

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

**Award No. 14044
Docket No. 13929
12-2-NRAB-00002-110012**

The Second Division consisted of the regular members and in addition Referee Lynette A. Ross when award was rendered.

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

STATEMENT OF CLAIM:

- “1. That in violation of the governing Agreement, Rule 35 in particular, the BNSF Railway Company arbitrarily and unjustly dismissed Electrician Mathias C. Anderson from its service as a result of an investigation conducted on October 8, 2010.**
- 2. That accordingly, and as a result of the arbitrary, unjust and excessive discipline assessed Electrician Mathias C. Anderson, the Carrier be ordered to return Electrician Anderson to service immediately and further, to make Electrician Anderson whole for all lost wages, rights, benefits and privileges which have been adversely affected as a result of the unjust dismissal from service.**
- 3. Further that all record of this matter be removed from Electrician Mathias C. Anderson’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.

The Claimant established service with the Carrier on June 4, 1979. By letter dated September 20, 2010, the Carrier directed him to report for an Investigation on October 4, 2010:

“ . . . for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to have your ID Tag applied to the Blue Flag on BNSF 2792 at approximately 0930 on Sunday, September 19, 2010, while working as an Electrician at Northtown Diesel Shop, Minneapolis, Minnesota.”

The Investigation was postponed to and ultimately conducted on October 8, 2010. By letter dated October 13, 2010, the Carrier notified the Claimant that as a result of the testimony and evidence presented during the Investigation, he was dismissed for having violated Rule S-24.2.10, Use of I.D. Tags, of the BNSF Mechanical Safety Rules and Procedures (MSRP) in effect at the Northtown Diesel Shop. The Claimant had approximately 31 years of service at the time of his dismissal.

The Organization promptly appealed the Carrier's disciplinary action and the parties ultimately conducted an on-property conference concerning the matter. Unable to reach a mutual resolution of the dispute, the claim is now properly before the Board for final and binding adjudication.

The Board carefully reviewed the Investigation transcript, as well as all documents submitted by the parties during their on-property handling. Initially, the Board notes that the claim is procedurally sound in all respects. Therefore, there is no procedural bar to the Board's adjudication of the claim on its merits.

The essential facts are not in dispute. During the Investigation, General Foreman T. M. Tye testified that while making rounds at the test line, he came upon the Claimant working on locomotive BNSF 2792 and discovered that the Claimant had failed to place his I. D. tag on the blue flag of the locomotive on which he was working. According to Tye, the Claimant was installing an “MU” electrical cable at

the rear of the locomotive. Tye testified that the Claimant accompanied him to the office, where in a calm manner, they discussed the blue flag protection Rules and the in-house policy relative to blue flagging locomotives. The Claimant essentially told Tye that prior to commencing work on BNSF 2792, he became distracted and neglected to place his I. D. tag, which was in the pocket of his bib overalls, on the blue flag already in place on the locomotive.

The Claimant did not dispute any of General Foreman Tye's testimony. He frankly testified that contrary to Carrier Rules, he proceeded to work on the locomotive without having his I. D. tag in place on the blue flag. He testified that he was familiar with the Carrier's blue signal Rules and policy, specifically, with the rule requiring blue flag I. D. tagging. His testimony reveals that he had recently participated in blue flag Rules training and was aware that the Carrier expected its employees to fully comply with the Rules and policy. The Claimant testified that he had forgotten to place his I. D. tag on the blue flag protecting workers on locomotive BNSF 2792 because he had been preoccupied with personal matters and had admittedly lost his focus on the important task at hand.

The Board finds that the Carrier's determination as to the Claimant's guilt of the charge is supported by substantial evidence. The record is clear that the Claimant failed to apply his I. D. tag to the blue signal for locomotive BNSF 2792 on which he was working. The Claimant's failure to apply his I. D. tag as required while working at the rear of the locomotive, in an area where serious injury could have occurred, violated Rule S-24.2.10, we concur.

The Board understands that the instant blue flag violation was the Claimant's third violation of its kind within an approximately 18-month period. According to the Carrier, after careful consideration it was determined that the Claimant's third violation of the blue flag Rules and policy warranted his dismissal under the Policy for Employee Performance Accountability (PEPA). Pursuant to the PEPA, blue flag violations are considered "Serious Rule Violations," we understand, and two serious Rule violations within a 36-month or 12-month period, depending on circumstances, will subject the employee to dismissal. The Carrier emphasizes that its decision to dismiss the Claimant was not arbitrary, capricious nor unjust given the Claimant's demonstrated propensity to violate a critical safety Rule and the provisions of the PEPA.

The Organization contends that the Claimant's long-term employment relationship with the Carrier is noteworthy, as is the fact that, until 2006, his disciplinary record was without blemish. The Organization asserts that during his meeting with General Foreman Tye the Claimant was cooperative at all times. It further asserts that during the Investigation, the Claimant admitted his mistake and presented medical documentation in support of his testimony. In the Organization's view, the Claimant's length of service and acceptance of responsibility should go to his credit. The Board has authority to view these circumstances as mitigating, and to overturn the Carrier's dismissal action on grounds that the discipline was harsh in this particular case, the Organization stresses.

The Board well understands that throughout this industry, instances of failing to comply with blue flag Rules and policies constitute serious Rules violations. Here, there is no dispute that the instant blue flag violation was the Claimant's third in a compressed period of time, and that the Claimant had been disciplined on a progressive basis in order to impress upon him the importance of complying with the Carrier's Rules.

In the instant case, the Board finds that the Claimant's career of more than 31 years with the Carrier, coupled with his honesty relative to this most recent infraction, serve to mitigate the penalty of dismissal. Given the unique facts and circumstances, the Board finds in this specific case that the Claimant deserves one last chance to prove himself a Rule-abiding and safety-conscious employee. The Claimant is forewarned that should a supervisory observation such as that conducted by General Foreman Tye on the incident date of September 19, 2010, reveal yet another workplace or Safety Rule or policy violation, it is extremely likely that his length of service and any admission of error will not go to his credit.

Accordingly, the Carrier shall reinstate the Claimant to service with seniority unimpaired, but without backpay or other benefits. The Claimant's return to work shall also be subject to his successful completion of the Carrier's customary return-to-work requirements, including, a physical exam and MSRP Rules training. Given the underlying circumstances in this case, the Board also holds that the Carrier may require the Claimant to meet with the Employee Assistance Program (EAP) counselor prior to resuming to work. The Carrier shall also amend the Claimant's personal record to reflect the Board's modification of the assessed discipline.

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 Second Division**

Dated at Chicago, Illinois, this 22nd day of October 2012.