

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 22114
Docket Number MW-22218

Rolf Valtin, Referee

PARTIES TO DISPUTE: ((Brotherhood of Maintenance of Way Employees
(St. Louis-San Francisco Railway Company

STATEMENT OF CLAIM: 'Claim of the System Committee of the Brotherhood that:

- (1) (a) The dismissal of **Trackman** Darrell W. Bailey was without just and sufficient cause and
(b) it was arbitrarily and capriciously imposed because Foreman Shockley, who dismissed the claimant, was not disciplined in any **manner** although he (Shockley) instigated and prwoked the incident which led to the claimant's dismissal.

(2) The claimant shall be restored to service with pay for all time lost and with all rights **intact** (System File **B-1619/Time** Claims: General: Bailey, Darrell W.)."

OPINION OF BOARD: The claimant, a Track laborer with about three years of service with the Carrier, was discharged for physically assaulting his foreman and threatening him with a shovel.

The evidence shows: that the **claimant** and the **foreman** were involved in an argument as to whether they had bet \$10 on the outcome of the race for the Democratic Presidential Nomination; that the **claimant** accused the foreman of "**welching**"; that the foreman denied it, and kept denying it when the claimant persisted in demanding **collection** of the asserted debt; that the foreman ultimately used words which either literally or in effect accused the claimant of being a liar; that the claimant, saying that this was an insult which he would not tolerate, both pushed and hit the foreman; that the foreman went down from the blow; and that the claimant stood **over** the **foreman** with a shwel in his hand in a threatening manner (though he walked away without actually engaging the shwel as a weapon).

The Organization makes a twofold contention: 1) that the assault resulted from the foreman's prwocation; 2) that two men were in an altercation and that it is arbitrary and discriminatory to discipline only one of them.

We are **in** disagreement with the Organization. It is only as to the argument that the two men may be said to have been similarly involved. And on this score, the fact is that the **claimant** was the first to use inflammatory language. The for- did respond in kind, but he went no further. It was the claimant alone who resorted to physical force. Moreover, his attack was violent (and on a considerably older wan).

There are two answers to the Organization's reliance on prwocation. The first is that the claimant, having himself assumed an accusatory stance (and, indeed, having been the first to assume it), is hardly in a position to convert the foreman's accusatory stance into a prwocation defense. The second is that, even if it were to be **over-**looked that the foreman had done no more than respond in kind, there is no proper way to conclude that the provocation was such as to justify the **claimant's** assault and threat.

In sustaining the discharge penalty, we are in accord with a series of Third Division Awards -- see, for example, Nos. 20314, 21299 and 21245.

The record is clear that the claimant received a full and proper hearing. We see nothing by way of a violation of his procedural rights.

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

That the parties waived oral hearing;

That the Carrier and the **Employes** involved in this dispute are respectively Carrier and **Employes** within the **meaning** of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction wer the dispute involved herein; and

That the Agreement was not violated.

Award Number 22114
Dock& Number MW-22218

Page 3

A W A R D

Claim denied..

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this **16th** day of **June 1978**.