

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION**

Award No. 26047
Docket No. 45972
04-1-03-1-M-2118

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

PARTIES TO DISPUTE: (Brotherhood of Locomotive Engineers
(Montana Rail Link, Inc.

STATEMENT OF CLAIM:

“Claim on behalf of Engineer D. D. Smith requesting that the discipline (dismissal) be reversed, that he be made whole for all lost time and benefits resultant from this incident and investigation, and that notation on his personal record be removed.”

FINDINGS:

The First 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 January 7, 2002, the Claimant waived his right to a fact-finding and accepted a 30-day suspension for missing a call for service in violation of Carrier Rules. This was the sixth time that the Claimant had missed a call, and the fifth such violation in 15 months.

In addition to its progressive discipline system, the Carrier also utilizes a demerit based discipline policy. Each day of suspension assessed, whether served or deferred, and each censure rendered, counts as one demerit. When an employee accumulates 12 months of service without an entry of discipline on his or her service record, 15 demerits are removed from the record. However, an employee who accumulates 100 demerits under the discipline policy is subject to a fact-finding and possible dismissal from service.

The Claimant's 30-day suspension put him over the 100-demerit threshold. Accordingly, he was notified by letter dated January 31, 2002 to attend a fact-finding to determine whether he failed to comply with the Carrier's discipline policy. The fact-finding was held on February 6, 2002, after which time the Claimant was dismissed from service.

The Carrier contends that dismissal was warranted. The Claimant had accumulated 118 demerits, the Carrier points out, and his record showed an increasing disregard for his job responsibilities. Despite the imposition of corrective discipline, he repeatedly missed calls for service and ultimately demonstrated an inability or unwillingness to comply with Carrier Rules.

The Organization asserts that the Claimant was dismissed for the accumulated discipline that he was carrying on his personal record - discipline for which punishment had already been issued. Because the Claimant was clearly punished twice for the same offense, he was impermissibly subjected to double jeopardy and the claim must be sustained.

The Board carefully reviewed the record in this case. We note at the outset that new, additional arguments presented to the Board have not been considered. The parties are required to develop their contentions during the on-property handling of the case. We need no citation for the well-established principle that the Board may not consider de novo arguments which have not been considered on the property.

That said, it is clear that the focus of the case centers on the issue of double jeopardy. The Carrier asserted that the Organization waived this argument by not raising it during the Investigation. Because the issue was raised and discussed on the property, however, it is properly before the Board for consideration and has not been waived.

We find that the Claimant was subjected to a measure of double jeopardy. The Claimant's dismissal was predicated on the accumulation of demerits assessed as a result of misconduct for which the Claimant was already disciplined. That is contrary to the established principal that only one disciplinary action may be invoked for any offense.

This same issue has been decided on this property in First Division Award 25309. In that case, the Board held that the employee was discharged after accumulating in excess of 100 demerits under this identical policy for acts that already resulted in discipline. The claim was sustained. We do not doubt the advisability of deciding the matter differently today. The Carrier failed to demonstrate that the facts of the present case are materially and sufficiently distinguishable to warrant a different conclusion. Moreover, the Carrier's reliance on prior Awards does not change the result, as those cases involved parties different than those herein where the subject of double jeopardy was not placed directly at issue.

It has long been held that resolution of disputes between the same parties concerning the same basic issues should not be disturbed in a subsequent proceeding in the absence of a finding that the prior Award was palpably erroneous. There is no basis for such a finding in the instant case.

In fashioning a remedy, we cannot ignore the fact that the Claimant admitted during the Hearing to a problem with alcohol abuse. Accordingly, we direct that the Claimant be reinstated with pay for time lost after the conclusion of the 30-day suspension, subject to offset for outside earnings and contingent on the following conditions:

- The Claimant must take and pass a return to duty physical which shall include drug and alcohol screening;
- The Claimant will meet with an Employee Assistance Counselor and follow any prescribed treatment program if deemed necessary.

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 First Division

Dated at Chicago, Illinois, this 23rd day of July 2004.