

PUBLIC LAW BOARD NO. 2206

AWARD NO. 18

CASE NO. 9

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 fifteen day suspension of Machine Operator W. L. McClaskey effective June 11, 1977 through June 25, 1977 was without just and sufficient cause. (System File P-P-353C)
- (2) Machine Operator W. L. McClaskey be paid for all time lost and his record be cleared."

OPINION OF BOARD:

On June 10, 1977 Claimant was working on Tie Gang 20 as a Machine Operator under the supervision of Gang Foreman P. L. Bradford. Claimant and another employee annoyed the Foreman by throwing rocks at a groundhog when they were supposed to be working. In order to "teach them a lesson" Bradford ordered the Tie Handler Machine Operator to stop throwing tie butts mechanically and instead assigned Claimant and the other offending employee to throw the tie butts by hand. Bradford sat in the driver's seat of the tie handler and drove the machine immediately behind Claimant and the other employee while they performed that task from approximately 9:30 A.M. to Noon. After the lunch break, Claimant began operating the tie handler but Bradford

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ordered him to stop and return to manually throwing the tie butts. Claimant stated that he had learned his lesson but Bradford responded in words or substance: "I'll tell you when you can stop".

In the face of their Foreman's order, Claimant and the other employee returned to throwing butt ends while the Foreman resumed his position in the driver's seat of the tie handler where he assumed a semi-reclining position with arms folded and his feet up. A short time later, Bradford assigned the employee who was helping Claimant to other duties and left Claimant by himself to throw the tie butts. At approximately 1:00 P.M. Claimant approached the Foreman who was still in a position of repose in the tie handler driver's seat. Claimant stated that he could not or would not work anymore throwing tie butts... and asked to be laid off the balance of the day. According to Bradford, Claimant was loud, profane, and physically aggressive in his refusal to continue throwing tie butts. According to the testimony of Claimant and two other eye witnesses, McClaskey did not touch Bradford but rather the Foreman reached down from his position on the machine and backhanded Claimant across the face with his fist. In any event, Bradford then jumped down off the machine and assumed a karate fighting position. There was no further physical contact, Bradford again ordered Claimant to go back to throwing tie butts and Claimant again declined to do so, stating that he was not physically able to continue. Thereafter Bradford took Claimant out of service and sent him home.

Following written notice and a formal investigation, Claimant was found guilty by Carrier of "failure to comply with instructions from proper authority" and assessed a fifteen-day actual suspension. The Organization seeks to reverse that discipline on procedural and substantive grounds. We have reviewed the record and concluded that the procedural objections are not dispositive of this case. However, we are persuaded that Carrier erred in finding Claimant

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guilty for his failure to continue throwing tie butts on the afternoon of June 10, 1977. The record does not support Carrier's conclusion that Claimant was willfully insubordinate. Overwhelming evidence establishes that after more than three hours of this work in temperatures in excess of 80°, he was physically unable to continue. In the circumstances, the Foreman acted unreasonably, if not provocatively, in his handling of the matter. In the judgement of this Board, the alleged insubordination was the product of harassment by the Foreman rather than dereliction by Claimant.

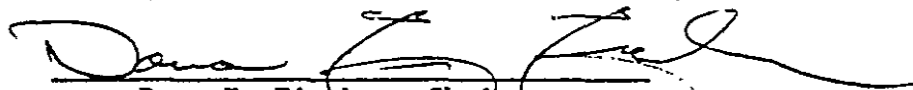
FINDINGS:


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

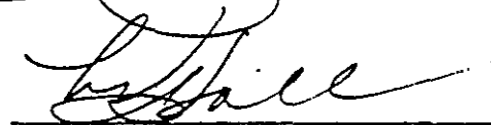
1. that the Carrier and Employee involved in this dispute are, respectively, Carrier and Employee within the meaning of the Railway Labor Act;
2. that the Board has jurisdiction over the dispute involved herein; and
3. that the Agreement was violated.

AWARD

Claim sustained.


Dana E. Eischen, Chairman


F. H. Funk, Employee Member


L. K. Hall, Carrier Employee

Date: Jan 8 / 80