

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Edward A. Lynch, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES**

RAILWAY EXPRESS AGENCY, INC.

STATEMENT OF CLAIM: Claim of the District Committee of the Brotherhood that

(a) The Agreement governing hours of service and working conditions between Railway Express Agency, Inc., and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, effective September 1, 1949, was violated at the St. Louis, Missouri Agency in the treatment accorded Employee Wm. C. Stilwell, as a result of an alleged investigation conducted August 12, 1954; and

(b) His record shall now be cleared of the charge against him; he shall be compensated for full salary loss sustained on his regular assignment covering the period August 6 to 18, 1954, inclusive, plus interest thereon at the rate of one-half ($\frac{1}{2}$) of one percent (1%) per month until paid, he shall be compensated separate and apart and at one and one-half times the straight time hourly rate of \$328.41 basic per month for all time withheld from service, detained and held in custody by the Civil or Federal Authorities in excess of eight hours per day on the work days of his regular assignment; at the rate of one and one-half times the straight time hourly rate on a minute basis for all time held by the Civil or Federal Authorities on days which were not a part of his regular assignment; and reimbursed for all unusual expense incurred by him incident to and arising out of the charge against him dated August 6, 1954.

OPINION OF BOARD: The record in this case, particularly the transcript of the investigation conducted and the correspondence exchanged, need not be repeated here.

Claimant Stilwell was formally charged by Carrier's letter of August 6, 1954, alleging "failure to properly perform your duties on July 31, 1954," in that he did "not afford proper protection to an air express value shipment, in accordance with Company rules and instructions * * *, carrying a declared value of \$100.00 (actual value \$38,000.00) moving under signature."

It should be noted that the record shows Claimant had no knowledge of the \$38,000.00 figure until he received Carrier's letter of August 6, 1954. Furthermore, the \$38,000.00 figure is an allegation by consignee, and an

allegation by Carrier. There is no proof in this record of its actual value other than its "declared value of \$100.00." We hold Claimant was handling a parcel with a declared value of \$100.00.

Carrier's disciplinary action was predicated on statement made by Claimant Stilwell on August 4, 1954, reciting what transpired July 31, 1954 with respect to the package in question, and his statement at the investigation that he had on October 12, 1948 read Carrier's rules and regulations, which included Regulation 715, violation of which Claimant conceded at the Carrier's investigation.

However, Rule 715 at the time he read it, provided that "hand to hand check must be made and receipts must be taken on Forms 5024 * * * for the following described shipments:

"Merchandise Classification

"All shipments valued at \$1,000 or more where weight does not exceed 200 lbs."

In other words, under the Regulations with which Claimant admitted familiarity, he would not have been required to maintain hand to hand check and get a receipt.

However, Carrier's Agent Myers, at the hearing, produced Operating Department General Circular 45 which, in effect, changed the \$1,000 above to \$100. Agent Myers stated that under date of June 17, 1954, this notice "was placed on a clip board, also on top of the counter where it could be and no doubt was seen by all employees." At the investigation, Claimant Stilwell stated that to the best of his recollection he had never seen such regulations. Carrier had no proof, such as by signature on October 12, 1948, that Stilwell had knowledge of the changes. We do not here infer that no obligation rests upon an employee to keep himself informed of changes in regulations.

Organization alleges that among evidence it was prevented, by Terminal Agent Myers' "abrupt closing" of the investigation, from introducing were statements dated August 9 and 10, 1954—prior to the investigation of August 12, 1954—by nine other Air Clerks, stating:

"Prior to August 6, 1954 no air clerks at St. Louis, Mo., were given verbal or written instructions to take hand-to-hand receipts between employees."

Organization also cites Carrier's instructions, dated August 6, 1954 (6 days after the Stilwell incident) and directed to "Chief Air Clerk, All Air Clerks" outlining requirements for hand-to-hand signatures of employees, and directing that all air clerks "acknowledge receipt and understanding of these instructions by signing and returning the enclosure as promptly as possible," as additional evidence it asserts Terminal Agent Myers' abrupt closing of the investigation prevented it from introducing.

The record in this case is replete with charges and evidence by Organization that Carrier's security regulations at this particular office were lax; that there was laxity in the physical security of the office as well as in the observance of proper regulations. There is also evidence that following the incident involving Claimant Stilwell there was a general tightening up and greater physical security for parcels and shipments of value. We are not here sitting in judgment of the adequacy of the security at this office, but we must observe that had there been any laxity prior to the Stilwell case it most certainly would have reflected against Terminal Agent Myers, among others, because he was Claimant Stilwell's superior and therefore responsible to his superior for the proper functioning of his office.

