

Award No. 1250

Docket No. 1169

2-B&O-SM-'48

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Adolph E. Wenke when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 30, RAILWAY EMPLOYEES'
DEPARTMENT, A. F. of L. (Sheet Metal Workers)**

BALTIMORE AND OHIO RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYEES: That Sheet Metal Worker L. J. Cutway was unjustly dismissed from the service on January 28, 1946, and that accordingly the carrier be ordered to reinstate him to all service rights with pay for all time lost retroactive to said date.

EMPLOYEES' STATEMENT OF FACTS: Sheet Metal Worker L. J. Cutway, hereinafter referred to as the claimant, was employed by the Carrier in the Water Service Department at Indianapolis, Indiana, during the hours from 8 A. M. to 4 P. M., with a seniority date of April 21, 1929.

The claimant worked his regular shift on December 26, 1945, left the premises at quitting time, at 4 P. M., but returned about 8:45 P. M. to the water service shop to change his clothes and wash up. While the claimant was washing up, Sheet Metal Worker Helper C. C. Hull came in the shop, and without warning struck the claimant with his fist behind the ear. Thereupon blows were exchanged and Helper Hull left the premises, but before the claimant could leave the shop, upon completion of washing up and changing clothes, Helper Hull returned thereto with his wife and daughter. The claimant was again viciously attacked, both by Helper Hull and his wife. On this occasion, while Mrs. Hull was holding and scratching the claimant, Helper Hull twisted his right arm out of socket at the elbow. The result of this injury is disclosed in Exhibits A, A-1, and A-2. Exhibits A and A-1 are dated February 12, 1946, and signed by Doctor Frank W. Teague. Exhibit A-2 is a detailed statement rendered by the Methodist Hospital of Indianapolis, showing the service rendered the claimant on December 27, 1945, the cost thereof and the cash paid thereon.

On December 31, 1945, charges were preferred against the claimant, et al., and the hearing date therefor was set to begin at 1 P. M., January 4, 1946, which is affirmed by copy of the letter submitted, dated December 31, 1945, addressed to the claimant by the division engineer, and identified as Exhibit B.

The hearing of the Claimant and, et al., was held as above scheduled, and a copy of said hearing transcript is submitted, identified as Exhibits C, C-1, C-2, and C-3.

"The evidence of record does not disclose adequate grounds for disturbing the disciplinary action of the management."

The identical principle was reiterated by the Division and referee in Award No. 690.

In short, on the basis of the above cited findings, this Division has enunciated and reiterated the principle that it can pass judgment only upon the facts of record. The facts of record in the case at hand are conclusive. On the basis of those facts of record, and on the basis of the principle laid down by this Division in the above cited Awards, the carrier submits the awards of this Division do not support this claim.

On the basis of all contained herein, the carrier requests the Division to find this claim as being one without merit, and to deny it accordingly.

FINDINGS: The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

The parties to said dispute were given due notice of hearing thereon.

There is no question of trespassing on company property here involved, but that a fight took place on the carrier's property on December 26, 1945, involving Louis J. Cutway, a water station repairman, and Clarence C. Hull, a water station repairman's helper, is fully established. Just what was the cause of the fight, who instigated it, and whether claimant was the aggressor or acted in self defense cannot be said to have been established with any degree of certainty, for the evidence relating thereto is very conflicting. While we think the evidence adduced justified the carrier in finding that Cutway's conduct was such as to merit some discipline, however, sufficient extenuating circumstances are disclosed by the record to require this Division to modify the carrier's sentence of permanent dismissal from the service.

We think Cutway's seniority rights should be restored, but payment for time lost should be denied.

AWARD

Reinstated with seniority rights restored, but without payment for time lost.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: J. L. Mindling
Secretary

Dated at Chicago, Illinois, this 29th day of June, 1948.