

Award No. 3364

Docket No. 3108

2-KCT-FO-'59

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Lloyd H. Bailer when the award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 38, RAILWAY EMPLOYEES'
DEPARTMENT, A. F. of L.—C. I. O. (Firemen & Oilers)**

KANSAS CITY TERMINAL RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYEES:

1. That under the current agreement Laborer Samuel Roberts was unjustly discharged without benefit of a fair and impartial hearing.

2. That accordingly the carrier be ordered to reinstate him with all seniority and service rights intact and pay for all time lost effective with July 23, 1957.

EMPLOYEES' STATEMENT OF FACTS: Laborer Samuel Roberts, hereinafter referred to as the claimant, entered the service of the Kansas City Terminal Railway Company, (hereinafter referred to as the carrier) as a laborer on January 15, 1952 and continued in such service up to July 23, 1957.

Under date of July 24, 1957, the claimant received the following letter appearing over the signature of Mr. W. M. Lehmanfi master mechanic:

"July 24, 1957

Mr. Samuel Roberts
1913 Montgall
Kansas City, Missouri

Dear Sir:

You are hereby notified that you are discharged from the service of the Kansas City Terminal Railway Company effective as of

he must answer for the consequences of his own acts. The carrier has found from the evidence that claimant assaulted, beat up and seriously injured a fellow employe. The evidence before us is sufficient to sustain such finding and sufficient, also, for us to say that it was not an arbitrary or capricious one. Under such circumstances this Board will not disturb the carrier's action."

From all the foregoing it is apparent that Claimant Roberts through his own actions has dictated his discharge from the service of the carrier. It is, therefore, clear the claim in this dispute is not supported by the agreement, is without merit and should be denied in its entirety.

In the event your Board should determine that the claim in the docket should be sustained and the claimant paid for time lost, the carrier without prejudice to its position as to the merits of this claim contends any award made in favor of the claimants should be less appropriate taxes and amounts paid under the Railroad Unemployment Insurance Act to the claimant which the carrier is obliged by law to return to the Railroad Retirement Board.

For the reasons we have assigned, we respectfully petition your Board to deny the claim.

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.

Parties to said dispute were given due notice of hearing thereon.

Under date of July 24, 1957 the carrier gave claimant Roberts, a Powerhouse Laborer, written notice of his discharge for violation of Rule 13 of the General Rules for Guidance of Employees. The cited provision is a carrier-established rule dealing with the conduct of employees. A hearing thereafter requested for claimant per Rule 30 of the Agreement was held on the property on August 14, 1957. On August 27, 1957 carrier's hearing officer issued written notice to claimant that the discharge was sustained.

The discharge action is appealed to this Board on the ground that claimant was denied a fair and impartial hearing as required by Agreement Rule 30. The incident precipitating the discharge was an altercation on the morning of July 23, 1957 between claimant and his foreman which ended with the latter lying unconscious on the floor in the Powerhouse. The only witness to this incident was Laborer W. M. Thompson, who was called to the hearing by claimant Roberts. The foreman, the claimant and Thompson were permitted to testify and to be cross-examined concerning the events occurring on the date of the altercation.

The basis for the contention that claimant was not afforded a fair and impartial hearing is that carrier's hearing officer sustained objections of the foreman's representative to any testimony concerning whether profanity was addressed by the foreman to the claimant prior to this date. The petitioner also protests the hearing officer's action in excluding any testimony

by persons not present during the altercation. This ruling had the effect of barring testimony by several fellow employees whom claimant had called to the hearing.

We think the hearing officer acted in an overzealous fashion by restricting the testimony to the events immediately surrounding the subject altercation. The test to be applied here, however, is whether the claimant's rights were prejudiced by the hearing officer's action. We do not think that they were. By other means the Organization has placed in the record of this case evidence that prior protest had been made concerning the foreman's use of profane and abusive language in addressing the claimant. Even if testimony concerning such conduct by the foreman prior to the date of the subject incident had been adduced at the hearing and accepted in conjunction with testimony offered in claimant's behalf regarding language used by the foreman on the morning of the subject incident, however, we do not see how claimant's action in knocking the foreman unconscious by hitting him on the head with a shovel could be condoned. It is not contended that the foreman made any gesture indicating intent to strike the claimant. In fact, the foreman did not even see what hit him. The testimony concerning the striking of the blow came from the lips of the claimant and his own witness, Laborer Thompson.

We are of the opinion and find that this claim is without merit. A denial award is required.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 2nd day of November, 1959.