

SPECIAL BOARD OF ADJUSTMENT NO. 947

Case No. 172
Award No. 172

Claimant: L. R. Gutierrez

PARTIES Brotherhood of Maintenance of Way Employees
TO and
DISPUTE 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 Claimant was a Grinder Operator on a two-man welding crew, Welding Gang 82. Normally, he was assigned to the Indio District. However on August 22, 1995, he and his co-worker were told to report to West Colton Yard where they were to grind the stock rail switch and frogs. They met their supervisor there and assisted in unloading a Switch Binder Model MC-3 with their Boom Truck. After the grinder was serviced they were to proceed with their work. It is not clear whether they started their work that day or the next. In either case, they worked uneventfully until August 25, 1995.

Around 11:30 on August 25, 1995, the Claimant testified that they heard a train approaching the work site. They decided to clear the track in order to allow the train to pass. When they tried to use the Boom Truck, it would not operate. With the

train moving toward them, the crew decided to move the grinder by hand. While doing so, the Claimant fell breaking his wrist and injuring his back. His co-worker also slipped injuring his lower back. An investigation was held shortly afterwards and the two men were taken to the doctor.

On September 7, 1995, a charge letter was sent to both employees directing them to appear at a formal investigation to be held at the Office of the Division Engineer at Bloomington, CA., on September 26, 1995. Since neither crew member received the notice in a timely fashion and did not receive subsequent notices of postponement, the Investigation was continued to November 1, 1995. The original charge letter alleged violations of the following Carrier Safety Rules:

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 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.

Rule 1.1.1 Maintaining a Safe Course

In case of doubt or uncertainty, take the safe course.

Rule 1.1.2 Alert and Attentive

Employees must be careful to prevent injuring themselves or others. They must be alert and attentive when performing their duties and plan their work to avoid injury.

Rule 1.6 Conduct, that part reading:

Employees must not be:

1. Careless of the safety of themselves or others
2. Negligent

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

After reviewing the evidence developed at the Investigation, the Carrier ruled the Claimant was guilty of the charges and issued him a five (5) day suspension without pay to be served immediately upon his return to work from his injury leave.

The Organization, on behalf of the Claimant, contends the Carrier has failed to meet its burden of proof. They also point out that no one can be blamed for equipment failure and there was no doubt that the Boom Truck for some unknown reason failed to operate when the two men attempted to clear the Grinder from the track.

Furthermore, they point out that the crew had never worked in the West Colton Yards and fully believed they were responsible for removing the Grinder from the track when a train approached. They did not believe trains would stop and seek their permission before proceeding across the switch and out of the yard. Therefore, when the Boom Truck failed, they saw no alternative than to manually remove the Grinder.

Finally, the Organization proffers the Claimant's years of experience as a mitigating factor. They suggest, if anything, it was a lack of communication which caused the Claimant and his co-worker to believe it was necessary to manually remove the grinder from the track, it was not an intentional disregard for the supervisor's instructions. Therefore, the Carrier should merely issue the Claimant a slap on the wrist for his actions.

The Carrier argues that the Claimant's supervisor, on several occasions, made it clear the Boom Truck was to be used any time the Grinder had to be moved. Furthermore, the crew had personally cleared track and time within the West Colton Yard when they were making the repairs to the switch. They should have been aware that trains would stop short of their work site and seek permission before proceeding. In any case, when the crew realized the Boom Truck was not working, they could have flagged the train if they did not believe it would have stopped on its own.

The Board has reviewed the case carefully. The Board does not believe the Claimant intentionally ignored the supervisor's directive not to remove the grinder by hand. His failure to comply with the direct order was more a response to the equipment failure. Regardless, he did violate clear instructions. Furthermore, as pointed out at hearing and is evident from the Claimant's employment record, he has been employed with the Carrier for over 17 years. It is hard for this Board to believe the Claimant did not know that once the crew obtained track and time, trains had to wait for their clearance before proceeding over the switch. Besides, the Carrier correctly asserts that if the Claimant truly believed the train would automatically proceed

through the switch, he had the prerogative to red flag the train once he realized the Boom Truck did not work.

Finally, the Claimant's testimony was inconsistent at times. The Board does not believe he was as forthcoming as he should have been. In contrast, the testimony of the supervisor was credible.

For all of these reasons, this Board believes the Carrier has met its burden of proof and the penalty issued was appropriate.

AWARD

The claim is denied.

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

Carol J. Zamperini, Neutral

Submitted:

March 29, 1996
Denver, Colorado