

The Third Division consisted of the regular members and in addition Referee Dana E. Eischen when award was rendered.

(Brotherhood of Maintenance of Way Employees  
PARTIES TO DISPUTE: (  
(Oklahoma, Kansas and Texas Railroad Company

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

(1) The dismissal of Foreman D. W. Banks and Machine Operator S. R. Cogdill for responsibility, if any, in connection with alleged altercation on or about September 18, 1985 was arbitrary, capricious, without just and sufficient cause and in violation of the Agreement (System Files OKT-D-1207 and OKT-D-1208).

(2) The claimants shall be reinstated to service, with seniority and all other rights unimpaired and they shall be compensated for all wage loss suffered."

FINDINGS:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employees 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 waived right of appearance at hearing thereon.

On the morning of September 18, 1985, while being transported to the work site in a Carrier "crew truck," the two Claimants entered into an altercation in which each struck the other with fists. Both Claimants were cited for separate investigations following which Carrier found each guilty of violating Company rules prohibiting quarrelsome or vicious behavior and fighting. Carrier dismissed both Claimants for those violations.

The evidence of record shows that the altercations occurred in and/or near Carrier's "crew truck" at a time when Claimants were en route to the work location. In those circumstances, the fact that the fight occurred a minute or two before rather than during Claimants' actual 7:00 a.m. - 3:00 p.m. tour of duty is not material. Thus, Organization contentions that Carrier improperly disciplined these employees for conduct "off the property" and "off the clock" are not persuasive. The record plainly shows that Claimants violated Carrier rules against quarreling and fighting on Carrier time and property.

Claimant Cogdell was sitting in the truck when Claimant Banks and he exchanged words. According to Banks' testimony, he threw his coffee at the truck in anger but did not intend to throw the coffee through the window onto Cogdell. The coffee thrown by Banks did strike Cogdell who then opened the truck door and threw some of his coffee onto Banks. Cogdell closed the door of the truck and sat back with several other employees. At that time, Banks opened the truck door and punched Cogdell in the face. Cogdell jumped out of the truck and the two employees then exchanged several blows until Cogdell's glasses were broken and the fight ended.

The evidence of record plainly supports the termination of Claimant Banks. So far as the record shows he was the party who instigated the quarrel and escalated it into a fight. Moreover, the testimony of witnesses present show that after the fight ended Banks intentionally squashed Cogdell's glasses underfoot. Although he was provoked, Cogdell's fighting cannot be condoned nor, strictly speaking, justified on grounds of self-defense. However, the Board is of the opinion that he is relatively less culpable than Banks and accordingly Claimant Cogdell shall be reinstated to service without backpay.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest:

  
Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 30th day of August 1988.