

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

**Award No. 14040
Docket No. 13915
10-2-NRAB-00002-100002**

The Second Division consisted of the regular members and in addition Referee James E. Conway when award was rendered.

PARTIES TO DISPUTE: (
(International Brotherhood of Electrical Workers
(BNSF Railway Company

STATEMENT OF CLAIM:

- “1. That in violation of the controlling Agreement, Rule 40 in particular, representatives of the BNSF Railway Company unjustly and arbitrarily dismissed from service Mechanical Department Electrician Alan Maddox.”**
- 2. That the Carrier further violated the controlling Agreement when while in the on-property handling of this dispute, the Carrier failed to respond to the Organization’s claim appeal in 60 days as required by Rule 39 (Employees’ Exhibit C). The Carrier is procedurally defective in this matter. The claim must be sustained on these grounds alone. The Carrier has been duly notified in writing, (please review Employees’ Exhibits A and B) yet the Carrier remained indifferent in this matter, showing total disregard for the controlling Agreement, as well as long established industry principles.”**
- 3. That accordingly, the BNSF Railway Company be required to return to service Kansas City, Kansas Electrician Alan Maddox, and that he be made whole for all lost wages, rights, benefits, and privileges, which were adversely affected by the assessed discipline.”**

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.

By letter dated July 18, 2008, Claimant A. Maddox was dismissed from his position as an Electrician for his role in failing to properly apply blue signal protections on a locomotive consist on June 9, 2008.

The formal Investigation held on June 27, 2008, proceeded on generally uncontested facts, although the parties are in sharp disagreement with respect to the appropriateness of the penalty imposed on the Claimant for his actions. The record reflects that in the early morning hours of June 9, 2008, the Claimant as well as Machinist J. S. Allison and Electrician W. Hackett had been on duty at the Argentine Diesel Service Facility (DSF) moving locomotives from inbound tracks into the DSF. The Carrier concluded, based upon undisputed information developed at the formal Investigation, that at approximately 2:45 A.M. he failed to properly apply blue signal protection to controlling locomotive BNSF 7856 and four others coupled on DSF inbound Track 521 on that date. By not placing either a blue flag or his blue signal ID tag on that locomotive, the Claimant failed to protect himself in violation of the Carrier's Argentine LMIT Blue Signal Policy; Rule S-24.2, Blue Signal Protection of Workmen, Section C., Blue Signal Readily Visible to Engineer; and Rule M-1.1, Use of ID Tags, Mechanical Safety Rules and Policies.

On the Claimant's behalf, the Organization at the outset asserts a number of procedural arguments suggesting that (1) the Carrier's handling of the formal Hearing, including withholding relevant documents and (2) failing to timely respond to the Organization's appeal within the time limits set forth in Rule 39, violated the Claimant's rights to a fair and impartial Investigation. The Board considered those contentions and finds all unpersuasive with the partial exception of the Rule 39 contention.

The record reflects that the Organization appealed the Carrier's denial of the claim by local officers on November 21, 2008. The Carrier did not respond with a denial of that appeal until March 13, 2009, well beyond the 60-day time limit established under Rule 39 (b) for the Carrier's notification of disallowance. There are other complicators in the picture as well, including the issue of whether the Organization's appeal letter was sufficiently clear in stating that an appeal was being taken, but on the central point, the Board adopts the rationale reflected in the very substantial arbitral precedent offered for consideration by the Carrier. Because the Carrier's response was untimely, its liability will be tolled from the date of its late denial.¹ Accordingly, pursuant to the weighty precedent from various Divisions of the Board, the proper remedy for the Carrier's procedural failure is compensation to the Claimant at the straight time rate from the date withheld from service until the date of the Carrier's March 13, 2009, denial.

With respect to the merits, the Organization argues first that the Argentine Blue Signal Policy is silent on what unit should be considered "the designated lead unit" for purposes of the Blue Signal Policy. Secondly, it contends that the Carrier's dismissal action offends Rule 40 in that of the five employees involved in the triggering incident (three Machinists and two Electricians) only the Claimant was disciplined. Moreover, given the frequency of blue flag violations, the penalty of dismissal was unduly harsh.

The Claimant was dismissed for neglecting to insure that he and his partner, Machinist Krell, were protected from the east when they began working on the DSF inbound track. Specifically, although a tag was placed on locomotive BNSF 4518, the trailing unit of the west end of the consist after Allison notified the Leadman in the tower, the Claimant did not blue flag the lead locomotive on the east end, nor did any of the other four intermediate units get the required blue signal devices ("donuts") on their control stands, thus leaving him and Krell without protection from the east. The Carrier's evidence establishes clearly that it was the Claimant's responsibility to determine which locomotive was the controlling unit in the five unit consist and to blue flag it. Nor does the Claimant attribute his failure to follow the applicable Rules to any lack of knowledge, freely admitting that he was familiar with the controlling DSF Inbound and Outbound procedures. Accordingly, while the Claimant was plainly obligated to (1) place a blue signal on the controlling locomotive (2) place a donut on the control stand of Locomotive

¹ See, e.g., Second Division Award 13692 ("The long settled rule is that the late denial of a claim tolls the Carrier's liability for the procedural violation as of that date. From the date of the late denial, the dispute is considered on its merits . . .") See also Decision of National Disputes Committee, March 17, 1965; ("The National Disputes Committee rules that receipt of the carrier's denial letter dated December 29, 1959 stopped the carrier's liability arising out of its failure to comply with Article V of the August 21, 1954 Agreement.") Although consistent with abundant arbitral authority, including cases addressing disputes involving the IBEW, the Board notes, however, that the IBEW was not a signatory to that memorandum.

