

SPECIAL BOARD OF ADJUSTMENT NO. 947

Case No. 159  
Award No. 159

Claimant: J. P Gonzalez

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

STATEMENT  
OF CLAIM

1. That the Carrier's decision to assess Claimant a five (5) working day 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 Carrier directed the Claimant by letter dated September 16, 1994, to be present at the Office of the Assistant Division Engineer, 9499 Atkinson Street, Roseville, CA at 9:00 a.m., Wednesday, October 5, 1994, for a formal Investigation. The purpose of the hearing was to determine his responsibility, if any, for his alleged failure to operate a rail saw in a safe manner on September 6, 1994 at MP 106.0, Roseville, CA, at or near 10:10 a.m.. His alleged actions caused the saw to kick back, striking and cutting his right shoulder. As a result, he was charged with possibly violating the following portion of Rule 1.1 GENERAL RESPONSIBILITIES of the Safety and General Rules for All Employees:

## Rule 1.1: Safety

Safety is the most important element in performing duties. Obeying the rules is essential to job safety and continued employment.

It is the responsibility of every employee to exercise care to avoid injury to themselves or others. Working safely is a condition of employment with the Company. The Company will not permit any employee to take any unnecessary risk in the performance of duty.

No job is so important, no service so urgent, that we cannot take the time to perform all work safely.

The hearing was held on October 25, 1994. Testimony and evidence was presented both by the Claimant and the Carrier. After reviewing the evidence adduced at the Investigation, the Carrier determined the Claimant had violated the aforementioned rules and assessed him a five (5) working days suspension. The Organization appealed the Carrier's decision.

The Organization contends the evidence does not support the charge against the Claimant. Testimony shows he was holding the saw correctly. Besides the Claimant has been a conscientious and loyal employee since 1969. He does not deserve any penalty in this case.

The Carrier points out that it is highly improbable that the accident would have occurred if the crew had taken the rail out of track and then made the cut on the free rail. Furthermore, they contend the evidence shows that the Claimant was holding the saw incorrectly and this allowed the saw to kick back when it became lodged between the rail end and the cut piece.

The Board has reviewed the evidence in this case carefully. It is true in retrospect that the rail would have been cut more safely if it had been removed from the track. However, there were two Foremen present who were both in a position to examine the track and make that determination. Secondly, the Foremen made the mark of where to cut the saw and should have determined any differences between the margin of gap on the top of the rail and the margin of gap near the bottom. It would not be unusual for the Claimant to rely on the expertise of the Foreman in charge.

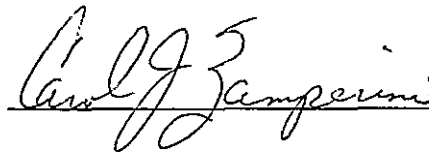
On the second issue of whether the Claimant was holding the saw properly, he must bear more responsibility. There is sufficient evidence that he failed to hold the saw at the forward handle. As a result, the saw was able to kick back as far as it did. Certainly a mitigating factor in this matter is the fact

the Claimant had not had the opportunity to view the safety film on the proper way to handle this saw.

When all of these facts are taken into consideration, along with the Claimant's exemplary record, the Board believes the penalty as issued was harsh and excessive.

AWARD

The penalty is to be reduced to a one (1) day suspension. The claimant is to be reimbursed the difference between the wages and benefits he lost because of the five (5) day suspension and what he would have lost with the one (1) day suspension.

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

Carol J. Zamperini, Neutral

Submitted:

June 12, 1995  
Denver, Colorado