

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 37604
Docket No. SG-37914
05-3-03-3-319**

The Third Division consisted of the regular members and in addition Referee Elliott H. Goldstein when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(BNSF Railway Company)

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Burlington Northern Santa Fe (BNSF):

Claim on behalf of T. S. Humble, to remove all mention of the investigation held on April 2, 2002 and any and all discipline from his personal record, and payment for all lost wages including overtime, beginning July 21, 2002 until he was returned to service, account Carrier violated the current Signalmen’s Agreement, particularly Rule 54, when it failed to provide the Claimant with a fair and impartial investigation, and without just cause issued excessive and unwarranted discipline to the Claimant as a result of an investigation held on April 2, 2002. Carrier compounded the violation when it failed to notify the Claimant within 30 days of its decision to discipline the Claimant following the investigation. Carrier’s File No. 35 02 0048. General Chairman’s File No. 02-041-BNSF-161-NM. BRS File Case No. 12550-BNSF.”

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.

Initially, the Board notes that the Organization's reference to a claim date of July 21, 2002, in the Notice of Intent, was identified as a typographical error. The parties agree that July 21, 2001 is the correct date, as confirmed by the initial claim and subsequent on-property correspondence regarding this matter.

According to the record, the Claimant held the position of Signaller on one of the Signal Construction Gangs. At the time of the incident that precipitated the April 2, 2002 Investigation, the Claimant had accumulated approximately three and one-half years of service with the Carrier, we note. The charges set forth in the July 2, 2001 Notice of Investigation concerned the Claimant's "responsibility if any, in connection with (his) alleged failure to comply with Maintenance of Way rule 1.6."

It is undisputed that, on June 19, 2001, the Claimant was arraigned and incarcerated after having been charged with seven counts of "Criminal Sexual Contact Of A Minor Under 13 years of age (3rd degree felony)" by criminal complaint filed in the Magistrate Court of Quay County, New Mexico, on March 30, 2001. There is also no dispute that the State subsequently charged the Claimant with 11 additional counts of criminal sexual misconduct involving a minor under 13 years of age. The Claimant's arraignment on those charges was scheduled for June 26, 2001.

According to the record, pursuant to the terms of a Release Order and Bond issued on June 27, 2001 by the 10th Judicial District of Quay County, New Mexico, the Claimant was released from custody subject to several conditions which, by his signature, the Claimant acknowledged his agreement. Two of the conditions stated:

"I further agree: Not to leave the (county of Quay, State of New Mexico) without prior permission of the Court. Defendant may travel through Oklahoma, New Mexico, and Texas, for work purposes only.

I further agree: To avoid all contact with the alleged victims or their family or anyone who may testify in this case."

The Carrier primarily argued that its decision to remove the Claimant from service, on July 9, 2001, pending a Carrier Investigation, originally scheduled for July 13, 2001, was completely warranted given the "serious infractions" with which the Claimant was charged. The Carrier further contended that the Claimant could not be retained in service because he and his brother worked in the same gang and, as the record shows, the Claimant's brother was the father of the alleged "victims." As noted above, one of the conditions of the Release Order and Bond required that the Claimant not have any contact with the "alleged victims or their family or anyone who may testify in this case," it also asserts. Indeed, as Signal Foreman Parker testified, because of the "movement of signal personnel by means of the exercise of seniority . . . it would have been difficult if not impossible to isolate the Claimant from his brother or other potential witnesses."

The Carrier also averred that for safety-related reasons the Claimant's removal from service was necessary. According to the Carrier, it believed that, given the charges facing the Claimant, he in all likelihood had been experiencing "mental stress," and his removal would have been in his "best interest" and in the interest of his co-workers. Signal Construction Supervisor Bealmear testified that, "in a way of a frame of mind he could come back and get hurt."

The record contains several letters postponing the Investigation. The Board notes at the outset that the postponements were essentially by mutual agreement of the parties and were necessary while the criminal charges were pending before the Court. According to the record, on March 21, 2002, the State of New Mexico and the Claimant (Defendant) entered to a Plea and Disposition Agreement, in which the Claimant pleaded "no contest, pursuant to North Carolina v. Alford," to "Count 12: Criminal Sexual Contact of a Minor. . . ." The Carrier's Investigation of the

charges pertaining to the Claimant's alleged violation of Rule 1.6 was then conducted on April 2, 2002.

