

PUBLIC LAW BOARD NO. 2206

AWARD NO. 62

CASE NO. 64

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF
WAY EMPLOYES

and

BURLINGTON NORTHERN RAILROAD

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The dismissal of Section Laborer M. H. Taylor was without just and sufficient cause and wholly disproportionate to the alleged offense. (System File 21-3, MW 1/23/80A)
2. Section Laborer M. H. Taylor now be reinstated to his former position and paid for all time lost and the discipline be removed from his personnel record.

OPINION OF BOARD:

As of July 1979 Grievant was working as a Sectionman on a gang under the supervision of Foreman S. C. Lopez. During working hours on the afternoon of July 23, 1979 it started to rain and Claimant, together with Sectionman Gibbs, stopped working and went into a nearby shanty. Foreman Lopez walked by and Claimant approached him to ask whether he would be paid for attending an investigation some two weeks earlier. Lopez replied in words or substance: "No, and you will not be paid for this afternoon either if you don't get back to work because it's not raining that hard".

It is not disputed that an altercation broke out shortly thereafter and Lopez was knocked to the ground. When he arose he told Claimant that he was

going to report the incident and started walking toward a nearby tower.

It is not disputed that Claimant followed Lopez and another fight broke out in which both men fell to the ground. When Lopez got up this time he continued to the tower, followed part way by Claimant who, after further verbal exchange with Lopez, left for his nearby truck and departed the scene. Lopez continued to the tower and reported the incident to the Assistant Trainmaster and a Special Agent.

On July 29, 1979 Claimant was served with notice to attend an investigation which was held on July 31, 1979. At that investigation other employees who witnessed the event of July 23 verified that at least two confrontations occurred between Lopez and Claimant, but nobody was able to say who struck the first blow. According to Claimant, Lopez told him that he was docked, struck him three times on the arm and pushed him toward the work site after they first spoke outside the shanty. Grievant insists that he merely defended himself against Lopez's attack. He conceded following Lopez as the latter walked away toward the tower, but claimed that Lopez grabbed him again as they were talking and wrestled him to the ground without any provocation. Finally, he denied threatening the Foreman with a brakeshoe and insisted that Lopez gave him permission to leave the property in his truck. Foreman Lopez testified that when he ordered Claimant to go back to work in the rain or be docked then Claimant grabbed him by the throat. He stated that when he tried to remove Claimant's arm, the latter strated striking him in the head knocking him to the ground where he "blackened out". He testified that when he came to he advised Claimant he was going to "write up the incident" and started walking toward the tower, at which time Claimant followed him and assaulted him again. When the second confrontation broke up Lopez stated he continued

toward the tower and Claimant then picked up a brakeshoe, held it in a threatening way and asked: "Are you still going to write this up?". Lopez testified that he responded he intended to do so at which time Claimant turned and walked away. Lopez does not remember giving Claimant permission to leave, although he conceded that by that time he was feeling "dizzy" from the punches he had received.

Following the hearing and investigation, Claimant was notified as follows:

This is to advise you that effective this date you are hereby dismissed from the services of Burlington Northern Inc. for your violation of General Rules 57, 661, 665, and 667 of the Burlington Northern Safety Rules for your altercation, quarrelsomeness and being otherwise vicious, failure to comply with instructions from proper authority, absence from duty without proper authority, and failure to devote yourself exclusively to the Company's service while on duty while working as a Section Laborer on Gang 948 at Lincoln, Nebraska on July 23, 1979, as disclosed by the investigation accorded you on July 31, 1979.

Please acknowledge receipt by affixing your signature in the space provided on copy of this letter and relinquish any and all company property, including free transportation, that has been issued to you.

P. L. Gingery
Asst. Roadmaster

cc: M. L. Cottingham, Representative
File: Sec.Lab.M.H. Taylor EM:474691-3
Incident 7/31/79 Lincoln (NE: 0764)
Labor Relations"

The present claim was filed in timely fashion by the Organization seeking Claimant's reinstatement with back pay, but was denied at all levels before appeal to this Board. It is noted that while the Organization was seeking his reinstatement, Claimant was arrested on September 28, 1979 in connection with a firearms assault, upon which he plead nolo contendere to reduced charges. As a result of this, he was convicted for second degree assault

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and was sentenced in October 1979 to serve one to three years in the state penitentiary.

Our review of the evidence reveals no basis upon which to reverse Carrier's conclusion that Claimant was guilty of repeated assaults upon his Foreman on July 23, 1979. The testimony was in direct conflict to be sure, but it is not "hearsay" as characterized by the Organization. There is substantial evidence which, if believed, supports the finding of Claimant's culpability. We cannot say that the Hearing Officer or Carrier was arbitrary or capricious in accepting the Foreman's version of the incident as more intrinsically consistent and likely to be true. Nor can there be any question that the penalty of discharge is not unreasonable for proven misconduct so severe as that engaged in by Claimant on July 23, 1979.

AWARD

Claim denied.

F H Funk
Employee Member

W. Hochmuth
Carrier Member

Dana E. Eischen, Chairman

Date: November 30, 1982