

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42841
Docket No. MW-42518
18-3-NRAB-00003-140153**

The Third Division consisted of the regular members and in addition Referee Meeta A. Bass 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 days suspension effective on the date of return from Medical Leave status] imposed upon Mr. J. Rea by letter dated August 27, 2012 for alleged violation of Core Safety Rule 11 on July 11, 2012 in connection with charges on Notice of Investigation dated July 26, 2012 was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File D-24-12-550-05/8-00536 CMP).**
- (2) As a consequence of the violation referred to in Part (1) above, all reference to the aforesaid discipline shall be removed from Claimant J. Rea’s record and shall receive ‘... all lost wages, straight time, overtime, paid and non-paid, allowances and safety incentives, expenses, per diems, vacation, sick time, health & welfare insurance, dental insurance, supplemental insurance, and any and all other benefits to which entitled***’.”**

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 Carrier issued a Notice of Investigation letter dated July 19, 2012, which gave Notice of an Investigation in to the following incident:

“with your alleged work actions may have been deemed unsafe while working at the Itasca Siding Track. The incident took place off Mile 22.2 Elgin Sub on Wednesday, July 11, 2012 and reported on June 21, 2012 at approx. 08:30 hours.”

After some postponement, the Hearing was held on August 7, 2012. Following the Investigation, the Claimant received a Discipline Notice dated August 27, 2012, finding the Claimant in violation of GCOR, Rule 1.11-The use of approved tool, equipment and materials for the purposes intended resulting in a five calendar day suspension under the CP Policy. The Organization appealed the Carrier’s decision by letter dated October 16, 2012. The Carrier denied the Organization’s appeal on December 3, 2012. A formal conference was held on June 26, 2013. The claim was appealed and now is before this Board for a final resolution of the claim.

The Claimant is a machine operator. Due to a shortage of staff on July 11, 2012, the Claimant and the assistant foreman had to assist in replacing switch-ties at Itasca Industry Park due to a derailment. The assistant foreman and the Claimant were initially using the claw bar to remove spikes. The assistant foreman came upon a spike which was under the plate, and was “really flat” and “smashed.” The assistant foreman instructed the Claimant to get the spike lifter from the truck. The Claimant went to the truck but was unable to locate the spike lifter. The Claimant returned to the site and told the assistant foreman that he could not locate the spike lifter. The assistant foreman then went to look for the spike lifter. While he was gone, the Claimant used the claw bar in reverse to try to pry the plate up and pop the spike, and in the process, the Claimant was injured. When the assistant foreman returned with the spike lifter, he was informed of the injury to the Claimant.

The Board has reviewed the record developed by the parties during their handling of the claim on the property, and considered evidence related to the following to make its determination of this claim:

- “1) Did the Claimant receive a full and fair investigation with due notice of charges, opportunity to defend and representation?**
- 2) If so, did the Carrier establish by substantial evidence that Claimant was culpable of the charged misconduct or dereliction of duty?**
- 3) If so, was the penalty imposed arbitrary, capricious, discriminatory or unreasonably harsh as applied to the facts and circumstances giving rise to this claim?”**

The Carrier contends that the Claimant was afforded a fair and impartial Investigation in accordance with the governing Collective Bargaining Agreement despite the various procedural errors raised by the Organization. The Carrier asserts that the balance of testimony regarding the use of the appropriate tool for the task established substantial probative evidence of the Claimant’s conduct to prove the violation of Rule 1.11. The penalty, a five working day suspension, is appropriate based upon the seriousness of the offense in accordance with the Carrier’s Discipline Policy.

The Organization contends that the Carrier failed to afford the Claimant a fair and impartial Investigation due to the manner in which the Hearing Officer conducted the hearing. The Organization asserts that the Hearing Officer asked a number of leading questions to witnesses to obtain a predetermined outcome. Further, that discipline was rendered by someone other than the hearing officer. The Organization further contends that Carrier failed to meet its burden of proof, and that the claw bar is an appropriate tool to remove spikes that are too tight as evidenced by the Carrier’s training manual. In addition, the Organization contends that the discipline assessed was arbitrary, capricious and unwarranted.

The Board is mindful of the challenges faced by a Hearing Officer in managing a hearing process while safeguarding the due process rights of the Claimant. Unless an abuse of discretion by the hearing officer is shown to prejudice the due process rights of the Claimant, the Board is unlikely to sustain an appeal on procedural grounds. It is evident from the record that a language barrier existed, and the hearing

officer allowed for interpretation of questions in Spanish by the Local Chairman to address this concern. The Claimant is bilingual as well. The Agreement does not mandate that discipline is to be rendered by the Hearing Officer. After a review of the record and in particular, the questions posed by the Hearing Officer, the Board finds that the Claimant received a full and fair Investigation with due notice of charges, opportunity to defend and representation.

The Claimant is charged with violation of GCOR, Rule 1.11-The use of approved tool, equipment and materials for the purposes. It is not disputed that in past practice the claw bar was used on the opposite end of the claw to lift the spike plate up in an effort to build a gap between the spike head and the plate. The witnesses acknowledged that veteran workers still may use the tool for this purpose, and the Claimant was most likely taught the use of claw bar in this manner from them. As technology has developed, the company has now determined to use the spike lifter for this purpose. If the spike lifter did not work, then some alternate method is used. The Claimant testified that upon receipt of the Notice for Investigation that he searched and found no rule or memo stating that the claw bar should not be used for this purpose, and no such document was introduced at the hearing.

The Board finds that the Carrier did not establish by substantial evidence that the Claimant was culpable of the charged misconduct.

AWARD

Claim sustained.

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 10th day of January 2018.