At the conclusion of the Investigation, the Hearing Officer informed the Claimant of the Carrier's willingness to reinstate him on a leniency basis, with seniority unimpaired but no backpay, effective April 8, 2002, pending his successful completion of the Carrier's customary return-to-duty medical requirements. It appears from the record that the Carrier's decision to allow the Claimant's return on a leniency basis was largely predicated upon its receipt of a Post-Review Hearing Order dated March 27, 2002 from the Court, essentially permitting the Claimant and his brother to "have contact, at work, with no abuse, but only while at work, and only about their work." The Carrier's decision to reinstate the Claimant with leniency was confirmed in a letter dated May 2, 2002 from Manager of Signals, J. P. Morgen.

By letter dated June 12, 2002, the Organization appealed the Carrier's May 2, 2002 disciplinary notice on several procedural grounds, which the Board has afforded careful consideration. The three most significant procedural objections are as follows.

First, the Organization asserted that the Carrier's May 2, 2002 letter was issued outside the 30-day time limit provided for in Rule 54(d). In its view, such error invalidated the Carrier's disciplinary action and now justifies the Board's removal of the discipline from the Claimant's record and issuance of a sustaining Award as regards the claim for lost wages and benefits, as set forth in the above Statement of Claim.

Second, it was contended that the Claimant was not afforded Agreement due process when the Carrier denied the Organization's request that the Manager of Signals, Morgen, should be allowed to appear at the Investigation as a witness and, instead, assigned Morgen to the role of Conducting Officer. It is however conceded by the Carrier that Morgen was "in the loop of individuals involved who had knowledge that threats were made against the Claimant," the Organization urges. Obviously, argued the Organization, in his capacity as Conducting Officer, Morgen was precluded from testifying about "threats" allegedly directed at the Claimant, in violation of the Carrier's Human Resources Policies addressing Workplace

Harassment and Violence in the Workplace issues. Moreover, the Organization asserted that because, in its view, Morgen authorized the Claimant's removal from service, his ability to conduct the Investigation in an impartial manner had been compromised. Finally, the Organization asserted that Morgen "consistently refused" to answer important questions put to him by the Claimant's representative at the Investigation.

Third, the Organization strenuously argued that the Carrier's decision to remove the Claimant from service under the "excuse" of the restrictions contained in the Release Order and Bond and to charge him with "immoral and discourteous conduct" was clearly prejudicial to the Claimant. According to the Organization, the Carrier's removal of the Claimant from service was premature because it occurred "before Mr. Humble had his day in court, and was vindicated on all charges." It also argued that the record contained ample evidence that the Carrier "wrongfully charged and removed" the Claimant from service. In the Organization's view, this is so because, when the Claimant eventually returned to work, he was able to place himself on an entirely different crew from that of his brother.

With regard to the merits, the Organization strongly argued that the Carrier completely failed to carry its burden of proving the Claimant guilty of engaging in conduct which specifically had violated any provision of Rule 1.6. In the Organization's view, the Claimant "was exonerated by the Court in New Mexico," proof that the charges were based on "unproven allegations, which were later dismissed."

Turning to the issue of the nine months of lost time suffered by the Claimant, the Organization strenuously argued that the Claimant was the victim of disparate treatment by the Carrier. According to the Organization, a Maintenance of Way Department employee "involved in a similar case . . . was not removed from service until after the courts found him guilty as charged and sentenced to prison." Such "obvious prejudgment," in the Organization's view, warrants a sustaining Award by the Board, with respect to all monetary losses claimed herein, it added.

