

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 37624
Docket No. MW-37911
05-3-03-3-295**

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

PARTIES TO DISPUTE: (
(Brotherhood of Maintenance of Way Employes
(BNSF Railway Company (former Burlington
(Northern Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The dismissal of Mr. K. E. Ruiz on January 22, 2002 for alleged violation of Maintenance of Way Operating Rule 1.1 ‘Safety’, Maintenance of Way Operating Rule 1.6 ‘Conduct’, Maintenance of Way Safety Rule S-26.1 ‘Conflict of Interest’ and Policy for Employee Performance Accountability as published in System Superintendent Notice No. 208/Pacific Division dated March 8, 2001, in connection with charges of dishonesty in procuring work release affidavit by Mr. H. P. Ruiz, III on or about September 17, 2001 and immoral conduct in connection with the ‘Statement of Defendant on Plea of Guilty’ he entered on October 25, 2001, was on the basis of unproven charges, excessive and in violation of the Agreement (System File S-P-927-G/11-02-0187 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Mr. K. E. Ruiz shall now ‘*** be immediately restored to the service of the Carrier, with seniority unimpaired and he must be made whole for his losses.’”**

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.

According to the record, the Claimant held the position of Sectionman, working under the supervision of his brother, Bellingham Section Foreman, H. P. Ruiz, III, Roadmaster S. R. Moran, and Division Engineer D. D. Perry, in the Carrier's Track Sub-department. At the time of the incident that precipitated the formal Investigation, held on December 4 and 27, 2001, the Claimant had accumulated approximately five years of service with the Carrier, we note.

The record reflects that on September 20, 2001, the Claimant pleaded guilty in the Superior Court of Washington, County of Whatcom, to two counts of "Child Molestation in the First Degree," both Class A felonies. The plea agreement was filed in Open Court on October 25, 2001. The Claimant's statement of guilt before the presiding judge consisted of an admission that in January 2001, he "had sexual contact with two of [his] step-children."

The November 9, 2001 Investigation Notice charged the Claimant with: (1) "alleged dishonesty and fraudulent procurement of false sworn affidavit by your brother, Henry P. Ruiz III, to the Whatcom County Sheriff's Office, on or about September 17, 2001, committing BNSF to a work release program for you, without the knowledge or concurrence of your immediate supervisor, Roadmaster Sylvester Moran, or other BNSF authorized officer . . ." and (2) "alleged immoral conduct, as evidenced by Statement of Defendant on Plea of Guilty . . . entered by you pleading

guilty to the crime of 'Child Molestation in the First Degree. . . ,' copy obtained by BNSF officers on November 9, 2001."

The formal Investigation was concluded on December 27, 2001. By letter dated January 22, 2002, the Carrier informed the Claimant that he was dismissed as a result of the formal Investigation, because the Carrier found him guilty of violating Maintenance of Way Operating Rules 1.1 (Safety), and 1.6 (Conduct), as well as the Carrier's Policy for Employee Performance Accountability (PEPA). On March 17, the Claimant appealed the Carrier's assessment of discipline and the Carrier denied the Claimant's appeal by letter dated April 29, 2002. In its subsequent appeal of June 25 the Organization requested a conference of the matter. Following the Carrier's August 21, 2002 letter of denial, the conference was conducted on February 19, 2003. Unable to resolve this claim during the parties' on-property handling of this matter, the instant dispute is now properly before the Board for final and binding adjudication.

The Carrier maintains that the Claimant received a fair and impartial Investigation, and that the discipline assessed was commensurate with the seriousness of the proven offense and the Claimant's past record. It urges the Board to deny the claim in its entirety.

The Organization raised various procedural objections under Rule 40 of the applicable Agreement. Regarding the merits, it asserted that the Carrier failed to sustain its burden of proof, and emphasized that the Carrier erred in disciplining the Claimant for conduct that occurred during the Claimant's off-duty hours.

The Board carefully reviewed the entire record as well as the parties' arguments and the precedent Awards cited in support of their respective positions. We find for the following reasons that the instant claim must be denied in its entirety.

