

SPECIAL BOARD OF ADJUSTMENT NO. 947

Case No. 168

Award No. 168

Claimant: U. R. Romero

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. On that day, he was assigned to Extra Gang 44, which was a three-man crew consisting of one other crew member and a Foreman. Their job was to spike switch plates which were out of adjustment. The two crew members were to work in tandem. After the two men had set about three spikes, the Claimant was preparing to hammer in the fourth. At the time, he was unaware that the other crew member had moved closer. When he raised his spike maul, he hit what he believed to be the visor of the other crew member's hard hat. He looked up to see the crew member place his hand on his forehead right above one eye. The other employee claimed he had been hit on the forehead with the maul. Neither the Claimant or the Foreman saw any visible signs of injury.

The accident was reported as required. The Foreman also offered to take the injured crew member to the doctor, but he just wanted to take it easy. He also complained of dizziness. Later, a supervisor met with the men at the depot and interviewed them. The injured crew member resisted going to the doctor, but 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 the Foreman of another crew to report 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 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. A second hearing was scheduled for June 22, 1995. Despite an attempt by the Carrier and the Organization the injured employee could not be contacted. Therefore, the hearing was closed without further testimony.

Subsequent to 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 did not cite specifically and/or precisely the allegations against the Claimant. They further urge that the Claimant has extensive service with the Carrier and has been a conscientious employee. Finally, they argue that there is no evidence he was performing in an unsafe manner on the day of the accident. They believe he should have been exonerated of all charges.

The Carrier believes there is ample evidence to demonstrate that the Claimant failed to make certain that other employees around him were in the clear of the arc of the spike maul which he was using. Therefore, 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, the Claimant does have a responsibility of assuring an area is clear before he swings a maul or uses any type of equipment. His failure to do so in this case, may have caused a serious injury. In this regard, he did fail to comply with the intent of the Carrier's Safety Rules. The only question remaining is whether the penalty issued the Claimant was reasonable in light of all factors.

The Claimant has worked for the Carrier for nearly thirty years. According to his employment history he has an unblemished work record, with the exception of some injuries suffered during his tenure. The most recent being in 1984 when he received some cuts and bruises when a hose came off the tamping gun he was using and hit him in the face. His most serious injuries involved a fractured knee and a broken elbow. While his injuries may indicate and occasional lapse in concentration, they are not extraordinary in number or result when you consider a career which exceeds 29 years of service. For these reasons, the Board believes the penalty issued to the Claimant was excessive. The five (5) day 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 28, 1996  
Denver, Colorado