

**Award No. 4440**

**Docket No. 4399**

**2-T&P-CM-'64**

**NATIONAL RAILROAD ADJUSTMENT BOARD**

**SECOND DIVISION**

The Second Division consisted of the regular members and in addition Referee J. Harvey Daly when award was rendered.

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**PARTIES TO DISPUTE:**

**SYSTEM FEDERATION NO. 121, RAILWAY EMPLOYES'  
DEPARTMENT, A. F. of L. - C. I. O. (Carmen)**

**THE TEXAS & PACIFIC RAILWAY COMPANY**

**DISPUTE: CLAIM OF EMPLOYES:**

1. That Carman T. T. Foster, was unjustly discharged from service January 8th, 1962, and that the Carrier be ordered to reimburse him for wages lost from said date to April 3, 1962.

**EMPLOYEES' STATEMENT OF FACTS:** T. T. Foster, hereinafter referred to as the claimant, was employed by The Texas and Pacific Railway Company, hereinafter referred to as the carrier, as a carman at Shreveport, Louisiana October 10th, 1922, to April 30th, 1947, out on disability due to heart attack August 30, 1947, through August 12th, 1956, continuous service up to the date of dismissal January 8th, 1962, on Tuesday, December 12th, 1961, claimant was involved in an altercation with Yardman R. J. Burnett, at about 7:45 P.M., during claimant's tour of duty. The carrier's superintendent filed charges against the claimant jointly with R. J. Burnett, December 13th, 1961. Carrier set date for investigation 10:00 A.M., Monday December 18, 1961.

Investigation postponed to January 4th, 1962 at the request of General Chairman L. A. Aucoin of the B.R.T. The investigation held as scheduled by Mr. G. W. Stone, assistant superintendent of the carrier, assisted by Mr. J. H. Webb, assistant master mechanic. On January 8, 1962, Carriers' Master Mechanic Mr. E. E. Long, notified the claimant that he was dismissing him from service of The Texas and Pacific Railway Company effective as of that date. Request was made on the carrier that the claimant be re-instated with seniority rights unimpaired and compensated for lost wages. The carrier effective April 3, 1962 restored the Claimant to service on a leniency basis with his seniority rights unimpaired without pay for time lost. The agreement effective September 1st, 1949 as subsequent Amended is controlling.

**POSITION OF EMPLOYEES:** It is submitted that claimant was justified in defending himself and that he acted solely in self defense when Mr. Burnett, advanced upon him backing him up toward a moving cut of cars. Burnett,

The foreman immediately notified claimant of his reinstatement by telephone, but the claimant, who was at Bryceland, Louisiana, replied by phone that he would not accept reinstatement unless he was paid for all the time he had been off. After further discussion, arrangements were made to take to him in person the letter notifying him of his reinstatement, and this was done on March 27, 1962. Evidently Claimant Foster got some advice from the general chairman or someone else in the Brotherhood between March 23 and March 27. Claimant Foster wrote on March 27, that he had received the letter and that he would report on April 3, 1962, (but not sooner); and he indicated that he was sending a copy to the General Chairman (Y. L. Crumpton). He did resume work on April 3, 1962. On October 19, 1962, while on duty, Claimant Foster fell and struck his head, and remained off duty thereafter until March 15, 1963, at which time he relinquished all rights to further employment with this company, and retired under the Railroad Retirement Act.

**POSITION OF THE CARRIER:** There is NO dispute about the fact that Claimant Foster intentionally hit Yardman Burnett with his lantern, inflicting injuries which were painful and might have been serious. There is NO dispute about the fact that both of them were on duty at the time. No dispute has been raised about any procedural or technical points or matters in connection with the charges, the conduct of the investigation, or the grievance procedure.

The dispute on the merits is simply as to whether there was just and sufficient cause for the discipline imposed on Claimant Foster, in the circumstances in which this altercation occurred. The carrier insists that there was, and that it cannot condone or permit fighting such as this among its employees on its property, and that such discipline as was imposed in this case is absolutely essential to the maintenance of order and a safe place to work, as well as to the furtherance of the transportation business. The entire transcript of the evidence is only twenty pages long; and we ask the Board to read it through. We think it speaks for itself.

Even if this discipline had been unjust, any earnings lost by the claimant after March 23, 1962, were lost solely by reason of his own choice, and the claim is improper as to the dates after that in any event. Likewise, the claim is improper as to the first three weeks following the date of his dismissal, because he suffered no loss or damages during the period. He was paid for three weeks, and he would have had a three-week paid vacation in any event, even if he had not been disciplined.

For the reasons stated, the carrier respectfully requests that all claims in this case be dismissed or 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 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.

Mr. T. T. Foster, the Claimant was first employed on October 10, 1922, as a Carman at the Carrier's Hollywood Yard at Shreveport, Louisiana, and remained in continuous service until May 1, 1947, when Claimant was granted a leave of absence following a heart attack.

The Claimant returned to work on August 13, 1956 and remained in continuous service until he had an altercation with Yardman R. J. Burnett, around 7:45 P. M. on December 12, 1961, while both were on duty.

Charges were filed against the Claimant, an investigation was conducted by Assistant Superintendent G. W. Stone on January 4, 1962; and the Claimant was found guilty of the charge and dismissed from service on January 8, 1962.

The Carrier, at the request of the Organization, restored the Claimant to service on a leniency basis on March 23, 1962, but the Claimant didn't report for duty until April 3, 1962.

Although Yardman Burnett is not a Claimant herein, it is important that the record show that he was accorded the same treatment as the Claimant by the Carrier.

The record also shows that while Yardman Burnett initiated the verbal offense, it was the Claimant who initiated the physical offense as evidence by Claimant's testimony—to wit—"I pushed Burnett with my left hand in the face, pushing him back."

The record further reveals that even when Yardman Burnett struck at the Claimant—the latter fended off the blows as shown by the following statement of the Claimant:

"He struck at me three times, glancing licks—I knocked them off with my arm."

That statement is not the remark of a timid or scared man but rather that of a confident and self-assured person.

From the above facts the Board must rule in favor of the Carrier and deny this claim.

#### AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman  
Executive Secretary

Dated at Chicago, Illinois, this 26th day of February, 1964.