PUBLIC LAW BOARD NO. 2206

AWARD NO. 5

CASE NO. 4

PARTIES TO THE DISPUTE:

Brotherhood of Maintenance of Way Employees

- and -

Burlington Northern, Inc.

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The dismissal of Sectionman William C. Welch, January 21, 1977 was without just and sufficient cause and wholly disproportionate to the alleged offense. (System File P-P-317C)

(2) Sectionman William C. Welch be reinstated with all seniority and other rights unimpaired and be compensated for all time lost.".

OPINION OF THE BOARD:

Claimant was employed as a regularly assigned Sectionman at Maupin, Oregon, with an employment date of September 17, 1974.

On December 13, 1976, at or about 2:15 pm, Mr. Welch had been setting gun-flags, and stopped his motorcar behind the motorcar of Acting Section Foreman P. D. Tolentino. Mr. Tolentino questioned Claimant about the work he had been doing when the inspection car came. Claimant directed several vulgar remarks at Mr. Tolentino. The Assistant Foreman then questioned Claimant about bundles of lumber piled on Claimant's motorcar and instructed him to return it to the loading dock from which it had been removed.

The following day, December 14, 1976, at or about 9:50 pm, Section Foreman J. A. Tolentino received a telephone call from the depot agent at Maupin to inform him that Mr. Welch had just picked up the keys to the

section tool house. The Section Foreman and the Acting Section Foreman proceeded to the tool house and discovered Claimant pouring gasoline from one of Carrier's gas cans into his private vehicle.

The Organization contends first that the Carrier's notice of hearing to Claimant was fatally flawed in that it did not specify precisely enough the charges for which the investigation was being held, thus violating Rule 40C of the Agreement. Rule 40C reads in pertinent part:

> At least five (5) days advance written notice of the investigation shall be given the employee and the local organization representative.... The notice must specify the charges for which investigation is being held.

The Organization argues that the notice sent by Carrier constituted "notice of a fishing expedition and not of an investigation on charges placed against the claimant," and was therefore not proper notice of the charges mandated by Rule 40C. Further, the Organization maintains that Claimant was accused by Assistant Foreman Tolentino of violating one set of rules (viz., 9C, 700, and 701) yet he was found guilty by the investigating officer of violating Carrier Rules 663 and 664; thus, Claimant was not convicted of the violations with which he was charged. With respect to the specific incidents leading to Claimant's dismissal the Organization argues that Claimant's use of profane language was provoked by the Assistant Foreman, and that Sectionman Addington admitted placing the lumber in question on the motorcar. The Organization contends that leaves only the matter of removal of the gasoline, an incident which, due to the mitigating circumstances, does not warrant dismissal.

Carrier maintains that Claimant's "extremely vulgar" remarks to the Section Foreman were unprovoked and unwarranted. Carrier also asserts that the December 15, 1976 notice to Claimant was specific as to the nature of the

matters under investigation. Finally, Carrier notes that when Claimant was confronted by the Assistant Section Foreman and Section Foreman at the tool house he admitted taking Carrier's gasoline without permission and "offered no explanation for doing so."

Upon careful consideration of the record before us, we find that Claimant received adequate notice of the charges against him to "provide the employee with an opportunity to prepare his defense against the accusations of his employer." Award 20238. Sectionman Addington's admission with respect to the lumber on the motorcar renders that charge unsupportable. As for the charge of profanity and vulgarity, the Acting Section Foreman initiated a confrontation with Claimant whose reaction, although excessively vulgar, was provoked by the profanity and attitude of the Acting Foreman. We cannot condone Claimant's reaction, but neither could we support discharge for that act standing alone. The critical issue, therefore, becomes Claimant's unauthorized use of company gasoline.

We do not find persuasive the Organization's argument that "mitigating circumstances" reduce the seriousness of Mr. Welch's removal of Carrier property. On the contrary, Claimant's failure to provide any explanation at the time of the incident suggests that the "emergency at home" rationale is a defense constructed in retrospect and compounds rather than mitigates the offense. He came to Carrier's gasoline tanks, helped himself without permission, did not log his withdrawal in record books kept for that purpose, and when confronted made no explanation, even when he was taken out of service. In our judgement Carrier has adequately proven that Claimant wrongfully converted Carrier property to his own use. In plain words, we believe that he stole the gasoline. That offense, standing alone would be enough to warrant his discharge. Awards 13130, 13674, 16168, 16888, 19486, 20003, 20868.

2206 - Aw 05

FINDINGS:

Public Law Board No. 2206, upon the whole record and all of the evidence, finds and holds as follows:

1. That the Carrier and Employee involved in this dispute are, respectively, Carrier and Employee within the meaning of the Railway Labor Act;

2. that the Board has jurisdiction over the dispute involved herein; and

3. that the Agreement was not violated.

AWARD

Claim denied.

Dana E. Eischen, Chairman

F. H. Funk, Employee Member

L. K. Hall, Carrier Member

Dated: 4/25/79