

PARTIES TO DISPUTE:

Brotherhood of Maintenance of Way Employes
and
Burlington Northern and Santa Fe Railway
(Former ATSF Railway Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement on April 18, 2001 when it issued the Claimant, Mr. K. G. Pohlman a 30-day Record Book Suspension for alleged improper use of BNSF telecommunications equipment, in violation of Rule 1.6, **Conduct**, of the Maintenance of Way Operating Rules.
2. As a result of the violation referred to in part (1), the Carrier shall remove the discipline mark from the Claimant's personnel record and make him whole for any time lost." [Carrier File No. 14-01-0116. Organization File No. 70-13C3-011.CLM]

FINDINGS AND OPINION:

Upon the whole record and all the evidence, the Board finds that the Carrier and Employees ("Parties") herein are respectively carrier and employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted by agreement and has jurisdiction of the dispute herein.

The Claimant, Mr. K. G. Pohlman, was hired by the Carrier on June 8, 1998. At the time of the incident which resulted in this disciplinary action, he was working as a welder in Woodward, Oklahoma. On February 26, 2001, a notice of investigation was sent him, which reads as follows, in pertinent part:

"Attend investigation . . . March 7, 2001 . . . to develop all the facts and place responsibility, if any, in connection with your possible violation of Rules 1.6 and 1.7 of the Maintenance of Way Operating Rules in effect January 31, 1999, as amended or supplemented, and Rules S-1.2.9 and S-26.7 of the Maintenance of Way Safety Rules in effect January 31, 1999, as amended or supplemented, concerning your alleged inappropriate conduct while using Company telecommunication system in the form of telephone conversation with Roadmaster Darin Martin on February 21, 2001, at approximately 3:10 p.m., while assigned as welder at Woodward, Oklahoma."

The investigation was postponed at the request of the Claimant's representative, and held on March 22, 2001. The Claimant was represented by the Organization's Vice-Local Chairman.

The event which gave rise to the charges brought against the Claimant is described in the antipodal accounts of a telephone conversation between the Claimant and Roadmaster D. W. Martin on February 21, 2001, in their testimony in the investigation transcript.

Mr. Martin's account:

"I told [Section Foreman Brian Webb] this was Martin and he laid the phone down to get Roger. The next thing on the phone before any hello or anything was a very annoying sound, kind of obnoxious, I don't know how else, just a sound, a gesture, I don't know how to refer it. I can't make the sound that came across the phone for a few seconds, probably 10 seconds, followed by Mr. Pohlman asking me what I was doing. I then stated I was coming to my office and I'd like to talk to him. Then, he asked, 'who's this?' and I instructed him, informed him who I was on the phone and stated again that, well, I didn't state again, I stated then that I was not very impressed and was not very happy and that is no way to answer the phone. And he just cut me off short and I asked him again to be in my office or waiting beside it when I got there so we could talk about this matter . . ." [Q.&A. 6].

"The noises that were, that were made on the phone, would you consider those noises discourteous?"

"Yes, sir." [Q.&A. 13].

"Did you feel harassed by these noises?"

"I, I won't say I felt harassed. I felt offended by them. That's the way I felt. We've had past practice or past knowledge of this same sound, this same gesture that was felt to be harassment by, by other employees or another employee on the BNSF Railroad. Mr. Pohlman was involved in that and that's behind us and past, but it's been proven and a fact that some people do consider that harassment. Yes, sir." [Q.&A. 15].

"Mr. Martin, when the phone was picked up and you heard these noises, could you have confused a 'hey' or a 'hello' for these noises or were they, could you better describe the noises?"

"No, they weren't confusing, what the same noises that has been heard before that's been across the radio towers before and the last investigation. It's the same, same noise, no confusing. Nothing confusing." [Q.&A. 65].

"Could you describe the noise? Is it squeaking, grunting, that type of, I, I'm not trying to put words in your mouth, but could you try and put a description on the, on the noise?"

"No, sir. I mean, it's not a, a groan or a dead cat squeal. I, I couldn't explain it. I can't even try to imitate it. I, I've tried and I can't figure it out." [Q.&A. 66].

"But, in your opinion, it was not a 'hey', a drawn out 'hey', like as in 'hi' or some, some type of greeting, is that correct?"

