NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD 6986

BNSF RAILWAY COMPANY

(Former St. Louis – San Francisco Railway Co.)

(Carrier)

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES DIVISION

(Organization)

PLB No. 6986 Case No. 20
Carrier File No. 12-08-0102
Organization File No. B-3213-1
Claimant: James M. Campbell

STATEMENT OF CLAIM

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated Rules 91(b)(5) and 91(b)(7) of the Agreement on May 16, 2008, when Claimant James M. Campbell was issued a Level S 30-day Record Suspension with a three year probationary period for violation of Maintenance of Way (MOW) Operating Rules 1.6 – Conduct and MOW Safety Rule S-26.9 Equal Employee Opportunity Policy and Program.
2. As a consequence of the Carrier's violation referred to in part (1) above, we request that the charges be removed from the Claimant's record.

This claim was discussed in conference between the parties.

NATURE OF THE CASE

The Claimant, James M. Campbell, was issued Level S 30-Day Record Suspension with three years' probation by letter dated April 18, 2008 for violation of Maintenance of Way Operating Rule 1.6 and Maintenance of Way Safety Rule S-26.9 – Employment Opportunity Policy and Program. The discipline was imposed because the Claimant allegedly conducted himself "in a discriminating discourteous manner creating a disrespectful harassment type situation, degrading the dignity of other individuals within the workplace with your verbal commutation as revealed during the interview with Manager of Human Resources on April 2, 2008."

The Carrier contends that the Claimant used the word "nigger" in a conversation with co-workers while in the presence of another BNSF employee and a contractor employed by BNSF at an unspecified time and date. The circumstances underlying the imposition of discipline in the instant case first came to the Carrier's attention when Machine Operator Mike Marshall advised the Assistant Roadmaster after a job briefing on March 19, 2008 that the Claimant had allegedly used the "N-word" several weeks earlier while off duty at a motel facility used by BNSF employees. Mr. Marshall, who is African-American, contended

that the comment occurred at the gang lodging facility at the Best Western in Hardy, Missouri approximately three weeks before March 19, 2008, when he reported the incident to the Assistant Roadmaster.

The Organization contends that there is no definitive proof that the Claimant used the offensive racial epithet, known colloquially as the "n-word". The Organization alleges that the witnesses testified only that this alleged incident occurred on the evening of March 19, 2008 after work hours in the motel room of Chemtron employee Phillip Smith. Mr. Campbell and Mr. Smith were playing a video game, perhaps listening to music and perhaps drinking while Mr. Marshall was using Mr. Smith's computer to play cards.

The Organization requested that the investigation of the instant matter "be held as provided for under Rule 91(b)(1) of the effective agreement dated August 1, 1975, and that we be advised in writing of the precise charges provided for under Rule 91(a) of the same agreement. In addition to this request we would like the Investigation to be handled under the provision of the Safety Incident Analysis Process. As you know, S.I.A.P. is founded on multiple problem-solving techniques 1, 2, 3: 1. Analyzing all incidents using a multiple cause approach that identifies all root causes. 2. Developing and implementing a safety

activity plan that will culminate or reduce future similar occurrence. 3. Providing scheduled follow-up to ensure the safety activity plan is working as expects." The Organization contends that by not stating with specificity the reasons for imposing discipline, the Claimant was effectively denied his right of appeal under Rule 91(b)(7) of the Agreement.

The parties were unable to resolve their dispute, and the matter was submitted to this Public Law Board for adjudication.

FINDINGS AND DECISION

Public Law Board No. 6986 (the Board) finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended. Further, the Board has jurisdiction over the parties and the subject matter involved.

The allegations against the Claimant are very serious; an employee who uses a racial epithet or slur, particularly the word n-----, in an abusive or derogatory manner commits an infraction of the Carrier rules that justifies the swift imposition of substantial discipline, in extreme cases justifying discipline, up to and including summary dismissal. All BNSF employees have been placed on notice that the Carrier will not

tolerate discriminatory practices or inter-personal abuse in which racial or ethnic slurs or invective are used. If the facts and circumstances underlying the instant case demonstrated persuasively that the Claimant had engaged in such misconduct, then the penalty imposed upon the Claimant would be upheld.

The evidentiary record does not support such a conclusion. The Claimant apparently uttered a phrase "I'm a cool nigger" either while singing a song or for some other unexplained reason during an off-duty after-hours situation in which he and Mr. Marshall, an African-American co-worker, were visiting the motel room of a contractor employee. The fact that this occurred after the employees were off the clock, but in a situation where lodging was being provided by the Carrier differentiates this instant case from situations that may constitute purely off-duty misconduct.

Nevertheless, the offended employee made no complaint to the Carrier or its representatives for several weeks, until he and the Claimant, who was employed as an Assistant Foreman, got into a verbal altercation after the Claimant asked Mr. Marshall a question at a morning briefing that Mr. Marshall deemed to be repetitive or unnecessary. According to the Claimant's unrefuted testimony at the investigative hearing, Mr. Marshall cursed at the Claimant in front of

other employees under the Claimant's supervision. More particularly, Mr. Marshall is alleged to have said "Mother fucker, I said I was going to run it, if you opened your God-damned ears".

