

NATIONAL RAILROAD ADJUSTMENT BOARD  
SECOND DIVISION

Award No. 14099  
Docket No. 13975  
14-2-NRAB-00002-140006

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

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

**STATEMENT OF CLAIM:**

- “1. That in violation of the controlling Agreement, Rule 35 in particular, the BNSF Railway Company, as a result of an investigation held on September 6, 2012 at Seattle, Washington, unjustly assessed Mechanical Department Electrician Todd M. Mercurio unjust discipline in the form of a Level S –Thirty (30) day record suspension, and in addition a three (3) year review period.
2. Accordingly, the BNSF Railway Company is ordered to remove the discipline assessed Todd M. Mercurio from his personal record and all reference to this matter in accordance with the terms of Rule 35 of the controlling Agreement.”

**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.

Following a formal Investigation conducted on September 6, 2012, the Carrier imposed the 30-day record suspension and three-year review period on Claimant Todd M. Mercurio here contested by the Organization on his behalf.

At approximately 6:30 A.M. on August 1, 2012, the Claimant was observed sleeping on duty while serving as an Electrician at the Interbay Locomotive Facility in Seattle, Washington. The record before the Board indicates that at about 6:30 A.M. on that date, General Foreman Scott Wiles had noticed a stool resting on the nose of a BNSF locomotive that was being serviced. As he and Mechanical Foremen Hollie Fultz and Paul Rees approached the unit, they saw the Claimant sleeping in the Engineer's seat. Wiles asked him if he was alright, and ". . . he lifted his head, looking around with a confused look on his face." In subsequent discussions with the Claimant back in the Foreman's office, Mercurio admitted that he ". . . was exhausted and hadn't got [a] . . . lot of sleep." His written statement provided at the time confirmed those remarks:

"I hadn't had a good sleep yesterday morning. I was simply exhausted and did my best to stay awake through the night. I closed my eyes for a second . . . accidentally fell asleep at the end of my shift."

Inconveniently for the Claimant, this was the second time he had been issued a Level S 30-day record suspension within a one-year period for violation of Rule 28.11 – Sleeping. On September 23, 2011, according to the record, he had waived his right to a formal investigation and had been assessed identical discipline after being found asleep on duty on September 18, 2011. Accordingly, although he was subject to dismissal in this instance, the Carrier indicates it extended leniency hoping that the Claimant's performance would improve.

The Organization makes several vigorous arguments in defense of Claimant Mercurio, including that an after-discovered medical condition had contributed to his tiredness and that his involuntary exhaustion was so pronounced he did not have a completely clear mind when he gave his statement to Carrier Officials.

The oral testimony and documentary evidence before us leaves little room for any finding other than that the Claimant was unfortunate enough to be found sleeping on the job twice within one year. With guilt established, the only genuine

issue under consideration, therefore, is whether the discipline imposed was, as the Organization urges, unduly severe. On that point, our review of the record likewise allows the Board no margin. The discipline assessed was well within the Carrier's Policy for Employee Performance Accountability (PEPA) guidelines, and indeed, as noted above, was less severe than it may have been under the circumstances. It cannot, therefore, be considered to have been excessive, arbitrary or capricious.

For the reasons stated above, the claim will be denied.

**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 17th day of December 2014.