

Award No. 2191

Docket No. 1981

2-WT-CM-'56

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

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

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 106, RAILWAY EMPLOYES'
DEPARTMENT, A. F. of L. (Carmen)**

THE WASHINGTON TERMINAL COMPANY

DISPUTE: CLAIM OF EMPLOYEES:

1. That under the current agreement, Carman Helper-Oiler Robert H. McBride was unjustly suspended from service effective at 8:00 A. M. on Friday, February 18, and who was also unjustly dismissed from the service Thursday, March 11, 1955 by The Washington Terminal Company.

2. That accordingly, The Washington Terminal Company be ordered to reinstate this employe in the service with his seniority rights unimpaired and to compensate him for all time lost since 8:00 A. M., February 18, 1955.

EMPLOYEES' STATEMENT OF FACTS: Carman Helper-Oiler Robert H. McBride, hereinafter referred to as the claimant, was employed as a car cleaner by The Washington Terminal Company, hereinafter called the carrier, and said carrier subsequently promoted the claimant to the position of a carman helper-oiler. The claimant thus established seniority as a car cleaner on July 28, 1944 and seniority as a carman helper on August 9, 1945.

The claimant's regular assignment of hours was from 8:00 A. M. to 4:00 P. M., with a lunch period of twenty minutes Fridays through Tuesdays, with rest days Wednesday and Thursday. However, the carrier elected to suspend the claimant from its service effective at the beginning of his shift on Friday, February 18, 1955 on written notice which reads as follows:

"This is to inform you that you are being held out of service in accordance with Rule 29 pending a hearing. A notice will be furnished you promptly in connection with this hearing.

Yours truly,

(Signed) E. Garner,
Assistant Master Mechanic"

knife in his hand until he and Shaw got behind the lockers, out of sight of the others, and that McBride then pulled the knife out of his pocket and cut Shaw.

McBride's use of the knife under such circumstances was unjustified even if it be assumed that Shaw was the aggressor and instigator of the fight. McBride's cutting Shaw was an act of force far in excess of what was proper and necessary in defending himself against Shaw who was unarmed. The First Division has refused to restore a brakeman to service who contended that the injury be inflicted on an engineer was in self defense. That Division said, in Award No. 13607, Docket No. 23974:

The evidence offered at the hearing establishes that the claimant, while on duty at DeForest Junction, Ohio, engaged in an altercation with an engineer who was also on duty at the time. While the first blow, or the attempt thereat, appears to have been struck by the engineer the evidence establishes that it was provoked by the conduct of claimant. While claimant had a right to defend himself after he was attacked, the evidence establishes that he used force far in excess of what was proper and necessary for that purpose, particularly in view of their difference in ages. There is nothing in the record that excuses claimant for what he did. It may be, and probably is, that the engineer is not without fault but that fact does not help claimant. He is responsible for what he did.

Such unnecessary use of force proved McBride to be a person of dangerous propensities. It was not only the right but the duty of the carrier, in the protection of all its employees, to dismiss McBride from its service. And this was so whether McBride was to blame for the fight in which he engaged with Shaw. **National Labor Relations Board v. Clearwater Finishing Company**, 216 F. 2d 608 (C.A. 4, 1954).

It is respectfully submitted that the claims asserted by the petitioner in this dispute should be denied.

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 employees 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.

This claim is made in behalf of Carman Helper-Oiler Robert H. McBride. It is claimed McBride was improperly suspended from carrier's service on Friday, February 18, 1955, and unjustly dismissed therefrom on Friday, March 11, 1955. Because thereof it is requested that McBride be reinstated in the carrier's service with his seniority rights restored and unimpaired and that he be compensated for all time lost.

On Friday, February 25, 1955, carrier notified McBride that on Thursday, March 3, 1955, he was to stand trial on the following charge: "fighting with Carman Helper-Oiler Sylvester Shaw in the Locker Room on the 2nd floor of Eckington Coach Yard Building, Washington Terminal, about 4:15 P.M., February 14 (should have been 15), 1955, and hearing in connection with this charge will be held in this office (that of Assistant Master Mechanic Elmer Garner) on Thursday, March 3, 1955, at 10:00 A.M." McBride, by letter dated February 17, 1955, had been suspended from service as of February 18, 1955.

The evidence adduced at the hearing disclosed that Shaw and McBride had engaged in an altercation which resulted in McBride cutting Shaw on the chin with a knife to such an extent that it took five (5) stitches to sew it up.

It is contended the hearing was not promptly held within the meaning of Rule 29 of the parties' agreement which provides, in this respect, that: "No employe shall be disciplined without a fair hearing * * * which shall be prompt, * * *." No objection was made on this ground at the hearing, which was held on Thursday, March 3, 1955. The incident here involved occurred on Tuesday, February 15, 1955; on Thursday, February 17, 1955 carrier notified McBride he was being suspended from service as of Friday, February 18, 1955; and on Friday, February 25, 1955, McBride was notified of the charge and that a hearing would be held thereon on Thursday, March 3, 1955. This hearing was held. We think this procedure fully met the requirements of the rule.

It is also contended the suspension was unjustified. In this respect Rule 29 of the parties' effective agreement provides: "Suspension for major offenses pending a hearing, * * *, shall not be deemed a violation of this rule." McBride had cut another employe with a knife to the extent as hereinbefore set forth. Certainly, until all the facts were brought out at a hearing, carrier was justified in suspending McBride from the service as a protection to his fellow employes.

We come to the merits of the case. It is the claim of the organization that Shaw was the aggressor and that McBride was acting solely in self defense. We shall assume that premise for the purpose of our discussion, although there is evidence to the effect that McBride joined in the altercation once it got under way. The right to defend oneself against an aggressor has its limitations. While McBride had a right to defend himself, after he was attacked, the evidence establishes he used means for doing so far in excess of what was proper and necessary for that purpose, considering the fact that Shaw was unarmed. There is nothing in the record to justify McBride using his knife in the manner that he did. While, as already stated, we think Shaw was the aggressor and certainly more at fault than McBride in causing the altercation, however, that fact does not relieve claimant from bearing the responsibilities of his own conduct.

There is another and far more important reason why carrier's act of dismissing McBride, under the circumstances here shown, was justified. It is the duty of a carrier to protect its employes while on duty from the risk of being physically assaulted by a fellow employe when it knows the latter has such propensities. If such should occur there is a possibility that liability may accrue to the carrier for injuries received by an employe under such circumstances.

We do not think the dismissal of McBride was arbitrary, capricious or an abuse of discretion on the part of carrier but find that what it did was fully justified under the circumstances disclosed by all the facts adduced at the hearing.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 1st day of August, 1956.