With that in mind we come to Organization's charge at the conclusion of the investigation, that Carrier violated Rule 29 of the applicable Agreement which provides that:

"* * * an employe * * * shall not be disciplined or dismissed without investigation,' in that Claimant Stilwell and his representatives collectively have, by the last statement of Terminal Agent Myers (closing the investigation), been denied the right to inject any testimony into the record which would have the effect of developing the facts for which an investigation is intended, and as clearly revealed by the language of Rule 29 of the Agreement; and under these circumstances we may take serious exceptions to the capricious, heady and arbitrary attitude of Mr. Myers * * *."

Terminal Agent Myers did act, as Organization charges, in a capricious, heady and arbitrary manner; he preferred the charges against Claimant Stilwell, he acted in the triple capacity of prosecutor, judge and jury at the investigation; he found Claimant Stilwell guilty, and passed sentence upon him. And when, during the hearing, Claimant's Representative asked Terminal Agent Myers if he were "through for the moment," Mr. Myers replied:

"No—just a moment. In view of the foregoing, and the admission made by Mr. Stilwell, unless someone has some information bearing directly on whether or not he did fail to secure a signature for this shipment as he admits knowing he should have done, the investigation is closed." And closed it was!

Terminal Agent Myers' action in the investigation made a mockery of all rules of objectivity and fair play. We do not wish to deprive a Carrier of its right to establish and seek compliance with proper rules and regulations governing safe operation of its facilities, and the safeguarding of life and property, whether it be its own or that entrusted to its care. When such regulations are broken, Carrier must have the right to properly investigate and assess discipline where required. But with these rights, a Carrier must also accept the responsibility of being fair and objective in its investigation of such transgressions.

Carrier's Terminal Agent Myers in the instant case showed a complete disregard of his responsibility in that respect, and for this reason we must and do hold that Carrier violated the Agreement, and we direct that Claimant Stilwell's record shall be cleared of all charges and demerits registered against it. Award 4317 (Robertson).

However, we cannot sustain part (b) of the claim as made. Award 6962 (Rader). We will however sustain the claim to the extent that his record shall now be cleared of the charge against him; he shall be compensated for full salary loss sustained on his regular assignment covering the period August 6 to 18, 1954.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

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 over the dispute involved herein; and

That the Agreement was violated in accordance with the Opinion.

AWARD

Claim sustained to the extent indicated in Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 2nd day of October, 1957.

DISSENT TO AWARD 8088; DOCKET CLX-7797

The Majority found no difficulty in arriving at the conclusion that the Carrier's investigation proved that the Claimant was guilty of having violated Company Rule 715 as charged in the Notice of Investigation. Their Opinion acknowledges his admission of guilt—

“* * * and his statement at the investigation that he had on October 12, 1948 read Carrier's rules and regulations, which included Regulation 715, violation of which Claimant conceded at the Carrier's investigation.”

None-the-less, and in spite of the fact that the Carrier showed leniency in assessing a mild form of discipline against him, the Majority chose to sustain his claim and thus to absolve him completely from his admission of guilt on the theory that the Carrier's investigating officer had shirked his responsibility of being fair and objective. The transcript of the investigative proceedings does not bear out this theory. Even a cursory review of it reveals that the General Chairman and the Vice Chairman were allowed to interpose questions at will throughout the hearing. When the hearing officer called upon them to produce, for the Record, some information bearing directly on whether or not the claimant failed to secure a signature for this shipment as he admits knowing he should have done, they refused his invitation to come forward and took refuge behind the plea that they were being deprived of a right to inject any testimony. The character and quality of whatever testimony they had is best judged by the fact that they failed to introduce it when they were called upon to do so.

In sustaining this claim, the Majority has fallen into the trap which we recognized in **Award 2339**, Referee Carter, where we held:

“Where an employe voluntarily acknowledges the commission of an offense charged and is assessed a measure of discipline which is fair in relation to the offense committed, any irregularities in the procedure cannot be said to be prejudicial to the rights of the employe, and at most constitute harmless error. This holding is in line with Awards No. 929 and 1823.”

Also, **Award 7467**, Referee Coffey:

“* * * Thus, we have placed tools in the hands of persons who find themselves at disadvantage and lacking in some of the skill required for use of the tools provided, leaving the real issue that is in dispute frequently under a cloud of alleged procedural defects in the record by which it hopes that one who should be disciplined will escape all the consequences of his wrong doing.” (Emphasis added.)

Also compare Awards 6919, Referee Coffey, and 2945, Referee Carter, and others.

/s/ R. M. Butler

/s/ J. F. Mullen

/s/ W. H. Castle

/s/ C. P. Dugan

/s/ J. E. Kemp