

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7048
AWARD NO. 199, (Case No. 199)**

**BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYES DIVISION – IBT RAIL CONFERENCE**

vs

BNSF RAILWAY COMPANY

William R. Miller, Chairman & Neutral Member
Samantha Rogers, Carrier Member
David R. Scoville, Employee Member

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- 1. The Carrier violated the Agreement commencing March 23, 2015, when Claimant, Jason R. Carter (1647767) was disciplined with a Level S 30-Day Record Suspension with a 1-year review period for his failure to wear any Personal Protective Equipment as well as wearing a finger ring on March 18, 2015 at approximately 9:24 a.m. while working as a flagman near milepost 27.2 on the San Bernardino Subdivision. The Carrier alleged violation of Maintenance of Way Safety Rule (MWSR) 21.1 Personal Protective Equipment Requirements, MWSR 21.5 Enhanced Visibility Work Wear, MWSR 21.3 Hard Hat, Maintenance of Way Operating Rule (MWOR) 1.15 Duty Reporting or Absence, MWSR 21.7 Safety Footwear, MWSR 21.2 Safety Eyewear and MWSR 1.1 Job Safety Briefing.**
- 2. As a consequence of the violation referred to in part 1 the Carrier shall remove from the Claimant’s record this dismissal and he be reinstated, with seniority, vacation, all rights unimpaired and pay for all wage loss commencing March 23, 2015, continuing forward and/or otherwise made whole.”**
(Carrier File No. 14-15-0270) (Organization File No. 180-SF13S1-1512)

FINDINGS:

Public Law Board No. 7048, upon the whole record and all the evidence, finds and holds that Employee and Carrier are employee and carrier within all the meaning of the Railway Labor Act, as amended; and that the Board has jurisdiction over the dispute herein; and that the parties to the dispute have participated in accordance to the Agreement that established the Board.

The facts indicate that on the March 18, 2015, the Claimant was working as a Flagman on the San Bernardino Subdivision and it was alleged that he was not wearing proper safety wear and/or equipment and was also wearing a finger ring and because of that allegation the Claimant was directed to attend a formal Investigation on March 31, 2015, which was mutually postponed until May 14, 2015, concerning in pertinent part the following charge:

“...for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to wear any Personal Protective Equipment as well as wearing a finger ring on March 18, 2015 at approximately 0924 hours while working as a flagman near milepost 27.2 on the San Bernardino Subdivision. The date BNSF received first knowledge of this alleged violation is March 19, 2015.

This investigation will determine possible violation of MWSR 21.1 Personal Protective Equipment Requirements, MWSR 21.5 Enhanced Visibility Work Wear, MWSR 21.3 Hard Hat, MWOR 1.15 Duty Reporting or Absence, MWSR 21.7 Safety Footwear, MWSR 21.2 Safety Eyewear and MWSR 1.1 Job Safety Briefing.”

On June 1, 2015, Claimant was notified that he had been found guilty as charged and was assessed a Level S 30-Day Record Suspension with a One Year Review Period.

The Board notes that the instant case is a companion case to Award No. 198, Case No. 198. This is the second of two cases that involve the same Claimant both of which are record suspension cases. Both cases correctly state in their Statement of Claims, Part 1 that Claimant was issued a Record Suspension whereas in Part 2 each requests reinstatement. It is further noted that this is the chronologically earlier incident.

It is the Organization's position that the Claimant was denied a “fair and impartial” Investigation for various reasons that included the Carrier amending the Notice of Investigation shortly before the Hearing and the Hearing Officer entering evidence into the record and acting as a witness, therefore, improperly holding multiple roles during the Investigation. It further argued that the Carrier brought in a witness who offered telephonic testimony denying the Organization the opportunity to see how that witness reacted to questioning and to be certain that the witness was not being coached and/or was properly sequestered. It asserted that was another example of the unfair behavior exhibited towards the Claimant during the Hearing. It asks that based upon those alleged procedural errors the discipline be removed without reviewing the merits.

Turning to the merits, the Organization argued that the record shows that prior to the arrival of Carrier's Operations Test Team to the site where the Claimant was working the Claimant was girded in all the proper PPE required for the job beginning at 0700. According to it, the

Claimant removed his safety equipment shortly before the Carrier Officers arrival on the scene at 0924 because he had been called in from the field to be reassigned to a different task working that night and was being sent home to rest for the remainder of the day. It argued he had removed his PPE while sitting in the truck and was leaving the work site for the day. It further argued that the Claimant explained in his testimony that he was approximately 150 feet away from the nearest rail when he stopped at a dumpster to throw away a bag of trash he had accumulated in the truck. Simply put it asserted that the Claimant was nowhere near any ongoing work and was leaving for the day. The Organization concluded that the Carrier had not met its burden of proof and it requested that the discipline be rescinded and the claim be sustained as presented.

It is the position of the Carrier that the Claimant was not denied a "fair and impartial" Investigation. It argued that contrary to the Organization's assertion there is nothing in the Agreement that prohibits a Hearing Officer reading into the record the alleged Rules that the Claimant had violated and that did not make him a witness. It further argued that Carrier Witness T. Hunter testified via telephone and the Organization was provided every opportunity to cross examine Mr. Hunter and Claimant was not prejudiced by Mr. Hunter's inability to be present for the Hearing. It concluded that the Organization did not prove that the Carrier did anything that inhibited the fairness of the Claimant's Hearing and it requested that the case be resolved on its merits.

