PUBLIC LAW BOARD NO 5850

Award No. 158
Case No. 158

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes

(The Burlington Northern Santa Fe Railroad

STATEMENT OF CLAIM:

1. The Carrier violated the Agreement when on August 21, 2000, D. R. Martin, B. L. Holdaway, R. W. Lathers, and K.G. Pohlman were issued a Level-S 30 day suspension for allegedly violating Maintenance of Way Operating Rules 1.2.7, 1.4, 1.6, 1.7 and 1.9, effective January 31, 1999, as amended; and Maintenance of Way Safety Rules S-1.2.9, and S-26.7, effective January 31, 1999, as amended concerning your alleged malicious misuse of company telecommunication system in the form of a harassing phone call made to a Track Supervisor on June 13, 2000, at approximately 1400 hrs., and your failure to report misconduct or negligence that may affect the interest of the railroad while assigned as employees of the BNSF Maintenance of Way Team.

2. As a consequence of the Carrier's violation referred to above, the Claimants shall the discipline removed from their personal records and they shall be compensated for all wage and other benefits lost in accordance with the Agreement.

FINDINGS

Upon the whole record and all the evidence, the Board finds that the parties herein are carrier and employee within the meaning of the Railway Labor Act, as amended. Further, the Board is duly constituted by Agreement, has jurisdiction of the Parties and of the subject matter, and the Parties to this dispute were given due notice of the hearing thereon.

On July 6, 2000, the Carrier advised the Claimants and one other that it intended to convene an investigation:

> "...to develop all facts and place responsibility, if any, in connection with your possible violation of Rules 1.2.7, 1.4, 1.6, 1.7, 1.9, 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 malicious misuse of company telecommunication system in the form of a harassing phone call made to Track Supervisor, Kent Gardner, on June 13, 2000, at approximately 1400 hrs., and your failure to report misconduct or negligence that may affect the interest of the railroad while assigned as employees of the BNSF Maintenance of Way Team."

The Investigation was held on July 20, 2000, following which one employee was exonerated with the Carrier assessing each of the four Claimants a 30 day suspension.

As background, all four are welders or welder assistants. On the date of the alleged infraction of the Rules, the weather caused the Carrier to halt the welding process. The four Claimants were sitting around a table near a phone inside their shop area and decided to call a Track Supervisor and leave on his recorder what has been described as an "AJ" which, from what this Board can determine, is a rather rude noise. Each thought this was rather humorous, but what compounded the problem was that the phone was not disconnected at the termination of noise making, thus an ensuing conversation was recorded also on the Track Supervisor's recorder. It is from this spontaneous recorded conversation that the Carrier became aware of who was talking and because one Claimant castigated the Supervisor they had just called in clearly unflattering language, charges were assessed, the

investigation was held and each of the four were disciplined.

From the Board's view, the so-called "AJ" was nothing more than a course or rude prank, but it did tie up the lines and did constitute a use of the phones to convey other than company business. However, the record discloses that leaving an "AJ" on the recorder had been going on for some time, since at least 1994. Further, there was unrefuted testimony that local supervisors (Nulik and Mouser) had been given "AJs" in the past and "...they took it in stride and saw the humor in it." Thus, the Board concludes that while employees giving "AJs" knew it was contrary to company policy, they also believed, to some degree, it was acceptable. In any event, as a result of this incident they now understand that such behavior will not be tolerated in the future.

Regarding the unflattering remarks made by Claimants Martin and Holdaway that were unknowingly recorded after they gave "AJs", this was clearly inappropriate behavior. The record indicates that these individuals recognized this fact and felt remorseful for their discourteous actions.

This Board finds, however, that the assessment was too harsh and it treated each Claimant as being equally involved when it is clear from the record that Claimants Holdaway and Martin were involved, whereas Claimants Lathers and Pohlman were just there in the room.

Under the circumstances prevalent in this file, the discipline assessed Claimant's Holdaway and Martin will be reduced to a reprimand. Claimant's Pohlman and Lathers are to be exonerated. Each Claimant is to be paid for time lost as provided in the Schedule Agreement.

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 date the award is adopted.

Robert L. Hicks, Chairman & Neutral Member

Rick B. Wehrli, Labor Member

Thomas M. Rohling, Carrier Member

Dated: June 1, 2001