The Board carefully reviewed the entire record in this case as well as the parties' arguments and the precedent Awards cited in support of their respective

positions. Initially, we note that much of the evidence adduced at the Investigation consisted of Court records. The testimony of Carrier witnesses Bealmear and Parker placed these documents within the context of the Carrier's duty to comply with the Court orders and to manage the totality of the situation as it related to the Claimant's ability to work for the Carrier while the felony charges were pending, especially in light of the unusual fact that Claimant's brother worked in the same gang and, again from the record, apparently was the father of the alleged "victims."

The totality of the oral testimony and the documentary evidence produced at Investigation convinces the Board that the Carrier sustained its burden of proving the Claimant's violation of Rule 1.6, regarding the standard of conduct required of Maintenance of Way Department employees. We also find no procedural error justifying the Board's removal or modification of the discipline imposed by the Carrier in this particular case. Our reasoning is set forth below.

First, in response to the Organization's contention that the Carrier was without just cause to impose serious discipline upon the Claimant, the Board reiterates that, from the record before us, the charges were substantially proven. The misconduct charges under Maintenance of Way Rule 1.6 clearly stemmed from criminal charges involving immoral conduct completely at odds with Rule 1.6, we find. We strongly disagree that the Claimant's Alford plea of "no contest" and his agreement to submit to 18 months of supervised probation was tantamount to "exoneration by the Court in New Mexico," as the Organization contended. First Division Award 25260 and Third Division Award 31931, in particular, upheld dismissal actions in cases involving indecency with a minor child and embezzlement where the claimants in those cases essentially entered the same "no contest" pleas. Here, the nexus between the Claimant's admitted off-duty immoral conduct and the Carrier's requirement under Rule 1.6 that employees refrain from engaging in "immoral" conduct was substantially proven. We further find no evidence that the "real issue" was a situation of threats or a "poisoned work environment" against the Claimant which was ignored by the Carrier, as the Organization argued.

Second, consistent with the Board's holdings in Awards 25260, 31931 and numerous others, we further find from the facts that the Carrier indeed possessed just cause to dismiss the Claimant given his proven misconduct and on the theory that his retention in service could have generated criticism toward the Carrier

and/or produced a general loss of goodwill. However, in this particular case, it is clear that the Carrier did not dismiss the Claimant, but instead reinstated him on a leniency basis, but without the backpay and other benefits claimed herein.

We find no evidence in the record that the Carrier's imposition of the arguably serious discipline of a lengthy unpaid suspension was inconsistent with the Carrier's alleged prior handling of a "similar case" five years earlier. Again, under the factual circumstances, the Carrier had just cause to strongly discipline the Claimant, and the discipline at issue was neither "excessive" nor "unwarranted," we rule.

Third, with respect to the Organization's procedural arguments, discussed in detail above, the Board finds there is no persuasive evidence that any provision of Rule 54 was violated in any manner whatsoever. Hence, we rule there is absolutely no reason for the Board to sustain this claim solely on procedural grounds.

The Board specifically finds from the record that (1) under the circumstances, the Carrier's May 2, 2002 letter merely reiterated the reinstatement terms explained at the close of the Investigation, thus it was not the typical disciplinary notice; (2) Manager of Signals Morgen was appropriately assigned to the role of Conducting Officer for the very reason that there were so few individuals who had been "in the loop"; (3) Supervisor Bealmear and Foreman Parker were credible witnesses whose direct testimony was factual and who, on cross-examination, provided the answers to the representative's questions, which Morgen presumably could not, given Morgen's role of Conducting Officer; and (4) the Claimant's removal prior to the Investigation was not prejudicial under the totality of the circumstances, including the stipulations contained within the Release Order and Bond, the overall seriousness of the charges warranting pre-Investigation removal, and the operational constraints which prevented the Claimant and his brother from being adequately separated.

Finally, the Board emphasizes that the Claimant's violation of Conduct Rule 1.6 stands proven given all the facts of record and the Claimant's Alford plea in the Claimant's criminal case. The Carrier's decision to extend leniency to the Claimant was its prerogative. Under the particular circumstances of this case, and again, in

light of the arbitral precedent which clearly weighs against the Claimant, the claim is denied in its entirety, for all of the foregoing reasons.

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 Third Division

Dated at Chicago, Illinois, this 22nd day of September 2005.