

Case No. 167
Award No. 167

Claimant: J. C. Valle

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 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 charges against the Claimant stemmed from an incident which occurred on November 11, 1994 at Buena Park, California. As Foreman, he was in charge of Extra Gang 44, a two-man crew which was spiking switch plates that were out of adjustment. Two members of his crew were working in tandem setting and hammering in the spikes. At some point, he turned to see the hard hat of one of the two crew members lying on the ground. Simultaneously, he saw the crew member place his hand on his forehead right above one eye. When he inquired about the situation, he was told the crew member had been hit by the spike maul. He saw no visible signs of injury. He offered to accompany the injured employee to the doctor, but, the crew member declined. Instead he merely asked if he could just take it easy.

The Foreman advised his supervisor of the accident. Later, the supervisor met with the men at the depot and interviewed them.

The supervisor tried to get the employee to a doctor, but the crew member continued to resist and continued to complain about dizziness.

The injured employee did report to work the next day, but asked that he be allowed to take it easy. On Saturday, two days later, the employee called another Foreman to report that he could not sleep and was going to the doctor. He did not show up for work the following Monday.

As a result of the incident, all three employees were charged with violating the following Carrier Rules and Regulations:

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.

1.6 Conduct, that part reading:

Employees must not be:

1. Careless of the safety of themselves or others.

Any act of . . . willful disregard or negligence affecting the interest of the Company or its employees is sufficient cause for dismissal

Indifference to duty, or to the performance of duty, will not be condoned.

The Claimant was cited for the additional rule violation:

71.2.3.3 Foremen must see that employees under them properly and safely perform their duties.

The Claimant was offered a waiver, but refused the offer.

An initial hearing was held on May 23, 1995, during which two of the three charged employees presented testimony on their own behalf. The hearing was continued to June 22, 1995 due to the absence of the injured employee. To accommodate the injured employee, the hearing was continued until June 22, 1995. Despite attempts by the Carrier and the Organization the injured employee could not be contacted. Therefore, the hearing was closed on June 22, 1995, without further testimony.

Following the hearing, the transcript was reviewed by a Carrier Officer and the Claimant was suspended for a period of five (5) working days.

The Organization argues that the charge letter failed to cite the allegations against the Claimant specifically and precisely. Furthermore, they argue, that while the Claimant may not have a lengthy tenure, he has proven to be a capable and safe employee. This is evidenced by the fact he was promoted to Foreman after only five (5) years of employment. They also contend there is no evidence he functioned in an unsafe manner on the day in question or that he failed to properly supervise his crew. They believe he should be exonerated of all charges.

The Carrier believes there is ample evidence to demonstrate that the Claimant did not properly advise his crew that they were not to work in tandem when spiking gages. For that reason, they believe the penalty issued was appropriate.

The Board believes the Parties were at a disadvantage because the injured employee did not appear at the hearing. As a result, it was difficult to determine whether the injured employee was more to blame for his own injury than either of the other two Claimants. Besides, there were no visible marks on the injured employee. This, coupled with the fact he did not go to a doctor for two days, does leave one pondering as to whether he was actually hit and injured by the spike maul.

Regardless, after reviewing the evidence in this matter it is obvious the Claimant failed to enforce the policy of the Carrier. Even though he testified that he did not know it was against the rules to allow employees to work in tandem when spiking gages, he had an obligation, as Foreman, to familiarize himself with such rules. His failure to do so placed two employees in a position where it was possible for this type of accident to occur.

The Claimant's work history of five (5) years is relatively short in the Railroad Industry. The Organization did, however, present a valid point, when they indicated his promotion to Foreman, along with his exemplary record should provide him with some benefit of a doubt, especially in conjunction with the unanswered questions surrounding the injuries suffered by the injured employee. For these reasons, the Board believes the penalty of a five (5) working day suspension was excessive for a first offense. The suspension should be reduced to a two (2) day suspension.

AWARD

The claim is sustained to the extent outlined within this Award. The Carrier is to comply with the Award within thirty (30) days of the date it is received.

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

Carol J. Zamperini, Neutral

Submitted:

February 27, 1996
Denver, Colorado