when the equipment was clear, which the machine operator did. The Claimant was told to send the equipment into the spur and clear the track, which he did. The dispatcher never indicated to the Supervisor that there was still an indication on the track and the Supervisor never asked the dispatcher if the indications were clear. The Organization argues there is blame to go around, but, in no way should the Claimant bear all of the responsibility for what happened. He should not

lose any time over this incident and his record should be cleared.

The Carrier contends the Claimant was given a direct order by the Supervisor to clear the track, send the equipment into the spur and line and lock the switch against movement into the spur. When that was complete either he or the speed swing was to contact the Supervisor and advise him the task was done. At that time, the Supervisor would release the track time.

The Board has reviewed the evidence presented at hearing. It is always difficult to rely on the memory of those testifying. It would be nice to have an eyewitness to the conversation which actually took place between the Claimant and the Supervisor relative to the Claimant's responsibilities in clearing the equipment off the track and securing the switch into the spur track. However, we do not have the benefit of such corroborative evidence. Instead, we have the testimony of many witnesses for the Claimant who, while presenting credible testimony do not present anything which verifies the conversation between the two. The closest thing we have to actual observers of the conversation were R. Murillo and R. M. Rameriz. Murillo said he heard the Supervisor say to the Claimant over the radio, "Let them work five more minutes", or "something like that", but then he left and went to load tools and never heard the rest of the conversation. Rameriz testified, "Yeah, he said to work five more minutes and then head in to the clear." Later in his testimony in response to the question, "But (the Supervisor) definitely called (the Claimant) on the radio and told him about five to go get in the clear." The answer, "Si. yes." He did not remember if the Supervisor told the Claimant to take the machines and get them in the clear or send him to get in the clear.

Overall, there seems to be enough corroboration of the Supervisor's testimony concerning his intent to put the Claimant in charge of clearing the track and getting the equipment into the spur. While there is no testimony to substantiate that the Supervisor also told the Claimant to line and secure the switch, there is a high probability the instruction was given. Whether the Claimant believed it was necessary to accompany the equipment to have that happen is another issue. Certainly, it would appear there is some question as to whether the operator of the last piece of equipment into the spur should not have thrown the switch since it appears no one else was there to accomplish that task. Even the testimony of the speed swing operator supports this possibility. In response to the question, ". . .so to your knowledge do you know what are the normal procedures when somebody opens the switch and closes a switch, are they. . . .

He testified:

Well usually the first, after notified, the first piece of machinery going into the spur switch will open it and the last piece of machinery, you know, will close it. But nobody, you know, it was Friday, and everybody was in a hurry to get home. There was still a foreman with us or any kind of officer.

Therefore, even if there were specific instructions given to the Claimant to clear the track and secure the spur switch, clearly the Organization raises a valid point that there was plenty of blame to go around. Even the Supervisor could have made it clearer to everyone that the Claimant was from that point on in charge of clearing the track and securing the switch. As it was, at least two other machine operators thought it was their responsibility to advise the Supervisor once the equipment cleared the track and many of the employees believed the bus driver was the acting Foreman.

While these circumstances do not clear the Claimant completely, they do seem to demonstrate why he might have been uncertain as to his exact role in the closing of that shift. There is not sufficient evidence to show the Claimant willfully disregarded instructions given by his Supervisor. Nor does the Claimant's employment record, as provided, indicate he has demonstrated an indifference to instruction during his 23 years tenure. According to his employment record, the Claimant was admonished in 1976 for backing a Company truck into a private vehicle causing \$103.00 damage and then disciplined in 1990 for driving a Company vehicle with a suspended license while not directing his passengers to wear seat belts and failing to check the brakes on the vehicle after noticing a problem. Other than some apparently minor injuries which were few and far between, these were the only two incidents on an otherwise perfect record. There is no pattern of intentional disregard of instruction or work orders.

The Board does not believe the Claimant is faultless, but does believe there was sufficient confusion and question about shared responsibility that his discipline should be reduced.

AWARD

The ten (10) working days suspension without pay issued to the Claimant is to be reduced to a five (5) working days suspension without pay. He is to be reimbursed the difference in any wages and benefits lost between the ten (10) days suspension without pay and the five (5) working days suspension without pay.

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

Carol J. Zamperini, Neutral

Submitted:

December 28, 1994
Denver, Colorado