PUBLIC LAW BOARD NO. 2206

AWARD NO. 67

CASE NO. 69

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, J. A. Norwood April 6, 1979, was without just and sufficient cause. (System File P-P-437C)

2. Section Laborer, J. A. Norwood be returned to service with the Carrier with all rights restored and paid for all time lost.

OPINION OF BOARD:

In March 1979 Claimant was employed as a Sectionman at South Junction, Oregon. As a result of an incident on March 2, 1979 involving Claimant and his Foreman, one C. A. Nickles, both employes were notified on March 3, 1979 to attend an investigation as follows:

> Attend investigation at the depot in South Junction, Oregon 10:00am Tuesday March 13, 1979 for the purpose of ascertaining the facts and determining your responsibility in connection with the scuffling and fighting incident, plus all conduct of a similar nature which resulted in injuring to Section Foreman M. C. Nickles at South Junction, Oregon 6TH Subdivision, Portland Division at approximately 2:50 PM Friday March 2, 1979.
>
> Arrange for representative and or witness if desired in accordance with the governing provisions of prevailing schedule of rules.
>
> Please acknowledge receipt by affixing your signature in the space provided on copy of this letter.
>
> J. G. Edmiston
> Superintendent

The record shows that Claimant and Foreman Nickles had a stormy relationship with frequent verbal abuse and profane name-calling back and forth. On March 2, 1979 the gang was traveling by motor car when one of the cars stalled on a track on which a through freight was expected within the hour. Foreman Nickles began kicking at the starter and Claimant, a former Machine Operator, told the Foreman in words or substance that he was doing no good and did not know how to handle machinery properly. The Foreman responded to Claimant: "Shut your fucking mouth", to which Claimant responded: "You are a fucking asshole". The Foreman again told Claimant in words or substance to shut his mouth and Claimant responded in words or substance that Nickles would have to shut it for him if he thought he could. At that point Nickles threw down his hardhat, came around the car and a physical scuffle ensued as a result of which Claimant's lip was bloodied and Nickles received scratches on the top of his head. Both men swore that the other threw the first punch and there were no other witnesses who could recall seeing the altercation. It is not disputed that Claimant, who is seven inches taller and thirty pounds heavier than Nickles, wrestled the Foreman to the ground, held him there until he stopped struggling, and then released him. Nickles reported the incident to the Roadmaster by telephone and then received medical attention for his scratches.

Following the hearing both Claimant and Foreman Nickles were terminated from service for fighting on duty. The Organization filed claim seeking reinstatement of both employes with full back pay. That claim was rejected at all levels but the record shows that Foreman Nickles subsequently was restated without back pay. The record persuades us that in conference on May 26, 1981 Carrier's Manager of Labor Relations offered to reinstate Claimant Norwood also on a "leniency" basis. The available evidence does not indicate whether the offer for leniency reinstatement of Norwood was conditioned, as

was Nickles', upon withdrawal of the pending claim for back pay and benefits. In any event, neither Norwood nor the Organization accepted that offer. Instead the claim for his complete vindication and reinstatement with full back pay was progressed to this Board for determination.

The assertions of the Organization that Claimant was deprived of a fair and impartial investigation are without support on the record. As to the merits, we in no way condone Claimant's behavior before or during the altercation. But his culpability or responsibility for the altercation certainly was not any greater than that of Foreman Nickels. Accordingly, any greater degree of discipline for Norwood would be arbitrary and unreasonable. We are persuaded from the record that Norwood could have been reinstated at the same time as Nickles rather than pursue his rights of appeal to this Board. He should not be penalized for seeking complete vindication. But neither should he be unjustly enriched with back pay for the period following offer of leniency reinstatement, since we find that he was guilty of misconduct which warranted a suspension without pay from approximately March 1979 to June 1981. Since our basic conclusion is that he should have received the same discipline as Nickles we shall direct his reinstatement to service, but with no back pay for time lost.

AWARD

Claim sustained to the extent indicated in the Opinion. Carrier is directed to implement this Award within thirty (30) days of execution.

F. N. Finke
Employe Member

W. Hardgrave
Carrier Member

Dana E. Eischen, Chairman

Date: March 1, 1983