

PUBLIC LAW BOARD NO. 2366

AWARD NO. 19

CASE NO. 31

1314 MW

T-226-T-79

PARTIES TO DISPUTE:

Illinois Central Gulf Railroad

and

Brotherhood of Maintenance of Way Employees

STATEMENT OF CLAIM

- "(1) The dismissal of Oscar B. Gillespie was without just and sufficient cause and wholly disproportionate to the charge leveled against him (Case No. 1314 M of W).
- (2) Trackman Oscar B. Gillespie shall be reinstated with all rights unimpaired and compensated for all wage loss suffered."

OPINION OF BOARD

The Claimant was instructed to attend an investigation concerning a charge that he struck a fellow employee. Subsequent to the investigation, the Claimant was dismissed from service.

The Claimant had only been an employee of the Carrier for slightly more than 2 months, and on July 31, 1979, he and a co-worker (Smith) were instructed to remove railroad ties from tracks. A dispute erupted between the two individuals and the Claimant struck Smith with his fist and Smith fell to the ground. Immediately, another individual intervened and no further blows were struck.

There appears to be no question that the Carrier has established, by a substantive preponderance of the evidence, that the Claimant did strike a fellow employee and, in fact, a number of co-workers witnessed the altercation.

The only substantial question presented to us is whether or not the disciplinary action of dismissal was warranted under all of the circumstances. We recognize that the Employee had only been working for the Carrier for a very short period of time, and we also recognize that fighting is clearly a dischargeable offense. At the same time, it is only fair to note that the co-workers of Smith and the Claimant were rather clear in their testimony that Smith was an agitator and that he provoked the fight, to some extent, on the day in question.

It is interesting to note that the Carrier only contends that one punch was thrown (see Pages 1 and 2 of the Company's Submission to this Board). Yet, the victim would have us believe that he was "jumped from behind" and hit several times in the back of the head and in the mouth. Certainly, we agree with the Carrier that an employee who is being badgered and provoked should discuss the matter with the Foreman and should not attempt to settle the matter himself. At the same time, we can recognize that if sufficiently provoked, an individual may take improper action, rather than following the wiser course.

We do not suggest, at all, that it is appropriate for an employee to engage in physical violence. At the same time, we do recognize that evidence which tended to show that the Employee was provoked may be considered in an appropriate case. Based on the entire record in this case, we will restore the Claimant to service, but without back pay.

FINDINGS

The Board, upon consideration of the entire record and all of the evidence finds:

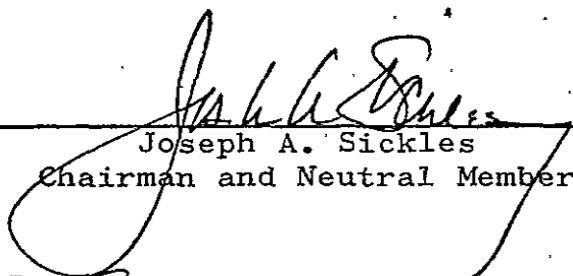
The parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended.

This Board has jurisdiction over the dispute involved herein.

The parties to said dispute were given due and proper notice of hearing thereon.

AWARD

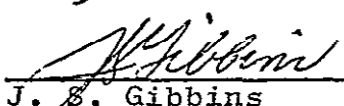
1. The termination is set aside.
2. The Claimant shall be restored to service with seniority and other rights, but he shall not be reimbursed for any compensation lost during the period of the suspension.
3. Carrier shall comply with this Award within thirty (30) days of the effective date.



Joseph A. Sickles
Chairman and Neutral Member



Hugh G. Harper
Organization Member



J. S. Gibbins
Carrier Member



7/14/81
DATE