"No, sir. This went on for 5, 6, 7, 10 seconds. It was the same groan, gesture, I don't know how to even word it, that's been heard before. It was not a 'hey' or 'hello' or anything of the matter." [Q.&A. 67].

Mr. Pohlman's account:

"There was a phone call made about 3:10. Brian Webb answered and he told Roger that it was his brother, David Martin, and I asked Brian who it was and he was, like, 'Yeah, it's David'. I was, like, 'Well, I would like to speak with him,' picked up the phone and said, 'Hey, Dave,' or, you know, 'What's up,' I'm not sure. And then there's a little pause and he's like, 'This isn't David, this is Darin Martin.' I go, 'Oh, I'm sorry. I thought this was Dave,' and then he told me that he wanted to speak with me before I left for that day." [Q.&A. 30].

"When you picked up the phone, did you, did you make strange noises?"
"No." [Q.&A. 36].

"Mr. Pohlman, so what you're saying is that, if I understand you correctly, what you said is kind of a long, drawn out 'hey'?"
"Yes." [Q.&A. 39].

"Could you think of any way, better way to describe it?"
"Oh, probably like the cartoon Bill Cosby had with Fat Albert, you know, 'hey, hey, hey'." [Q.&A. 40].

"Kind of extended out? Did, so, when you got the phone you were instructed it was another welder, Dave Martin, who's a good friend of yours off duty?"
"Yes." [Q.&A. 41].

"Okay. And that's just the way you guys greet each other?"
"Yes, that's correct." [Q.&A. 42].

"Well, would you have used the same type of greeting if you'd been instructed it was Roadmaster Martin on the telephone?"

"Yeah, I would probably have used, if it was, if I knew it'd been Darin Martin, I'd just picked up the phone and say 'hi', 'hello', or 'how you doing?'." [Q.&A. 43].

"So, it would've been, what you're saying is, then, it would have been a different greeting if it had been anybody other than a, a friend that you thought you were talking to?"

"Yes. Yes." [Q.&A. 44].

"I gave a welcome over the phone to someone who was misrepresented (sic) as someone else in a manner that was friendly and acceptable to the perceiving party. This misrepresentation was neither malicious nor hateful, rather done in a humorous and fraternal, he's one of us, manner. My greeting was done in a manner of humor. Also, it was not profane, vulgar, hateful or disrespectful and its intent no more than a hello." [Q.&A. 71].

These inconsistent accounts are the substance of the conversation between the Claimant and Mr. Martin. There is no reason to doubt the Claimant's statement that he thought he was addressing David Martin, rather than Darin Martin. This conclusion is based not only on the Claimant's own statement, but the testimony of Mr. Martin, at Answer No. 6: "Then, he asked, 'who's this?' and I instructed him, informed him who I was on the phone . . ."

As the consequence of the investigation, Division Superintendent T. D. Sarrett wrote the Claimant on April 18, 2001:

"This letter will confirm that as a result of investigation on March 22, 2001, in connection with your inappropriate conduct while using company telecommunication system in the form of a telephone conversation with Roadmaster, Darin Martin, on February 21, 2001, at approximately 3:10 p.m., while assigned as Welder at Woodward, Oklahoma, you are issued a Level - S, 30 Day Record Suspension for Violation of Rule 1.6 of the Maintenance of Way Operating Rules, in effect 12:01 a.m., Central time, January 31, 1999, including revisions up to April 2, 2000 as amended or supplemented and Rule(s) S-1.2.9 and S-26.7 of the Maintenance of Way Safety Rules, in effect 12:01 a.m., Central time, January 31, 1999, including revisions up to October 10, 1999, as amended or supplemented. Additionally, you have been assigned a review period of 3 years. If you commit another serious rule violation during the tenure of this review period, you will be subject to dismissal.

"This is the second time in less than one year that you have been disciplined for your misuse of the BNSF telecommunication system and discourteous behavior. It is imperative that you fully understand that any further unprofessional use of the BNSF telecommunication systems or other discourteous actions on your part will result in your termination of employment with the BNSF Railroad.

"As part of your closing statement at the formal investigation you asked the following question: 'Also, let me say, that I understand discipline is a tool to correct unacceptable behavior, but who is to say what is unacceptable?' I offer the following answer to your question. I will say what behavior is unacceptable while you are working for the BNSF Railroad. Your behavior in both of these instances has been unacceptable. If you have any question concerning my clear instructions to you, please do not hesitate to call me.

