

SPECIAL BOARD OF ADJUSTMENT NO. 947

Case No. 163

Award No. 163

Claimant: J. Villanueva

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 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 Claimant, a Welder, went on duty at 7:00 a.m., February 27, 1995, at Oakland, California. He and a Welder's Helper were assigned to go out on the Hayward Line to replace two rails which were wheel burned. The process involved removing a section of rail and welding in another piece. Another employee cut the rail and he and his Welder Helper were to do the welding using the Orgo-Thermit Welding procedure. Testimony indicated that the Claimant and his Welder Helper wore goggles, but neither wore face shields. While the two men were cutting the excess weld, a piece of slag struck the Claimant on the lip. The resulting laceration required five (5) stitches. Because they failed to wear face shields, the Claimant and the Welder's Helper were

charged with possible violations of the following Rules from the Chief Engineer's Instructions for the Maintenance of Way and Engineering, effective April 10, 1994:

72.17.18 Procedure For Boutet Welding:

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- 27 Both welder and helper must wear goggles and faceshield (sic) cutting with hot-cut chisel. . . .

18.1 Use of Protective Equipment

Only personal protective equipment, approved by the Safety Department, will be used while on duty. All protective equipment and clothing furnished by the Company must be used only for the purpose intended. Such equipment must be used where conditions of the job require, and in accordance with rules, and instruction, or directions from supervisor.

Employees are responsible for keeping all protective equipment issued to them in good order, properly fitted and replaced as may be required to maintain intended protection.

The Claimant was advised to appear at a formal Investigation to be held at the Roadmaster's Office, 1912 - 7th Street, Oakland, California, at 9:00 a.m., Tuesday, March 21, 1995.

Following the hearing, the Carrier determined that the evidence at the Investigation was sufficient to support the charges against the Claimant. He was issued a five (5) working days suspension effective 12:01 a.m., Monday, April 10, 1995, through 11:59 p.m., Friday, April 14, 1995.

The Organization argues that the Carrier failed to cite any rules which deal with the Orgo-Thermit welding procedure. Instead the Carrier cites rules which deal only with the Boutet welding procedure. The rules governing the two are not identical and at best could be considered confusing relative to the requirements to wear a face shield. If the rules governing the Orgo-Thermit procedure required the use of face shields during the procedure, the Claimant would have complied. However, there are no such requirements stated in the applicable rule.

The Carrier contends the Claimant, a Welder, is obligated to be familiar with the rules governing welding. There is little

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difference between the Boutet welding procedure and the Orgo-thermit welding procedure. According to the Company, the rules cited clearly require the use of face shields. In addition, they contend that other sections of the rules require the use of face shields, along with eye protection, any time an employee is working with molten metals.

The Board in reviewing the evidence from the hearing has concluded that the Claimant should have been aware of the requirement to wear a face shield. His injury would have been avoided if he had worn the protective device.

Admittedly, the Carrier failed to cite the rules which more closely governed the situation, however, a Welder, particularly one with the experience and expertise of the Claimant are expected to be familiar with each rule in the Rule Book, not just a select few. In this case, the Carrier's failure to cite the appropriate rules did not violate the Claimant's due process. He and his representatives were clearly aware of the reason for the charges and were not disadvantaged in the presentation of a defense. Furthermore, the Claimant, with his experience, would have been well aware of the possible ramifications of working with the molten metal without a face shield.

Having determined that the Claimant was responsible for failure to properly protect himself, the Board turns to a determination of whether or not the five (5) working day suspension was appropriate. The Board believes the penalty was excessive. The Claimant has 25 years of service. According to his Employment Record he has never been cautioned about his conduct nor has he been issued any type of discipline during his tenure with the Carrier. His Employment Record and his tenure are mitigating factors.

AWARD

The five (5) working day suspension should be reduced to a one (1) working day suspension. The Claimant is to be reimbursed the difference in what he would have lost in wages and benefits with the one (1) working day suspension and what he lost in wages and benefits as a result of the five (5) working day suspension.



Carol J. Zamperini, Neutral

Submitted:

July 4, 1995
Denver, Colorado