

Joseph Lazar, Referee

PARTIES)
TO)
DISPUTE)

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
and
FORT WORTH AND DENVER RAILWAY COMPANY

1. That the Carrier violated the Parties' Agreement when as a result of an investigation conducted at Amarillo, Texas, September 2, 1981, they dismissed Section Foreman J. A. Cruz, such dismissal being capricious, unjust and based on an investigation that was neither fair nor impartial.
2. That the Carrier shall reinstate Claimant J. A. Cruz to his former position of Section Foreman with seniority, vacation and other rights unimpaired and, additionally, shall compensate him for loss of earnings suffered account this improper action.

FINDINGS: By reason of the Memorandum of Agreement signed November 16, 1979, and upon the whole record and all the evidence, the Board finds that the parties herein are employee and carrier within the meaning of the Railway Labor Act, as amended, and that it has jurisdiction.

On September 15, 1981, Claimant Extra Gang Foreman J. A. Cruz, Jr., of the Fort Worth Division, was "dismissed from the service of the Fort Worth and Denver Railway Company for violation of Rule 57 of the Burlington Northern Safety Rules in connection with an altercation at about 11:15 a.m., August 13, 1981, in the vicinity of Mile Post 307.6 while he was employed as an extra gang foreman assigned to Extra Gang #2 at Claude, Texas, as evidenced by formal investigation afforded him on Wednesday, September 2, 1981, at Amarillo, Texas."

Carrier's Safety Rule 57 reads:

"57. Employees must not enter into altercation with any person, regardless of provocation, but will make note of the facts and report such incident in writing to their immediate superior."

The basic facts of the altercation at about 11:15 a.m., August 13, 1981, between Claimant and Extra Gang Laborer R.D. Christy are clear beyond any doubt. Claimant reports (Tr. p. 58): Christy "threw his hard hat off" and "was coming at me, you know, with an angry look on his face...I drew my knife...He went like this (indicating) and that's when I drew the knife on him, see, when he made an advance on me, and I swung it at him...and again I thought he was going for tools on the track, see, so I tried to stop him; and that's probably when I cut him quite a bit of times trying to hold him..."

Claimant's knife was a pocket knife, 8½ to 9 inches when unfolded. Christy, who advanced threateningly on Claimant, had no weapon. At the time Claimant first cut Christy, Christy was being restrained by Supervisor Diggs, as testified to by Christy (Tr. p. 50): "Bill Diggs took hold of my right arm...my right arm, and just at the second that he took hold of my right arm, Rudy come out with the knife. He cut me in the throat. He cut me on the hand. Bill give me a tug. He got me in the shoulder. He got me in the back. I turned to try to get something off the push cart. He got me again in the stomache. I turned around to face him. I turned again around to get something off the push cart. He got me in the shoulder. By that time, I think Bill Diggs realized what was going on and realized that he had better get his hands off of me because he . . . he was doing wrong by having his hands on me, and me not being able to protect myself; which I wasn't able to protect myself whatsoever..."

When Christy advanced on Claimant Cruz, Cruz retaliated with the deadly weapon, the knife. Cruz repeatedly cut and stabbed Christy even though Christy's freedom of movement was restrained by Supervisor Diggs. The evidence of record does not indicate that Cruz's life was in jeopardy. Cruz used a lethal weapon in circumstances, objectively considered, clearly uncalled for. Even if one were to imagine himself in Cruz's shoes, in emotional fear at being attacked by the stronger and larger Christy, it is clear that Cruz's reaction, with deadly force, using the deadly weapon repeatedly, was irrationally excessive and dangerous beyond justification.

The Board has thoughtfully considered the fact that Christy had threatened Cruz and had provoked the altercation. Additionally, the Board has given weight to Cruz's efforts to avoid further confrontation with Christy by going to Supervisor Diggs. Nevertheless, the Board

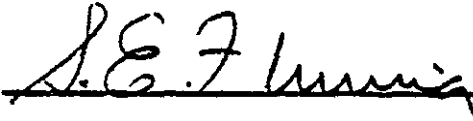
cannot condone Claimant Cruz's repeated use of the deadly weapon, cutting and stabbing Christy, in the circumstances presented. The law, as well as reasonable prudence, requires the Carrier to look after the lives and safety of its employees, and the Carrier has the right and the obligation to exercise reasonable discretion in its disciplinary actions. There is substantial evidence in the record of this case to uphold the Carrier's finding that Claimant Cruz was in violation of Rule 57. The Carrier's disciplinary action was not discriminatory, unjust, capricious or arbitrary. The record does not show denial of due process in the conduct of the investigation.

A W A R D

1. The Carrier is not in violation of the Agreement.
2. The Claim is denied.



JOSEPH LAZAR, CHAIRMAN AND NEUTRAL MEMBER



S. E. FLEMING, EMPLOYEE MEMBER



B. J. MASON, CARRIER MEMBER

DATED:

5-23-83