"This letter will be placed in your personal record. Please acknowledge receipt of this notice in the space provided below and return in the provided self-addressed stamped envelope. Your signature below serves as receipt of this letter."

The Board has taken notice that when this letter was written by the Division Superintendent, Public Law Board No. 5850 had not yet rendered a decision on the Organization's appeal of the previous assessment of discipline referred to in this letter.

Maintenance of Way Operating Rule 1.6 instructs employees not to be insubordinate nor discourteous. Maintenance of Way Safety Rule S-1.2.9 forbids horseplay, practical jokes, and harassment. Maintenance of Way Safety Rule S-26.7 is a lengthy rule, sweeping in its scope, which governs the use of telecommunications. As a general policy, it states:

"In order to meet the needs of our customers and minimize expense to the company, use of telecommunications services should be restricted to business communications. Personal use should be limited to necessary and urgent matters."

and

"Misuse of BNSF's telecommunications system or services may result, without limitation, in termination of employment, suspension, or other disciplinary action."

Superintendent Sarett's disciplinary decision, above, was appealed to the Carrier's highest designated officer, General Director-Labor Relations D. J. Merrell, by the Organization. It was the Organization's position that the Carrier failed to provide substantial evidence to prove the charges, in that Roadmaster Martin could not give a clear indication of what alleged noises were made by the Claimant; that Mr. Martin "had an axe to grind with the Claimant;" and that even if the charges were proven (which they were not), the discipline is disproportionate to the alleged offense.

The Carrier responds that there is clear evidence in the record that the Claimant used the Carrier's communication system in violation of the Carrier's rules, and there is no evidence whatsoever that Mr. Martin had some kind of vendetta against the Claimant, other than the opinion

of some of the Claimant's co-workers. The Carrier also alluded to the previous instance in which the Claimant was involved:

"...As you are well aware, the Claimant, along with three other employees, was disciplined when a telephone call was placed to a Track Supervisor and a disgusting noise, referred to as an 'AJ' was recorded on the Track Supervisor's answering machine. Also recorded, although unintentionally, was a conversation between two of the employees wherein inappropriate comments were made. Following the incident, all four of the employees were disciplined, however, the Organization took the case to arbitration and the arbitrator exonerated the Claimant because he was not an active participant in the conversation. However, the Board noted the following, 'In any event, as a result of this incident they now understand that such behavior will not be tolerated in the future.'

"The Board recognized that the employees, especially the Claimant and the other three individuals involved in the previous case, have been put on notice that inappropriate use of the Carrier's communication equipment will not be tolerated. When the Claimant made the same disgusting noise as was made previously, an 'AJ', he apparently had little concern for his responsibilities as they applied to the use of Carrier communication equipment and he had little concern about his responsibility to not do an 'AJ' under any circumstances. As was pointed out in the previous case, an 'AJ' is a sound that mocks the speech patterns of a former employee. The Carrier made it perfectly clear in the previous hearing that the making the sound was not acceptable and the Claimant was at the hearing. Contrary to your contentions, there was no conspiracy to 'get' the Claimant. What happened is the Claimant made a disgusting noise into the telephone thinking someone other than the Roadmaster was on the line. However, it didn't matter who was on the other end of the telephone line, the Claimant was not to use the Carrier's communication equipment to transmit the noise under any circumstances."

The appeal of the Claimant's discipline was denied by the Carrier's highest designated officer, and the case was thus progressed to this Board.

This Board believes that some modification of the disciplinary penalty in this case is appropriate for the following reasons.

We do not believe that the Claimant's telephone transmissions, whatever their nature, were intended as a personal affront, insult, nor act of insubordination toward Roadmaster Darin Martin. Clearly, the Claimant was under the misapprehension that he was addressing Welder David Martin, purportedly a personal friend and co-worker; perhaps addressing him with less decorum than

typically heard in a Sunday morning Bible class. Roadmaster Martin testified that the Claimant asked, "who's this?" when he was instructed to meet Mr. Martin at his office.

