

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 39339
Docket No. MW-39922
08-3-NRAB-00003-070077
(07-3-77)

The Third Division consisted of the regular members and in addition Referee Gerald E. Wallin when award was rendered.

(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(Soo Line Railroad Company (former Chicago, Milwaukee,
(St. Paul and Pacific Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline [five (5) calendar day suspension effective January 20, 2006] imposed upon Mr. J. A. Scott for alleged violation of General Code of Operating Rules 1.1 and 1.1.2 in connection with a personal injury on October 21, 2005, while working as an assistant foreman in Sturtevant, Wisconsin, was arbitrary, capricious and in violation of the Agreement (System File D-23-05-550-11/8-00487 CMP).
- (2) As a consequence of the violation referred to in Part (1) above, all reference to this discipline shall be removed from Mr. J. A. Scott's record and he shall be compensated for any and all lost wages and have all rights and benefits restored that may have been lost as a result of this suspension.”

FINDINGS:

The Third 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.

The Claimant twisted his ankle while attempting to step over loose ballast on a crosstie while carrying tools after performing some FRA defect correction work. The Claimant admitted seeing the loose ballast before trying to step over it. On October 25, 2005, four days after the injury incident, the Claimant and his supervisor met for a Formal Counseling session in accordance with Section 1 of the Carrier's Positive Behavior & Performance Development Policy. As part of that process, the Claimant's supervisor opted to complete a Performance Development Plan. Parts 1-7 of the Plan were completed by the supervisor.

In Part 1, the supervisor described the behavior or performance issue leading to the counseling as follows:

"Not taken *{sic}* his personal responsibility to preventing injury to himself. Failure to provide control measures for known hazards. Not having a good safety attitude to prevent accidents."

In Part 3, the supervisor described the future performance to be required of the Claimant as follows:

"Must take personal responsibility to prevent accident *{sic}* to himself and fellow workers. Having a good attitude towards safety."

Similar supervisor comments were listed in Part 4 to describe the measures that the Claimant needed to take to raise his performance to the required level. Finally, in Part 7, the plan listed three future dates on which the Claimant's

performance would be reviewed with him: October 28, November 11, and November 28, 2005.

Space was provided for the Claimant's comments in Part 8. The Claimant wrote:

"I do not agree that I did not or do not take responsibility for my . . . or my fellow workers safety & well being from injury. I always look out for hazards for myself and fellow workers. I believe that I took every measure possible to prevent my injury."

The Performance Development Plan was completed and signed by both the Claimant and his supervisor on October 25, 2005.

Six days later, by letter dated October 31, 2005, a different Carrier official initiated the Investigation into the Claimant's injury that resulted in the 5-day suspension and the instant claim.

The Organization advanced a procedural objection at the Investigation and maintained the objection during the appeal process on the property. It based its objection on the doctrine that prohibits "double jeopardy." In the Organization's view, the Claimant was disciplined twice for the same offense. We agree.

The Carrier's Positive Behavior & Performance Development Policy is a 17-page document that essentially categorizes behavioral and/or performance misconduct into three stages for appropriate handling. Section 1 defines the stages of Informal Counseling and Formal Counseling. Informal Counseling is directed at the least serious infractions and does not result in any documentation.

The policy goes on to provide as follows:

"If informal counseling (coaching) does not correct the situation, has been tried previously, or the supervisor believes the behavior/performance to be sufficiently serious, the supervisor will formally counsel the employee on the performance or behavior issues, with documentation. The purpose of counseling is to

thoroughly discuss the work performance or attitude which may have contributed to an incident and to identify specific steps to be taken by the employee to ensure proper performance in the future. Formal counseling will include written documentation of the discussion and performance expectations or a written Positive Action Plan, which should be jointly developed by the supervisor and the employee.”

Section 2 of the Policy deals with discipline under the Agreement. By the terms of the Policy, this stage is reserved for more serious matters. The initial paragraph of the section reads as follows:

“The supervisor may opt to use the disciplinary process of the applicable collective bargaining agreement for extremely serious performance/behavior issues as well as for frequent or continued unacceptable behavior/performance for which coaching and counseling has not been effective or is not appropriate.” (Emphasis added.)

It is clear from the record that the Claimant’s immediate supervisor fully exercised the option under the Carrier’s policy to invoke Formal Counseling after discussing the matter with the Claimant. The existence of the signed Positive Development Plan confirms that this option was exercised. The policy is clear that a supervisor can invoke Informal Counseling or Formal Counseling or discipline under the Agreement, but not more than one of the stages for the same incident. Indeed, the policy illustrates this election of options graphically on page 11. After the supervisor’s completed exercise of the Formal Counseling option with the Personal Development Plan, the matter was fully and finally handled under the policy for the injury in question. The on-property record does not show any evidence whatsoever of subsequent behavior or performance deficiencies that would justify invoking the discipline procedure under the Agreement.

Given the foregoing discussion, we must conclude that the Carrier did attempt to discipline the Claimant twice for the same injury. Thus, we must sustain the Organization’s objection and overturn the five-day suspension he has been assessed. The Carrier is directed to reimburse the Claimant for his actual wage loss resulting from the suspension pursuant to Rule 18 of the Agreement.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 29th day of September 2008.