

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

Award No. 13638

Docket No. 13528

01-2-00-2-4

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

(International Brotherhood of Electrical Workers
(System Council No. 16)

PARTIES TO DISPUTE: (

(Burlington Northern Santa Fe Railway Company

STATEMENT OF CLAIM:

- “1. That in violation of the current Agreement, Rule 35 in particular, Electrician Steven A. Moyer was unjustly issued a Level I Formal Reprimand by the Burlington Northern/Santa Fe Railroad Company following an investigation held on June 26, 1998.
2. That the issuance of the Level I Formal Reprimand, a one (1) year probationary period and instructions that Mr. Moyer must develop a written joint plan with his supervisor designed to solve problems and prevent further occurrences was unjust.
3. That accordingly, the Burlington Northern/Santa Fe Railroad Company be directed to set aside such discipline and remove all record of it from Electrician Steve A. Moyer’s personal file.”

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 May 29, 1998, the Claimant was performing service at the Carrier's Guernsey Diesel Servicing Facility in Guernsey, Wyoming. At approximately 1:30 P.M., he was observed by his Supervisor, working in the Diesel Pit Servicing Building without his hearing protection on. This was at a time when locomotives were running and the exhaust fans were on.

Formal Investigation was scheduled to determine the Claimant's responsibility, if any, in connection with his alleged failure to comply with instructions from proper authority when observed working without the proper personal protective equipment. Following the Investigation, the Claimant was assessed a Level I Formal Reprimand and placed on probation for a period of one year. In addition, he was instructed to develop a written joint action plan with his Supervisor.

At the Investigation, the Claimant did not dispute the fact that he failed to wear ear protection at the time in question. He conceded that he "just forgot" and "didn't think about it." The Organization argued, however, that discipline was unwarranted because the Claimant did not receive advance written notice of the precise charge for which the Investigation was held. The Organization further argued that there was an inconsistent application of the Rules and policies at the Guernsey facility. After careful consideration of the record in its entirety, the Board rejects both contentions.

We find no procedural or due process defects on this record. The Claimant was provided sufficient notice to apprise him of the alleged misconduct which led to the charges. No contractual requirement has been cited which would have required the Carrier to cite a specific Rule in its Notice of Investigation.

The Organization's second argument was in the nature of an affirmative defense for which the Organization had the burden of proof. In order to establish inconsistent or disparate application of the Rules, the Organization had to show that employees engaged in the same type of misconduct as the Claimant and were treated differently or that no reasonable basis existed for variations in the enforcement of the Rule. No such showing was made.

The record indicates that verbal instructions had been issued to employees advising them that ear protection was not required in the working areas of the building if there were no motors running and the fans were not on in the building.

However, that fact alone does not establish inconsistent or disparate treatment. On the contrary, the Carrier supervision testified that employees working in the Diesel Pit Servicing Building have been consistently disciplined for failing to wear ear protection when the machinery and fans were running; no discipline has been issued when the machinery and fans have been off. There was no evidence offered to refute these crucial points.

Similarly, although the Claimant asserted that supervisory personnel did not adhere to the policy, there was no proof that they were in the same working location as the Claimant and failed to wear protective ear equipment. The Organization's arguments must therefore be deemed unpersuasive.

The Claimant was working under conditions and in a location where hearing protection was required. He knew the Rule and its application at this facility, yet failed to wear the required ear protection. Discipline therefore was warranted. Under the circumstances, the penalty assessed was neither arbitrary nor excessive.

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 6th day of August, 2001.

