

SPECIAL BOARD OF ADJUSTMENT NO. 947

Case No. 150
Award No. 150

Claimant: R. H. Porras

PARTIES
TO
DISPUTE

Brotherhood of Maintenance of Way Employees
and
Southern Pacific Transportation Company

STATEMENT
OF CLAIM

1. That the Carrier's decision to suspend Claimant from its service for a period of thirty (30) days 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 has been employed by the Carrier since 1973. His record is absolutely clear except for five (5) reported injuries which occurred between the years of 1975 and 1984. Not included among those five injuries is the injury which is the subject of this matter and an injury which presumably occurred in 1981 which according to the Claimant's record had an unknown location, an unknown cause, and the nature of the injury was also unknown. The Claimant did not remember this incident, nor was there any testimony explaining the record. According to the

Claimant's employment record, he has not missed any work time as a result of on-the-job injuries until this incident. In the present case, there was no record provided for the number of days the Claimant missed work, but, it is clear he was absent from June 22, 1994, when he reported the injury until at least July 22, 1994 when he obtained a letter from his attending physician.

According to the evidence presented at hearing, the Claimant reported to work on June 22, 1994 and advised his Supervisor that he awakened in the middle of the night, got out of bed and noticed some discomfort in his back. He further explained that he thought picking up some angle bars during work the day before might have been a factor in his pain. He wanted to fill out a 2611 Injury Report Form and was given the opportunity. Upon completing that form, he was taken to the doctor.

On the morning of June 22, 1994, the Roadmaster obtained the Claimant's employment record and discussed with him each reported injury throughout his tenure. According to testimony, the discussion was cordial. The two discussed safety equipment, company expectations (policies) and how to perform various tasks safely.

It wasn't until July 6, 1994, the Claimant was sent a charge letter by certified mail. Unfortunately, the letter was sent to an incorrect address. Eventually, the Claimant learned about the letter through his Organization Representative. At least initially, both the Representative and the Claimant stated they had time to prepare for the hearing. According to the charge letter the Claimant was accused of violating Rules 1.2.5, and 1.1 of the Safety and General rules For All Employees, dated April 10, 1994, which state:

1.2.5 Reporting

All cases of personal injury, while on duty or on company property, must be immediately reported verbally to the proper manager before leaving company property. For CS2611 (Employee Report of Accident) must be completed as soon as possible by the injured employee and witnesses.

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 an 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 letter further advised the Claimant to appear at a formal investigation on July 20, 1994 (actually held on July 25, 1994), at the Office of the Assistant Division Engineer, 5750 Sacramento Avenue, Dunsmuir, CA.

After reviewing the evidence adduced at hearing, the Carrier determined the Claimant was guilty of violating the cited rules and suspended him for a period of thirty (30) days which was to begin upon his medical release from the Southern Pacific Medical Administrator to return to duty.

The Organization, citing the notification requirements of Rule 45, urges that the Claimant was not properly notified. The Carrier sent the charge letter to the wrong address twice despite having the correct address on file. The Claimant didn't find out about the letter until he was contacted by his Organization Representative. Furthermore, even when the Claimant reported the possible injury, he did not state for certain a cause, but, the most recent incident he could think of that might have caused an injury to his back. As the letter from his attending physician indicates, it isn't unusual in this type of back injury to have a delay in the onset of pain. Finally, with 20 years of service to the Carrier, there is no evidence the Claimant here was trying to commit fraud. He reported the pain as soon as possible after realizing it existed and asked to fill out an injury report as required. Since the Carrier has failed to prove either charge against the Claimant they should be dropped.

The Carrier has always been concerned about the safety of its employees. The Claimant was aware of the reporting requirements and yet did not report the potential injury until the next day. This was clearly a violation of Rule 1.2.5. Beyond this, the Claimant has had numerous accidents during his tenure with the Carrier which may indicate a need on his part to perform the work more carefully.

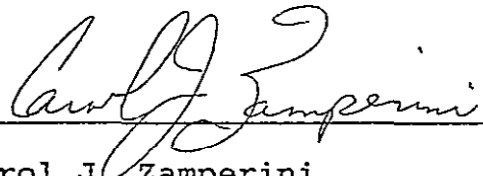
The Board has reviewed the facts in this case carefully. What we have is an individual who has been with the Carrier for over twenty (20) years. During that period, he has reported

injuries on seven different occasions, including the injury which is the subject of this case. In at least three of these instances it is questionable whether the injury was actually caused by anything the Claimant did. In two of those cases, a foreign object entered the Claimant's eye. In neither instance did the Claimant say he was doing anything which caused debris to be flying about. It could have been nothing more than debris picked up by the wind. There is no evidence that the Carrier counseled the Claimant because he did anything wrong. In the other case, the Claimant was bitten by a bee. Without evidence to the contrary, it is far-fetched to blame the Claimant for some act of carelessness which incited the bee. Regardless, there was no loss of time in any of these three incidents nor in any of the other instances with the exception of the latest back injury. Nor was there any record or testimony that the Claimant received any type of monetary settlement from the Carrier. At best, it would appear the Claimant was very conscientious about filing his injury reports as required.

With that in mind, this Board believes the Claimant should be given the benefit of a doubt concerning the reason he failed to report this injury on the day it happened. Even though it is understandable that delays in reporting injuries are viewed with skepticism, and justifiably, it is also a reality that back injuries do not always show up immediately. Sometimes it takes a period of inactivity before the symptoms, namely pain or immobility, are apparent. As the letter written by Paul Schwartz, M.D. indicates, "It is very reasonable for an injury such as this to take 12-24 hours to present itself." Furthermore, one has to ask him/herself why an employee who so faithfully reported every injury, minor or otherwise, over the last twenty years would fail to report this potential injury. Admittedly, the injury could have taken place off-site. However, there is no evidence to substantiate that fact and the Claimant indicates it happened on Carrier property. His record supports consideration in this regard. However, he must recognize his obligation not to allow even the slightest potential injury to go unreported, an obligation he has seemingly met with a great deal of consistency during his tenure. In this regard, the Carrier is justified in taking some disciplinary action against the Claimant, but, in view of the Claimant's employment record and taking into account other similar cases brought before this Board, a thirty (30) day suspension is excessive.

AWARD

The thirty (30) day suspension issued to the Claimant is to be reduced to a five (5) day suspension. He is to be reimbursed any loss of wages and/or benefits because of days off work in excess of the five (5) days.

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

Carol J. Zamperini
Impartial Neutral

Submitted:

September 24, 1994
Denver, Colorado