

NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION

Award No. 38998  
Docket No. MW-39453  
08-3-NRAB-00003-060109  
(06-3-109)

The Third Division consisted of the regular members and in addition Referee Sinclair Kossoff when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees Division -  
( IBT Rail Conference  
( BNSF Railway Company (former Burlington  
( Northern Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (dismissal) imposed upon Mr. E. Yalowizer under date of February 5, 2005 for alleged violation of Maintenance of Way Safety Rules S-1.3.1, S-21.1 and S-21.2.2 in connection with charges of failure to wear required personal protective equipment on November 24, 2004 while assigned as a machine operator, headquartered at Douglas, Wyoming was arbitrary, capricious, unwarranted and in violation of the Agreement [System File C-05-D070-3/10-05-0122(MW) BNR].
- (2) As a consequence of the violation referred to in Part (1) above, Mr. E. Yalowizer shall now receive the remedy prescribed by the parties in Rule 40(G).”

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.

On November 24, 2004, the Claimant was assigned as a Group 2 Operator on a front end loader with an enclosed cab. For his job he was required by Maintenance of Way Safety Rule S-21.2.2 to wear safety boots. He had been excused to leave work early that day to attend a funeral and, when he exited from the loader, the Assistant Roadmaster observed that he was not wearing safety boots. The Claimant testified that he had worn his safety boots to work that day but that he ripped the sole off of one of the boots when testing the tires on his machine. He then put on his personal hiking boots, he stated, which he carried with him. The Assistant Roadmaster notified the Roadmaster that the Claimant had failed an OPS safety test with regard to his footwear.

By letter dated November 29, the Claimant was notified to attend an Investigation on December 6, 2004, "for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to wear required protective equipment while assigned as a Machine Operator, headquartered at Douglas, Wyoming." The notification letter stated that "[t]he incident occurred November 24, 2004, near MP 0109.8 on the Orin Subdivision, and is your second operation test failure in 30 days in which you failed to wear the proper personal protective equipment." Following one postponement by mutual agreement, the Hearing was held on January 5, 2005, at the Roadmaster's office in Douglas, Wyoming.

The reference in the notification letter to a "second operation test failure in 30 days" was to an incident in which the Claimant failed an OPS safety test with regard to the wearing of safety glasses. The Claimant denied that the safety glasses incident occurred within 30 days of the safety shoes incident, and the actual date of the prior occurrence does not appear in the record. The Claimant began his employment with the Carrier on April 12, 1993, and his testimony was not disputed that in his 11 and one-half years of employment with the Carrier he was given approximately 200 OPS safety tests of which the present one and the prior one were the only ones he failed. The Claimant had no injuries during his 11 and one-half years of employment.

The Claimant returned to work from a personal leave of absence on November 23, 2004. At that time he was given a return-to-work interview in which the Carrier's

Safety Vision Statement was reviewed and its Safety Action Plan discussed. In the interview, among other things, the Claimant committed himself "to following rules and procedures in accordance with our Safety Rules and Engineering Instructions." At the conclusion of the interview he signed a statement acknowledging that he agreed to all points covered in the interview.

Following the Investigation, by letter dated February 1, 2005, the Carrier notified the Claimant ". . . that as a result of formal investigation on January 5, 2005, concerning your failure to wear required personal protective equipment while assigned as a Machine Operator, headquartered at Douglas, Wyoming, on November 24, 2004, near MP 0109.8 on the Orin Subdivision, you are dismissed from employment for violation of Maintenance of Way Safety Rules S-1.3.1, S-21.1 and S-21.22, January 31, 1999." The letter added, "In assessing discipline, consideration was given to your personal record." At the time of the November 24, 2004, incident the Claimant had on his personal record an active 30-day record suspension for a prior serious incident unrelated to safety.

The Organization appealed the dismissal by letter dated March 28, 2005. In its appeal the Organization argues that the Claimant reported for work with his safety boots but that the sole of one of his boots came loose while he was doing a safety inspection. The appeal states that the Carrier did not establish that the Claimant at any time placed himself or anyone else in an unsafe position and that the Claimant "is a safe employee with an excellent safety record, with no injuries in eleven years work history and with one other 'ops test' failure in those eleven years, out of an estimated 200 tests." The appeal contends that the Claimant complied with the Safety Rules on the date in question "to the best of his ability" and that "this is a very minor rules violation that does not in any way justify the dismissal that was issued to an employee with [the Claimant's] exemplary safety record."

It is the position of the Carrier that the Claimant admitted in the Investigation that he did not wear safety shoes and that he was in violation of the cited Safety Rules. The Carrier asserts that the safety violation was the Claimant's second serious incident within 36 months, and its Personal Employee Performance Policy ("PEPA") states, "A second serious incident within a 36-month review period will subject the employee to dismissal." The Carrier takes serious issue with the Organization's argument that the Claimant's infraction was a minor violation. It stresses that the Claimant participated in a safety briefing and then violated Safety Rules the very next day.

The Board carefully reviewed the transcript and exhibits in this case. The evidence establishes that the safety violation here in issue was the Claimant's second serious violation within a 36-month period. The Carrier's PEPA permits dismissal of an employee under these circumstances. However, the PEPA does not preclude the consideration of extenuating circumstances.

It is not disputed that for approximately 11 years prior to the two recent safety infractions the Claimant had an exemplary safety record. He had not failed an OPS safety test during that entire period. In addition during his entire period of employment of 11 and one-half years the Claimant has not had either a reportable or a non-reportable injury at work. These facts would indicate that the present safety infractions are not characteristic of the Claimant's general attitude and conduct with respect to safety. These elements of mitigation, the Board believes, are a basis for giving the Claimant another chance. He shall be offered reinstatement with seniority unimpaired. The importance of safety and the seriousness of the Claimant's most recent safety violation, however, especially having occurred the very next day after a detailed safety briefing and a written commitment by the Claimant to follow the Safety Rules and the fact that this is his second serious violation within the applicable PEPA review period preclude awarding any backpay.

**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 27th day of March 2008.