

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

Award No. 13611

Docket No. 13494

01-2-99-2-92

The Second Division consisted of the regular members and in addition Referee Ann S. Kenis when award was rendered.

PARTIES TO DISPUTE: (**Brotherhood Railway Carmen Division/
Transportation Communications International Union**
(**Springfield Terminal Railway Company**)

STATEMENT OF CLAIM:

“Claim of the Committee of the Union that:

1. That the Springfield Terminal Railway violated the terms of our current agreement, in particular Rule 13.1 when they arbitrarily assessed a five (5) working day suspension to James Besemer as a result of an investigation held on October 1, 1998.
2. That accordingly, the Springfield Terminal Railway Company be ordered to compensate Carman James Besemer in the amount of eight (8) hours pay for each workday he was withheld from service. Also, compensate him for any other lost compensation as a result of this investigation.”

FINDINGS:

The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

On August 5, 1998, the Claimant was employed as a Carman at the Carrier's car repair facility in Lowell, Massachusetts. During the course of his shift, he was observed by supervision wearing a pair of work boots in which the sole had separated from the leather upper of the boot. He was issued a failed STOP, pursuant to Carrier's Safety Training and Observation Procedure, and was notified that this constituted a violation of Safety Rule No. 2, which prohibits employees from wearing shoes with loose soles.

After further review of the incident, the Carrier notified the Claimant to report for an Investigation in connection with the alleged safety incident. Following an Investigation on October 1, 1998, the Claimant was issued a five-day suspension.

The Organization contends that the Investigation notice and resulting disciplinary action issued after the failed STOP memo must be considered dual discipline. It maintains that the Claimant was disciplined by the issuance of the STOP memo and then disciplined again, more severely, when he was assessed a five-day suspension.

After careful consideration of the matter, we must reject that argument. The testimony and evidence adduced on the record indicates that the STOP memo provided an opportunity for the Carrier to instruct the Claimant on the correct application of a Safety Rule. There is no probative evidence that the STOP memo was disciplinary in nature or that it was used as part of a progressive discipline process. The five-day suspension issued in this case was the only discipline issued for the August 5 incident. Therefore, the Carrier has not run afoul of double jeopardy principles.

The Organization also objected to the conduct of the Hearing Officer at the Investigation, arguing that he overstepped his role by refusing to permit two Organization representatives to present questions during the Hearing and then incorrectly ruled on several evidentiary points. The Board has reviewed the transcript of the Hearing and finds no support for the Organization's contentions. Neither Rule 13 nor any other Agreement Rule provides the Claimant with the right to have multiple representatives at an Investigation. Moreover, contrary to Second Division Award 8292, cited by the Organization, there is no evidence of a practice on this property whereby charged employees have been permitted multiple representatives at Investigations.

We note, too, that the Claimant and his representative were both allowed to ask questions during the Investigation. The Hearing Officer also permitted them to confer with their co-representative in the presentation of the Organization's case. In addition, the Organization and the Claimant were afforded full opportunity to present such evidence and argument as desired, including an examination and cross-examination of all witnesses. Nothing more was required of the Hearing Officer. Thus, we find that the record as a whole fully supports the conclusion that the Claimant had a fair and impartial Hearing. There is no basis for a determination that there was prejudicial error or that the Claimant's rights of due process were in any way abridged.

Turning to the merits of the case, the Board concludes that there is substantial evidence to support the finding of the Claimant's Safety Rule violation. Despite some dispute by witnesses as to whether the sole separation was an inch and a half or three inches, the fact remains that the Claimant did not properly conform to the requirements of Safety Rule No. 2. The rationale behind the Rule is to ensure that an employee does not trip or otherwise injure himself because of defective footwear. In the instant case, the Claimant's own admission establishes the violation.

As to the reasonableness of the penalty imposed, the Board's role is well-established. We do not interfere with the assessment of discipline absent a finding that the Carrier's determination was arbitrary, discriminatory or capricious. The record here indicates that the Claimant received training pertaining to this Safety Rule and was counseled and instructed about applying the Safety Rules properly. After two safety reviews, he was told that another violation of the Safety Rules would be dealt within a disciplinary manner. In September 1997, he was issued a two-day suspension for improper use of his crane. The imposition of a five-day suspension is therefore not unreasonable or unduly harsh under these facts.

Moreover, the Organization did not succeed in establishing that the Claimant was disparately treated. There was some evidence presented at the Hearing that two other employees were permitted to tape tears in the upper leather portions of their shoes and continue working, although failed STOP's were issued to them. The Carrier witnesses maintained that the Claimant's shoe, which had separated at the sole, presented a much greater hazard, and we have no reason to doubt that testimony. Absent evidence that other employees had disciplinary records similar to the Claimant's, and were not issued a suspension for the same Rule violation, we cannot say that the Claimant was subjected to unequal treatment on this record.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division**

Dated at Chicago, Illinois, this 4th day of June, 2001.