Turning to the record the Carrier argued the facts substantiate that the Claimant engaged in conduct that resulted in a violation of all the Operating Rules listed in the Notice of Investigation by having failed to wear appropriate Personal Protective Equipment and following those requirements while on duty on March 18, 2015, which was witnessed by Carrier Officers of the Operating Rules System Team for the Engineering Department. Lastly, it asserted it is clear that the Claimant was guilty as charged and the discipline was appropriate and it asked that the discipline not be disturbed and the claim remain denied.

The Board has reviewed the transcript and record of evidence and will first address the Organization's procedural arguments. Countless arbitral Boards have determined that telephonic testimony does not deny a charged employee the opportunity to a fair Hearing provided the Organization is allowed the opportunity to fully question and cross-examine the witness. Review of the transcript reveals that the Organization and the Claimant were allowed their procedural rights to fully question Mr. Hunter, the telephonic witness, and the Claimant's defense was not inhibited. Additionally, Boards have consistently found that reading of Rules into the transcript are not improper nor does a reading of such by the Hearing Officer

make that Officer a witness. It is determined in this instance there was no showing that the Hearing Officer held improper multiple roles. The Board does not find any other procedural arguments rising to the level that the discipline must be set aside without addressing the merits of the dispute, therefore, it is determined the Investigation and appeal process met the guidelines of Rule 13(a) and Appendix No. 11 and the case will be resolved on its merits.

Beginning on page 38 of the transcript the Manager Operating Rules, Mr. Troy K. Hunter was questioned about the incident in question and responded as follows:

“Troy K. Hunter: Absolutely, Uh, my team and I were on the San Bernardino Sub and approached a pickup which had an employee that was throwing trash out of it into a dumpster along the right-of-way at San Bernardino Sub. Uh, when we approached the vehicle we noticed that the employee did not have any safety shoes on, didn’t have a safety vest, no hard hat, anything of that nature. As, uh, we got closer to the employee, uh, I requested if he had any PPE available, asked him why he did not have any PPE on. He said that, uh, he just hadn’t put it on yet and, uh, that, you know, he, he was getting ready to do so. I asked him then to get his boots and all the required PPE and put it on. He was wearing a pair of tennis shoes, a pair of spy sunglasses, uh, a wedding ring, and again, no approved PPE.” (Underlining Board’s emphasis)

On pages 39 and 40 Mr. Hunter went on to explain that the Claimant stated he was just hanging out and acknowledged that he was on the right-of-way of the Carrier’s property and on page 44 Mr. Hunter stated that the Claimant had told him he was working as a Flagman.

On page 51 of the transcript the Claimant offered his explanation of why he did not have his PPE on. He testified that he was on the way to the office. The questioning of Claimant continued as follows:

“Frank Barrera: You’re still in the field and you understand the requirements that you are still supposed to have your PPE on at that while you’re on the railroad right-of-way?

Jason R. Carter: Correct.”

Beginning on the bottom of page 52 of the transcript the Claimant raised the question as to whether or not he was on the right-of-way because the trash container was approximately 150 away from the rails. In response to that question the Hearing Officer referred the Claimant to Rule S-21.1 which states in pertinent part:

"...All BNSF employees, contractors, and their agents, visitors, and vendors, working in other than an office environment, must wear long pants, waist length shirts with sleeves, and wear appropriate PPE at all times."

The Hearing Officer then went on to ask the Claimant the following question:

"Frank Barrera: So you weren't in an office environment, correct?"

Jason R. Carter: No."

The questioning of the Claimant continued as follows:

"Frank Barrera: You were out on the railroad right-of-way?"

Jason R. Carter: I don't know.

Frank Barrera: So you were outside of an office environment.

Jason R. Carter: Yes.

Frank Barrera: Okay, so by the rule where it states here, it says: working in other than an office environment, so you weren't at the office, we can agree to that.

Jason R. Carter: Correct.

Frank Barrera: And, um, when in doubt we take the safe course at BNSF, correct?

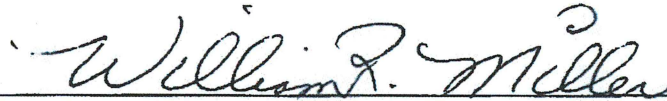
Jason R. Carter: Correct." (Underlining Board's emphasis)

The testimony of Witness Hunter and Claimant confirmed that at 0924 hours the Claimant was not wearing the proper Personal Protective Equipment and Claimant further admitted that the safe course of action at the time of the incident was that he should have followed the Rule covering PPE. It is clear that the Carrier met its burden of proof that the Claimant was guilty as charged.

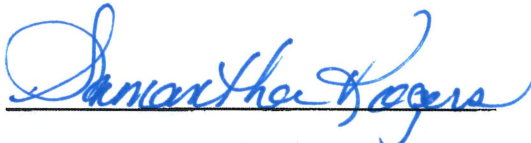
The only issue remaining is whether the discipline was appropriate. At the time of the incident the Claimant had approximately ten years of service with a Formal Reprimand still open under a 12 month review period and a 30-Day Record Suspension with a Three Year Review Period (covered by Award No. 198) issued on the same date as the instant discipline. The discipline assessed was in accordance with the Carrier's Policy for Employee Performance Accountability (PEPA), therefore, the discipline will not be disturbed and the claim will remain denied because it was not contrary to PEPA, nor was it arbitrary, excessive or capricious.

AWARD

Claim denied.



William R. Miller, Chairman & Neutral Member



Samantha Rogers, Carrier Member



David R. Scoville, Employee Member

Award Date: 7/21/17