

Award No. 1675

Docket No. 1581

2-UT-EW-'53

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

The Second Division consisted of the regular members and in addition Referee Edward F. Carter when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION No. 121, RAILWAY EMPLOYEES'
DEPARTMENT, A. F. of L. (Electrical Workers)**

THE UNION TERMINAL COMPANY

DISPUTE: CLAIM OF EMPLOYEES: 1. That under the current agreement Electrician Ralph Fincher was unjustly treated when he was suspended from the service of the Carrier on July 20, 1952 and discharged from the service of the Carrier on July 28, 1952.

2. That accordingly the Carrier be ordered to reinstate Electrician Ralph Fincher to his former position with seniority rights unimpaired and compensated for all time lost.

EMPLOYEES' STATEMENT OF FACTS: Electrician Ralph Fincher, hereinafter referred to as the claimant, was employed by the Union Terminal Company of Dallas, Texas and assigned to the second shift with hours 3:00 P. M. to 11:00 P. M.

There were two electricians regularly assigned to the second shift. The other electrician started his vacation on July 18, 1952, and the claimant was working alone on the second shift on July 18, 19 and 20, 1952.

Under date of July 21, 1952, the carrier's general mechanical foreman directed a letter to the claimant advising him to be present at a formal investigation at 12:45 P. M., July 22, 1952, a copy of which is submitted herewith and identified as Exhibit A.

The investigation was held on Tuesday, July 22, and submitted herewith and identified as Exhibit B, is a copy of the hearing transcript.

Under date of July 28, the carrier's Mr. Newton directed a letter to the claimant advising him that he was removed from the service of the carrier, a copy of which is submitted herewith and identified as Exhibit C.

The agreement effective March 1, 1938, as subsequently amended, is controlling.

zation has made on the property or may make before your Board, the altercation between the claimant and his foreman was prompted by the claimant. The foreman's participation was limited to a defense against bodily injury.

Many awards of this Board have recognized that discipline is a delicate matter to handle. Your Board has emphasized that in handling cases involving impositions of discipline, the proper operation of the railroad is the responsibility of the carrier. To effect that end, a railroad must resort, in some instances, to discipline measures. The discipline assessed must of necessity be within the railroad's discretion. If that discretion is exercised judiciously without unfairness, malice, bias, or bad faith, such exercise of judgment should and must not be arbitrarily tampered with. There was no unfairness, malice, bias, or bad faith in the discipline assessed the claimant. It was based upon a reasonable and fair appraisal of the evidence in the investigation. It should not be altered.

In the event the Board accepts jurisdiction of this case, even though Rule 16 (e) is clear and unambiguous, and notwithstanding the offense committed by the claimant and despite the reiterated assertions that it will not support its judgment in discipline matters nor give consideration to the measure of discipline, determine that the claim in this docket should be sustained and the claimant paid for the time lost as set forth in the claim, the carrier without prejudice to or in any manner waiving its position as to the merits and lack of jurisdiction of this claim, contends that the Board should award the claimant pay only for time actually lost by reason of the discipline imposed, i.e., for those days on which the claimant was available and stood for work and would have worked in his class or craft less any earnings from other employment. Also, any award made in favor of the claimant, which we maintain would be unwarranted and unjustified, should be less appropriate taxes and amounts paid under the Railroad Insurance Act to the claimant which the carrier is obliged by law to return to the Railroad Retirement Board.

On the merits, it is our position that the discipline assessed Claimant Fincher is predicated upon the clear and impregnable evidence offered at a fair and impartial hearing proving beyond doubt his guilt. The claimant's attempt to inflict bodily injury upon his foreman cannot in any manner be justified nor can the carrier reasonably expect its foreman to be subjected to such an act.

It is further our position that the dispute brought to your Board by the Organization is outlawed and therefore, under the provisions of the Agreement, the merits of the case must be ignored, and a decision be based upon Rule 16 (e).

For the reasons we have assigned, we respectfully petition the Board to deny the claim.

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.

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

The claimant contends that he was unjustly treated when he was dismissed from the service of the carrier and asks that he be restored to service with seniority rights unimpaired and be compensated for all time lost.

Claimant was charged with threatening to whip his foreman on July 18, 1952, and with engaging in a fight with his foreman on July 20, 1952. An investigation was held and claimant was found guilty. The carrier dismissed him from service on July 28, 1952. On August 6, 1952, the organization's general chairman wrote the carrier's general manager concerning the reinstatement of claimant and advised that if the request was denied that an appeal would be taken to this Board. There is evidence that a personal conference was held by the general chairman and carrier's general manager on August 7, 1952, at which this matter was discussed. On August 13, 1952, carrier's general manager wrote the general chairman in which the latter was advised that the carrier would not grant the request for reinstatement of the claimant. The case was subsequently presented to this Board under date of November 20, 1952. The carrier asserts that the time for appeal to this Board had expired by the terms of the agreement and that this Board has no jurisdiction to hear and decide the claim. The applicable part of the agreement provides:

“(e) Should the highest designated railroad official or his duly authorized representative, and the duly authorized representative of the employe as provided herein, fail to agree, the case may then be handled in accordance with the Railway Labor Act, if presented to the appropriate board within sixty (60) days after decision.”
Rule 16 (e), current agreement.

It is clear from the record that carrier's general manager and the general chairman failed to agree. The letter of August 13, 1952, was clearly final on the question of the reinstatement of the claimant. The attempted appeal to this Board was taken more than 60 days after the final decision. The organization now asserts for the first time that there was no conference between the parties within the purview of the Railway Labor Act and that the presentation of the dispute to this Board was premature. The fundamental question is whether the organization, after instigating the appeal, can now properly assert that the claim was improperly handled on the property and secure a remand after it discovers that the appeal was filed out of time and a dismissal is imminent.

The authority of this Board is derived from the Railway Labor Act which imposes a duty upon the parties to exert every reasonable effort to adjust all disputes in conference on the property. Sec. 2, Second, Railway Labor Act. This Board is not authorized to step in until the dispute has been properly referred to it after it has been handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes. Sec. 3, First (i) Railway Labor Act. This contemplates an orderly and expeditious handling of claims. The rules with reference thereto are not mere technicalities which the parties may disregard and either or both parties may insist upon compliance. But an improper handling on the property may be waived by a failure to protest irregular handling. Award 1471. We find no objection raised on the property by the organization to any failure to hold a conference within the meaning of the Railway Labor Act. By appealing to the highest operating officer and this Board, it has clearly waived any right to raise the question here for the first time. While it is true that the Railway Labor Act requires that disputes shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes, a handling by such chief operating officer without objection because of noncompliance with procedural steps on the property, constitutes a waiver. One may not elect to treat the decision of such chief operating officer as final and submit the dispute to this Board, and then complain for the first time that procedural steps on the property have not been properly taken. By raising no such objection on the property and appealing to this Board, the regularity of all procedural steps on the property are conclusively presumed. One may not ordinarily elect to appeal and then assert the irregularity of his own action to escape an adverse ruling. Under such circumstances, the decision of the chief operating officer was a final disposition of

the dispute on the property. An appeal to this Board within 60 days was available to claimant as provided by Rule 16(e), current agreement. Claimant, however, did not present his case to this Board until 39 days after the 60-day period had expired. The decision of the carrier became final at the expiration of the 60-day period and this Board is without power to entertain an appeal after that date. We are therefore required to dismiss the purported appeal. Award 1510.

AWARD

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 18th day of May, 1953.