

**Award No. 5140
Docket No. 5004
2-CB&Q-EW-'67**

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

The Second Division consisted of the regular members and in addition Referee Harold M. Weston when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 95, RAILWAY EMPLOYEES'
DEPARTMENT, AFL-CIO (Electrical Workers)**

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYEES:

1. That, under the current Agreement, Electrician Helper E. W. McGowan was unjustly dismissed from the service of the Carrier December 29, 1964, and thereby deprived of his seniority as Electrician Helper and his right to make a living.

2. That, accordingly, the Carrier be ordered to reinstate the aforementioned to service with all seniority rights, vacation rights, holidays, pass privileges, hospitalization unimpaired, and to compensate Mr. McGowan additionally for all time lost subsequent to December 29, 1964.

EMPLOYEES' STATEMENT OF FACTS: The Chicago, Burlington and Quincy Railroad Company, hereinafter referred to as the carrier, employed Elbert W. McGowan, hereinafter referred to as the claimant, in the capacity of electrician helper for approximately four years. On December 29, 1964, carrier dismissed claimant from service following an investigation due to an altercation between claimant and Machinist Helper Ravel Soto. This altercation occurred while claimant and Machinist Helper Soto were on duty at the Zephyr Pit, 14th street passenger yard, Chicago, Illinois; between 11:00 P. M. and 11:30 P. M. on December 28, 1964.

Claimant acted in self-defense during altercation as was pointed out by testimony given at investigation held at the office of J. R. VanNortwick, district master mechanic. Investigation to determine facts of altercation was requested by claimant in accordance with rule 31 of the agreement between System Federation No. 95 and the Chicago, Burlington and Quincy Railroad Company. The other party in the altercation, Machinist Helper Ravel Soto, did not request an investigation as he, too, had been dismissed from service due to the fracas. Machinist Helper Soto also was charged with aggravated assault by the City of Chicago in connection with the incident.

tric shop at approximately 11:15 P. M. on December 28, 1964. At the investigation, Assistant Special Agent D. L. Kemp testified:

"In questioning Mr. Stader, the only witness that I was able to question at the time, he stated that they were in the Electric Shop talking and a fight had developed between Mr. Soto and Mr. McGowan and that Mr. Soto came in with a razor and pulled it on Mr. McGowan and at that time Mr. McGowan knocked him down and secured a knife and jumped on top of him and made about three slashes with the knife. It was at that time he grabbed McGowan around the arms to hold him, at which time he tried to stop and break up the fight."

The investigation also shows that the knife that was secured by claimant at that time was on claimant's person under his belt and that he was prepared to fight.

"102. Q. The fact, Mr. McGowan, that you secured a knife blade which was approximately 12 inches long and put it in your belt indicated that you were prepared for a fight, is that correct?

A. Yes sir."

The testimony at the investigation shows that after Mr. Soto pulled the razor on Mr. McGowan in the electric shop at about 11:15 P. M., Mr. McGowan knocked Mr. Soto down to the floor and in that instant when Mr. Soto was in a prone position, claimant McGowan jumped on top of Mr. Soto and slashed him, not once or twice, but three times.

In this connection attention is again called to the fact that the privilege of self-defense extends only to the use of reasonable force. If a man strikes a blow not necessary to his defense or by way of revenge, he is himself guilty of an assault and battery. It is submitted that three separate knife slashes inflicted on a man who is in a prone position on the floor is an execution of force well beyond the limited confines of self-defense.

The foregoing facts clearly show that claimant is not entitled to the privilege of claiming self-defense in this case. Not only did claimant fail to resort to legal remedies to avoid the altercation but the evidence clearly indicates that claimant went beyond mere self-protection and exerted unreasonable force not necessary to his actual defense when he slashed Mr. Soto three separate times while Mr. Soto was laying on the floor. This being the case, it is submitted that claimant McGowan, having admitted the altercation on the date in question, clearly violated rule 47 on this property and his dismissal must be upheld. This board is well aware of carrier's responsibility concerning the employment of men with propensities toward violence. The carrier has, in the past, been faced with legal action due to allowing a man who had shown a propensity toward violence and fighting, etc., to remain in service when said man subsequently entered into further altercations with other employes causing injury to other employes.

Carrier respectfully requests that the discipline assessed in this case remain undisturbed.

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.

The substance of the present claim is that Carrier acted unjustly in dismissing Claimant, an electrician helper, for his part in an altercation with Mr. Soto, another employe, that occurred on company property during working hours at about 11:15 P. M. on December 28, 1964.

There is no question but that Soto and Claimant were involved in a bitter fight at the time and place in question and that the latter had slashed Soto's face with a twelve inch butcher knife after Soto had fallen to a prone position. It is equally clear, however, that Soto started the fight and to do so deliberately went to the Electric Shop where Claimant was engaged in conversation with another employe. When Soto saw Claimant there, he grabbed him physically and then held a razor near Claimant's throat. It was then, and only then, that Claimant took action. The assault by Soto triggered Claimant's use of force and on the record before us, we are not in a valid position to hold that Claimant acted with an unnatural degree of violence under the pressures of the moment and constitutes a menace.

Claimant was in error in not notifying supervision of an incident that had occurred in the locker room a little earlier that same night when Soto also threatened Claimant with the straight razor. Every employe has the affirmative obligation to take reasonable measures to avoid a fight on Company property and to notify his supervisor promptly of any potentially explosive condition existing on the property such as serious threats and weapon-flourishing by employes. It is the Carrier's right and responsibility to enforce the rule strictly by appropriate discipline.

In this factual situation, a layoff without pay of over two and one-quarter years is ample discipline for Claimant's misconduct. We will direct Carrier to offer Claimant immediate reinstatement to a position substantially equivalent to that he occupied on December 28, 1964, with all seniority and vacation rights unimpaired but without back pay of any kind.

AWARD

Claim sustained only to the limited extent that Claimant will be reinstated with seniority rights and vacation unimpaired.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 13th day of April, 1967.

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