7586 and (3) attach his ID tag to the blue signal banner on the Engineer's side of the locomotive he was on so that it could be seen from the ground, he admits he only placed a blue light on the trailing unit.

The Organization's central argument appears to be that the dismissal action was overly severe inasmuch as the violations established were not "flagrant" and the penalty assessed was disproportionate to that imposed on others involved in the incident. Those arguments might, in another context, have considerable force. Here, however, unlike his fellow employees, the Claimant had been issued two Level S violations in the past year, one for sleeping and one involving dishonesty. So, while already laboring under a 36-month review period for previous Level S violations, the Claimant accrued a third Level S, subjecting him to dismissal. In that respect, his situation differed materially from that of all other employees involved.

The generally accepted standards applicable to this appellate forum dictate that once the facts alleged in support of discipline are proven, the level of discipline should not be disturbed in the absence of arbitrary or capricious judgment on the part of the employer. Here the dismissal comported with the Carrier's established policy of progressive discipline. The Claimant's actions put him and his fellow worker at grave risk, and there is nothing in the record to suggest that the Carrier's dismissal action in response was either arbitrary or excessive in light of the Claimant's past record.

While the Claimant's dismissal is upheld, he shall be made whole for time lost from the date of his removal from service without pay until the date of the Carrier's March 13, 2009, claim denial.

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.

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NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Dated at Chicago, Illinois, this 28th day of December 2010.

**LABOR MEMBERS' DISSENT
TO
AWARD NO. 14040 DOCKET NO. 13915
REFEREE JAMES E. CONWAY**

The Board has seriously erred by failing to comply with the explicit terms of the controlling Agreement, in particular, Rule 39 and denying the Organization's appeal. Rule 39 states **"Should any such claim or grievance be disallowed, the Carrier shall, within 60 days from the date same is filed, notify whoever filed the claim or grievance in writing of the reasons for such disallowance. If not so notified, the claim or grievance shall be allowed as presented"** (Emphasis added). The Board correctly found that Rule 39 (b) was violated, as the Carrier responded to the disciplinary appeal 111 days after it was received:

The record reflects that the Organization appealed the Carrier's denial of the claim by the local officers on November 21, 2008. **The Carrier did not respond with a denial of that appeal until March 13, 2009, well beyond the 60-day time limit established under Rule 39(b) for the notification disallowance.**

Emphasis added.

It therefore was obligated to sustain the Organization's appeal as written in accordance with the Rule. The record contains absolutely no evidence that the Organization ever waived or otherwise relinquished its right to enforce the clear and unambiguous mandate of the Rule. Nevertheless, the Board declined to grant the contractually-mandated relief and instead "adopt[ed] the rational reflected in the very substantial arbitral precedent offered for consideration by the Carrier."

Suffice it to say that the IBEW was not involved in most of those cases. Of the three cases BNSF cited to the Board that are IBEW cases – Second Division Award Nos. 12384 and 13975, and PLB 5531 Award No. 2 -- none arose on BNSF and only the last one involved the same rule and the award in that case doesn't even specifically discuss the time limit in question here.

Perhaps most disturbing is that the Board completely ignored arbitral and judicial precedent directly on point that supports the union's position. Exhibit V to the Organization's submission was Second Division Award 13005 and the related court decision setting aside a prior award leading to Award 13005. It shows that the United States District Court of for the District of Illinois vacated Award 2-12580, which reached the same conclusion this Board now reaches in a dispute involving an identical time limit rule, for "being in excess of the Arbitrator's authority under the Agreement". The rule addressed in Award 2-12580 was the same as Rule 39 here:

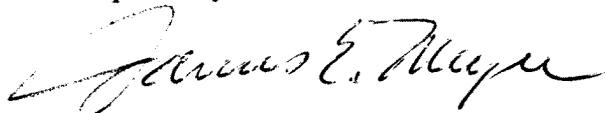
"Should any such claim or grievance be disallowed, the Carrier shall, within 60 days from the date same is filed, notify whoever filed the claim or grievance (the employe or his representative) in writing of the reasons for such disallowance. **If not so notified, the claim or grievance shall be allowed as presented**, but this shall not be considered as a precedent or waiver of the contentions of the Carrier as to other similar claims or grievances."

Emphasis added.

In that case, the Illinois Central Railroad took the same position as the Carrier here, i.e., that "arbitral precedent," not the express language of the Rule itself, should determine the outcome of the case. The Board agreed, but the Court did not. The Court held that the contract provision was so clear and precise that no interpretation was necessary, so the Board's award to the contrary was "in excess of the Arbitrator's authority under the Agreement." As the Division later explained in Award 13005, the Court vacated Award 12580 and remanded the dispute to the Division to correct its error and apply the rule as written.

Because this Board has failed to adhere to the clear and unambiguous requirement of Rule 39, it has exceeded his authority by not applying the contractually mandated-relief to the Claimant. Based on the foregoing, we strongly dissent to the Award in this case.

Respectfully Submitted,

A handwritten signature in cursive script, reading "James E. Meyer".

James E. Meyer
Labor Member