

## SPECIAL BOARD OF ADJUSTMENT NO. 947

Case No. 169

Award No. 169

Claimant: A. R. Ramirez

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. The other employee was actually setting and hammering the spikes into the switch plates. After the two men had set about three spikes, the other crew member set a fourth spike and prepared to hammer it into the plate. As he raised the spike maul, it allegedly hit the Claimant who was standing beside his co-worker. The Claimant's hard hat flew off and he claimed he was hit on the forehead right above the eye. There were no visible signs of injury. The Claimant did not want to go to the doctor and merely wanted to take it easy.

The accident was reported as required. Later, a supervisor met with the men at the depot and interviewed them. The Claimant continued to resist going to the doctor, but still complained about dizziness.

The Claimant reported to work the next day, but again asked that he be allowed to take it easy. On Saturday, two days later, he called the Foreman of another crew to report that he could not sleep and was going to see a 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 the other charged employees presented testimony on their own behalf. The hearing was continued to June 22, 1995, because the Claimant alleged his injuries prevented his attendance. Despite attempts by the Carrier and the Organization the Claimant could not be contacted at any time prior to the second hearing. Therefore, the hearing was closed 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 Claimant was refused an opportunity to face his accusers and question witnesses when the hearing was held in his absence. Furthermore, they contend the charge letter was not specific enough relative to the actual charges against the Claimant. Finally, they contend there is insufficient evidence to prove the Claimant worked in an unsafe manner on the day in question. Therefore, they believe he should be exonerated of all charges.

The Carrier believes there is ample evidence to demonstrate that the Claimant failed to make certain he was clear of the arc of a spike maul being used by his fellow crew member. Therefore, they believe the penalty issued was appropriate.

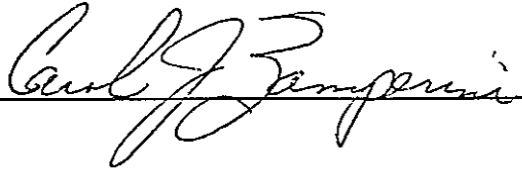
The Board believes the Parties were at a disadvantage because the Claimant did not appear at the hearing. As a result, it was difficult to determine whether he was injured, as he claimed and whether he was responsible for any injury he received. After all, immediately following the accident, there were no visible marks which showed he was hit by the maul. This, coupled with the fact he did not go to a doctor for two days, does create some doubt as to what actually happened on the day in question.

Even assuming the Claimant was injured as he says, he certainly had an obligation on the day in question to stay far enough away from his co-worker while he was swinging the spike maul. They had already set three spikes so he should have been aware of the appropriate distance. Furthermore, the Claimant was negligent in not advising the Carrier of his whereabouts during his absence. His failure to do that was not only unfair to his employer, but jeopardized the status of his fellow crew members. His actions in this regard cast doubt on his intentions, as well as, the true extent and longevity of his injuries.

The Claimant's record is certainly not a good one. While he does have many years of service, he has suffered many injuries and was dismissed by the Carrier in 1984 and reinstated two years later. Under the circumstances, the Board does not believe the penalty issued by the Carrier should be disturbed.

AWARD

The claim is denied.

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

Carol J. Zamperini, Neutral

Submitted:

February 29, 1996  
Denver, Colorado