The Roadmaster's inability to describe the "very annoying," "kind of obnoxious," sound or "gesture," leaves the Board perplexed as to the nature of the objectionable transmission. The guarded references to the "AJ" sound in Mr. Merrell's letter and in the unnumbered Award of Public Law Board No. 5850, are no more enlightening.

The Board believes that reference to the previous disciplinary case by the General Director-Labor Relations, in support of his decision in this case, is inappropriate. While it is literally true, as Mr. Merrell wrote, "...the Claimant, along with three other employees, was disciplined . . .", that was not the end of the story. Public Law Board 5850 exonerated the Claimant and the discipline was removed from his personal record. The effect of that decision is as though he was never assessed discipline for the previous event, and that fact is reflected in the Claimant's personal record in the file. Put another way, therefore, the current disciplinary proceeding is a "first offense."

The written statements of co-workers submitted in the investigation, alleging that Roadmaster Martin does not like the Claimant, are of little or no evidentiary value. They may be perfectly correct, but that does not change nor mitigate the facts developed in the investigation by direct testimony.

The Board is persuaded, however, that greater weight should be given the written statement of Section Foreman Brian Webb, also submitted as evidence by the Claimant in the investigation. Mr. Webb wrote:

"The day in question when Mr. Pohlman was thought to abuse the company phone. I answered the phone and did not hear real well. I thought the caller (said it) was David Martin and wanted to talk to Roger Martin. So I got up and tried to find him and (I) told him his brother was on the phone. Mr. Pohlman overheard me and asked me if it was David and I said yes. He picked up the phone and I didn't hear any profanity or anything other than (a) ordinary conversation between friends."

The Board observes that Mr. Webb was not called as a witness by the Carrier, nor did the Claimant request that he be called. He could not be questioned, therefore, by direct and cross examination to clarify the missing details of his statement. As the only witness to the event, his testimony would be of greater value and impartiality than the self-serving testimony of the principals in this matter, the complaining Roadmaster and the Claimant. We are caused to wonder whether Mr. Webb left the room to find Roger Martin. If so, he could not have heard the entire conversation. We can only conjecture the true value of his testimony, had he been called and appeared.

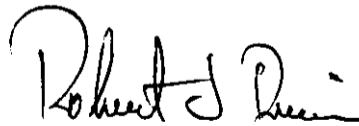
In any event, the antipodal testimony of the Claimant and Mr. Martin was weighed by the conducting officer, who chose to believe that of Mr. Martin. The Board is unable to resolve discrepancies between the testimony of the Roadmaster and that of the Claimant. The conducting officer, who heard the words and observed the demeanor of those who testified, is best equipped to assess the credibility of those who appeared before him. Despite Mr. Martin's inability to clearly articulate what sounds he heard, something happened in that telephone communication which triggered a negative reaction from him. Whether it was an obnoxious sound, or one of the mysterious "AJ's," or a flippant "hey, hey, hey," is ill-defined in the record.

Clearly, the Claimant's telephone usage was not restricted to business, although it does not appear to have been abusive, insubordinate, nor vicious. The testimony of both of them indicates he did not know he was addressing Roadmaster Martin. His telephone usage did not comport to the requirements of the Carrier's rules, however, but the discipline assessed is out of proportion to the offense. At the time he was assessed discipline, this was regarded by the Division Superintendent as a second offense of the same nature. As it turned out, his record was cleared of the previous disciplinary entry.

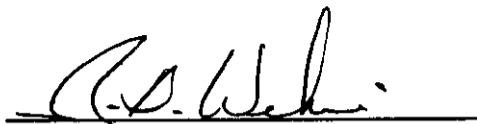
The Board concludes that the Level S - 30 Day Record Suspension should be reduced to a written letter of reprimand, and the three-year review period, which is tantamount to probation, should be expunged.

AWARD

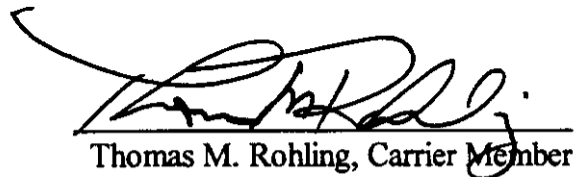
Claim sustained in accordance with the above Opinion.



Robert J. Irvin, Neutral Member



R. B. Wehrli, Employee Member



Thomas M. Rohling, Carrier Member

November 5, 2002

Date