First, the Investigation record clearly establishes that Division Engineer Perry did not possess actual knowledge that the Claimant had been working in a "work release program" on the Carrier's property until November 2, 2001, when he received a fax notification from the Whatcom County Sheriff's Office. Subsequently, on November 9, 2001, Perry received both a copy of the Claimant's

plea agreement and the Work Release Employer's Affidavit bearing the signature of the Claimant's brother, H. P. Ruiz, again the Claimant's immediate supervisor who was clearly subordinate to Perry. Division Engineer Perry credibly testified that neither he nor any other management employee of the Carrier had authorized H. P. Ruiz to prepare a work release document on behalf of the Claimant. Indeed, the record clearly established that the Carrier's practice was not to participate in work release programs, and such testimony was not rebutted by the Organization.

Given the above factual circumstances, the Board rules that the Organization's procedural objection that the Carrier failed to issue the Investigation Notice in accordance with the 15-day time limit set forth in Rule 40(A) is clearly without merit. The Board carefully considered the Organization's additional procedural objections and we find that they similarly must fail. The record shows that the Claimant was afforded the Agreement due process of a fair and impartial Investigation, and the Board finds no procedural errors justifying our modification or removal of the Carrier's assessment of discipline.

Second, the totality of the oral testimony and the documentary evidence produced at the 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 Carrier's Maintenance of Way Department employees, as well as his violation of the Carrier's Policy for Employee Performance Accountability (PEPA). The record contains substantial evidence that the Carrier had just cause to impose serious discipline upon the Claimant. From the record before us, the felony charges involved immoral conduct completely at odds with Rule 1.6, we stress.

We agree with the vast body of arbitral authority in this and other industries and, specifically, the relevant Awards cited by the Carrier, that in cases where an employee's proven misconduct involves behavior that is "morally reprehensible" by prevailing standards, the employer may exercise its discretion and terminate the employment relationship as a result of the proven immoral conduct, regardless of whether the misconduct occurred during his off-duty hours. Here, the Claimant's admitted misconduct clearly violated "Conduct" Rule 1.6 and, furthermore, was a "Dismissable Rule Violation" under Appendix C, "Conduct leading to a felony conviction," under the Carrier's PEPA. Thus, under the present circumstances, the Carrier had no obligation to continue to retain the Claimant in its service. See

Public Law Board No. 3740, Award 1; Public Law Board No. 5213, Award 8; and Public Law Board No. 3530, Award 84.

Third, the Claimant's collaboration with his brother to prepare a work release authorization, which the Claimant clearly submitted to the Court, despite his knowledge that such arrangement would not have been approved by Division Engineer Perry, as the Claimant admitted at the Investigation, was blatantly dishonest. That misconduct clearly violated both Rule 1.6 and the Carrier's PEPA concerning "Gross Dishonesty," under Appendix C. We also agree that the specious work release affidavit devised by the Claimant and his brother violated Maintenance of Way Safety Rule S-26.1, "Conflict of Interest." The record contains the Claimant's unambiguous testimony that he was aware of the supervisory chain-of-command, and that he had been told by Division Engineer Perry, to whom the Claimant's brother and Roadmaster Moran reported, that "it was not [Carrier's] policy to sign 'that,'" referring to the work release affidavit. Thus, the record strongly suggests that the Claimant and his brother conspired to arrange for the Claimant's re-employment following the Court's October 25, 2001 filing of Claimant's guilty plea, for the ostensible purpose of having the Claimant avoid incarceration as a consequence of his admitted criminal misconduct.

Given the testimony and documentary evidence adduced at the fair and impartial Investigation, the Board rules that the Carrier's finding of guilt and its assessment of the discipline of dismissal must not be overturned. We find no evidence that, given the seriousness of the proven offenses, the Claimant's dismissal was arbitrary, capricious, unreasonable, or unfair.

AWARD

Claim denied.

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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 19th day of October 2005.