

SPECIAL BOARD OF ADJUSTMENT NO. 947

Case No. 181

Award No. 181

Claimant: J. A. Herrington

PARTIES
TO
DISPUTE

Brotherhood of Maintenance of Way Employees
and
Southern Pacific Lines

STATEMENT
OF CLAIM

1. That the Carrier's decision to assess Claimant a three (3) 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.

By certified letter dated June 13, 1996, the Claimant was directed to attend a formal Investigation to be held at the Assistant Division Engineer's Office, 9499 Atkinson Street, Roseville, California, at 9:00 a.m., Thursday, June 27, 1996. The purpose of the hearing was to determine whether the Claimant had violated Rule 18.8 Head Protection and Rule 1.10 Games, Reading, or Electronic Devices, on June 12, 1996, when he allegedly failed to wear a hard hat while operating a Ballast Regulator and also was allegedly reading the newspaper while on duty. The portion of the rules cited read as follows:

18.8 Head Protection

Safety hats will be worn while on duty in:

Designated hard hat areas.

Areas of potential injury from falling objects and,

Areas designated by supervisor.

Rule 1.10 Games, Reading, or Electronic Devices

Unless permitted by the railroad, employees, while on duty, must not:

Read magazines, newspapers, or other literature not related to their duties.

The Carrier notified the Claimant by letter dated July 5, 1996, that the evidence adduced at hearing was sufficient to determine he violated the aforementioned rules. They issued a three (3) working day suspension commencing June 19, 1996, through June 21, 1996. The Organization subsequently appealed the suspension.

The Claimant was assigned as Ballast Regulator Operator for Extra Gang #5. He began his tenure with the Carrier in January, 1978. He was working with Tie Gang T-15 at the time of the alleged rules violations. On the day of the incident he was working in Arena, California and went on duty at 6:00 a.m. and went off duty at approximately 2:30 p.m.

As he was sitting in his Ballast Regulator waiting for the Spike Drivers to advance, the Claimant's supervisor, who was driving down the highway at the time, allegedly observed the Claimant reclining in his seat with his feet on the console reading a newspaper. The supervisor turned around and drove to where the Claimant was working. When he arrived he noticed the Claimant was wearing a ball cap rather than a hard hat and he noticed the newspaper was then covering the back windshield. When he questioned the Claimant about reading the newspaper while working, the Claimant denied he had been reading the paper and explained he was using it to block out the sun. When he was told to remove the paper he did. He was also questioned about why he was not wearing a hard hat as required. He indicated at the time, he did not believe it was necessary to wear a hard hat in an enclosed cab. However, he did wear the hard hat the rest of the day, as directed. He was subsequently offered a waiver and three days off, but, refused to sign the waiver.

PARTIES POSITIONS

The Organization argues that this was the first time the Claimant was told to wear his hard hat in an enclosed cab.

Furthermore, they argue that other supervisors have seen the Claimant without his hard hat and have never told him to put it on. They further argue that the Claimant was not reading a newspaper at the time and was merely using it to partially block the sun from coming through the back window. They contend a conference at the time of the incident would have taken care of the problem and would have eliminated the need for a formal investigation.

The Carrier points out that the supervisor clearly saw the Claimant reclining in his seat with his feet propped on the instrument panel reading a newspaper. They also contend it is Company policy to wear a hat hard in working areas and that includes while driving a Ballast Regulator. They contend the Claimant argued with the supervisor about the need to wear a hard hat, as well as, the need to remove the newspaper from the back windshield. The Carrier believes the Claimant was well aware of the safety requirements and violated the cited rules.

DECISION

The Board has reviewed the facts in this case, along with the Claimant's record. The Rule clearly requires employees to wear their hard hats in "designated hard hat areas; in areas of potential injury from falling objects and in areas designated by supervisor". The Claimant was working in such an area. If he had any doubts about whether or not he had to wear a hard hat in an enclosed cab, he had every opportunity to raise the question at the morning safety sessions. Otherwise, he must assume he has to follow the rules as written. An employee has no right to modify the rules to suit his own circumstance. He must seek permission to act contrary to the rules. However, there was unrefuted evidence that other supervisors observed the Claimant previously in the Ballast Regulator and never reminded him about the hard hat. Even if the Regulator was not in motion at the time, it should have been brought to the Claimant's attention. Furthermore, the Claimant did comply with the directives of the supervisor, albeit with some protest. Even though this does not totally excuse the Claimant, it does mitigate the penalty due him.

As to the allegation that the Claimant was reading the paper, there is insufficient evidence. The supervisor was driving by in what he himself described as fast-moving traffic. It is very plausible, and considering the folded newspaper blocking the window, highly probable that the Claimant wasn't reading the paper, but folding it for the window. Therefore, there is insufficient evidence the Claimant violated Rule 1.10 as alleged.

The Board determines that the penalty issued was too severe for the offense, based on the facts revealed at hearing.

AWARD

The claim is sustained to the extent the suspension is reduced to a one (1) day suspension. The Carrier is to reimburse the Claimant the difference in wages and benefits lost between the three (3) working day suspension and the one (1) working day suspension directed in this Award.

The Carrier is to comply with this Award within thirty (30) days.



Carol J. Zamperini, Neutral

Submitted this 30th of October, 1996.
Denver, Colorado