When the Claimant called Mr. Marshall aside to admonish him for using such language toward a Supervisor in front of co-workers, Mr. Marshall grew irate. The complaint underlying the instant case was lodged against the Claimant immediately thereafter, thereby undermining the credibility of Mr. Marshall's assertion that the Claimant had made a derogatory offensive comment in his presence.

The Chemtron employee, Phillip Smith, who has no reason to lie and has been friendly with the Claimant, testified credibly at the investigatory hearing that he heard the Claimant utter the phrase "I'm a cool nigger", perhaps while singing the lyrics of a song. According to the testimony, it is not clear whether Mr. Smith had been drinking or it was not clear to Mr. Smith whether Mr. Marshall heard the remark. When the incident was reported three weeks later in the context described above, the Carrier immediately undertook to investigate. However, the investigation by Human Resources personnel did not provide conclusive evidence sufficient for the Board to sustain the full extent of discipline imposed in the instant case for several reasons.

First, the accusation against the Claimant was not made immediately after the incident and may have been made in a retaliatory or retributive manner in order to preclude discipline of Mr. Marshall for his abusive and insubordinate comments to the Claimant in front of co-workers whom the Claimant supervises.

Second, even if the Claimant made the comment, which would have been grossly insensitive and justifiably insulting to Mr. Marshall, especially uttered by a white person in the presence of an African-American, the Claimant was not then engaged in an altercation with Mr. Marshall in Mr. Smith's room, nor did he direct the comment at Mr. Marshall. Although Mr. Smith initially believed that Mr. Marshall did not hear the sentence uttered by the Claimant, Mr. Marshall testified credibly that he did hear this sentence and that shortly thereafter left the hotel room.

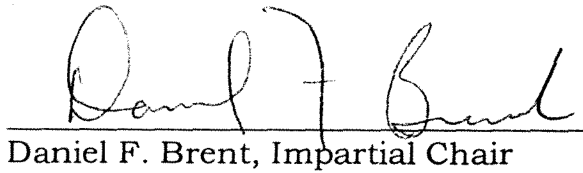
It is noteworthy that the Claimant did not address Mr. Marshall using the n-word, nor did he make any comment about African-Americans using the n-word. Rather, the Claimant is accused of having said "I'm a cool n-----." There was no conversation going on in which this reference can be construed as an intentional insult. At worst, it was an unfortunate choice of words, notwithstanding that an unfortunate choice of words can have potentially devastating impact.

The Claimant testified credibly that he understood the potentially hurtful impact of this word and thus has no recollection of, or denies, using this epithet. The circumstances established in the evidentiary record afford inadequate basis for concluding that the Claimant used this highly offensive word in an aggressive, demeaning, intentionally disrespectful or insulting manner. At worst, the Claimant made an unfortunate choice of words, even if he was singing along with the lyrics of a song, as the extraordinarily hurtful ramifications of using the "n-word" should be universally understood by all employees. The Carrier is justifiably concerned that employees do not insult each other, especially using racial or ethnic epithets. However, the manner in which the Claimant spoke the words attributed to him, even if they were established persuasively by substantial evidence, do not justify the penalty imposed.

In view of the circumstances underlying the instant case, particularly the delay in reporting the incident to the Carrier, the inconsistent descriptions of what actually occurred, and the apparent motives underlying Mr. Marshall's timing in making the accusation, the penalty of a Level S 30-day Record Suspension and three year probationary period was excessive and cannot be sustained. However, because Mr. Smith apparently did not fabricate his testimony and some unfortunate use of a prohibited 'n-word" epithet was made, even with the

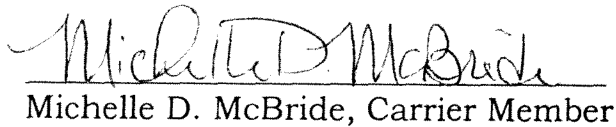
most benign intent, the Claimant is vulnerable to the imposition of minimal discipline. Consequently, the Level S 30-day Record Suspension is hereby reduced to a Ten Day Record Suspension, and the three year probationary period is removed.

We so find.



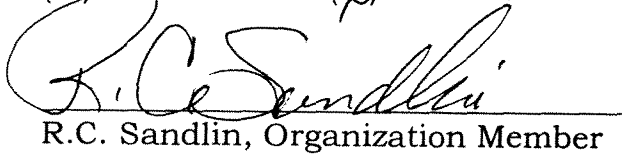
Daniel F. Brent, Impartial Chair — Dated: 9-3-09

(X) I concur. ( ) I dissent.



Michelle D. McBride, Carrier Member — Dated: 9/8/09

( ) ~~I concur.~~ (X) I dissent.



R.C. Sandlin, Organization Member — Dated: 9/11/09