

SPECIAL BOARD OF ADJUSTMENT NO. 947

Case No. 158
Award No. 158

Claimant: J. A. Herrington

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 Carrier directed the Claimant by letter dated September 15, 1994, to be present at the Office of the Assistant Division Engineer, 9499 Atkinson Street, Roseville, CA at 9:00 a.m., Wednesday, September 28, 1994 for a formal Investigation. The purpose of the hearing was to determine his responsibility, if any, for his alleged failure to supervise employees working under his jurisdiction which resulted in personal injury to an employee. His actions, if proven, were violations of the following rules, those portions reading:

RULE 71.2.3.3: TRACK FOREMEN

Foremen must see that employees under them properly and safely perform their duties, and will assist in work of their gangs. They must keep the records and make the prescribed reports of the time of their men, and of the receipt, distribution and (sic) use of materials furnished them.

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.

Once the Carrier reviewed the evidence adduced at hearing, they contacted the Employee by letter dated October 27, 1994. The letter advised the Claimant that the evidence supported a finding that he had violated the cited rules. He was suspended from service for a period of five (5) days, effective 12:01 a.m., Monday, November 7, 1994 through 11:59 p.m., Friday, November 11, 1994.

The Organization filed the present claim on behalf of the Claimant. They urge that the Claimant entered service in 1978 and within six months was promoted to Foreman. They urge that he has performed his service conscientiously and knowledgeably. The accident was an unfortunate event, but, the Foremen in charge had held their briefings, as required. The Claimant handled his assignment in accordance with all Carrier rules, including assuring the prescribed use of protective equipment. The operator was given instructions and performed his job in line with those instructions. The Carrier has not met its burden of proof in this case. The charges against the Claimant should be dropped.

The Carrier believes the Claimant failed to supervise the a member of his crew. As a result of this lack of supervision, the employee was injured. As pointed out by Rule 1.1 "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."

While the evidence demonstrates that the Claimant has some responsibility for the accident, there are mitigating factors. In part, he was directed by his supervisor to assist the Welders in performing another task near the site where the rail was cut. It was while he was performing that function that the injury occurred. Therefore, he could not have been expected to observe how the injured employee was holding the saw. Furthermore, all indications are that he had provided his men with proper instructions and had been present while the equipment was tested. Everyone was aware that he had been told to accompany the Welders and assist them. In addition, there was a second Foreman on the job who was working with the crew which was cutting the rail. These things along with the Claimant's lengthy record are in his favor.

However, the Claimant was one of two Foremen on the job. He, as well as, the other Foreman examined the track and marked where the cut was to be made. They both should have noted that the rail had previously been torched. They should have measured the difference between the gap at the top of the rail and the gap at the bottom of the cut. If they had, they may have made the more prudent and safer decision to remove the rail before the cut was made.

In consideration of all of the above facts and circumstances, the Board believes the Claimant should be held accountable to the degree outlined below.

AWARD

The penalty issued is to be reduced to a one (1) day suspension. The Claimant is to be reimbursed the difference in wages and benefits lost as a result of the five (5) day suspension and what he would have lost if the suspension had been a one (1) day suspension.



Carol J. Zamperini, Neutral

Submitted:

June 9, 1995
Denver, Colorado