

Award No. 16121  
Docket No. TE-15356

**NATIONAL RAILROAD ADJUSTMENT BOARD**

**THIRD DIVISION**

**(Supplemental)**

Milton Friedman, Referee

---

**PARTIES TO DISPUTE:**

**TRANSPORTATION-COMMUNICATION EMPLOYEES UNION**  
**(Formerly The Order of Railroad Telegraphers)**

**NORFOLK & WESTERN RAILWAY COMPANY**

**STATEMENT OF CLAIM:** Claim of the General Committee of The Order of Railroad Telegraphers on the Norfolk & Western Railway, that:

1. Carrier acted in a capricious and arbitrary manner when it held Telegrapher R. H. Marcum out of service pending and following investigation, June 22, 23, 24, 25 and 26, 1964, in the manner in which it conducted the investigation and when it assessed a suspension of 30 days against record of claimant.

2. Carrier shall now be required to clear the record of Telegrapher R. H. Marcum of all charges and compensate him for June 22, 23, 24, 25 and 26, 1964.

**OPINION OF BOARD:** On June 19, 1964, at 3:00 A.M., Claimant, who is a Telegrapher, and J. B. Gardner, a Clerk-Caller, engaged in a fight in the lobby of the Cavalier Hotel, Portsmouth, Ohio. Both were notified later that day of a hearing on June 22 concerning "responsibility in connection with altercation."

The Cavalier is owned by the Carrier and leased to the operator of the hotel and restaurant. Employees frequently stay over there, as did Claimant, and Gardner goes there in connection with his duties as a crew-caller.

Claimant was held out of service for five days beginning with the day of the hearing. The hearing was conducted by Trainmaster C. W. Lewey. On June 29, Superintendent A. S. Tabor advised both men that "debit entry of thirty (30) days in lieu of dismissal has been placed on your record for violation of Rule 426, Book of Rules, June 19, 1964."

The Organization contends Carrier's imposition of the five day suspension without pay was capricious and arbitrary, as were the "manner in which it conducted the investigation" and the 30 day record suspension. It is asserted that Carrier prejudged the case, failed to have all witnesses at the hearing, and failed to apprise Claimant of the precise charge. Further,

the Organization states that since Claimant was not on duty at the time of the incident, and was in his "home away from home" as a paying guest, Carrier lacked authority to discipline him for his acts. The Organization also said that the decision by an official other than the hearing officer was improper.

The evidence, including the record of the hearing, does not sustain these contentions. That the hearing officer had prior knowledge of some of the facts does not in itself preclude a fair proceeding in developing the evidence. The interrogation on the property does not reflect an absence of fair treatment, although Trainmaster Lewey based several questions on information he had received earlier. Moreover, no objection to the hearing officer was made at the time.

While Carrier did not produce a retired employe who was a witness to the fight, over whom it said it had no control, no objection was made to this at the hearing. The Agreement also gives the Claimant the right to produce witnesses. He produced none, and neither he nor his representative requested an opportunity to do so.

Claimant was adequately advised of the charge against him, although specific reference was not made to Rule 426. He was not disadvantaged at the hearing for he had been notified that its purpose was to ascertain responsibility for the altercation.

The Board finds no impropriety in this case because Superintendent Tabor rather than the Trainmaster issued Carrier's decision.

The proper place to challenge the fairness of the procedure would appear to be at the hearing. No objections were made, however, at that time, and they must be therefore deemed to have been waived.

As to the contention that occurrences in Claimant's "home away from home" are not Carrier's concern, the hotel lobby not only fell short of being Claimant's home, but the hotel was the work place of Gardner at the time. Claimant presumably knew it, since he had asked Gardner to give him a call later. While the hotel may not be considered "on property", a fight with a fellow employe on duty there is considerable difference from an incident with a non-employe in one's own residence. In addition, any such imbroglio as this, which was so definitely work-related, is not in the category of private affairs outside Carrier's area of interest.

The record does not disclose who began the fistcuffs. Gardner's and Claimant's testimony is replete with contradictions and lapses of memory. Gardner denied that any conversation preceded the fight, while Claimant's testimony disclosed the provocative comments he had made to Gardner. It is ironic that Claimant's larger share of responsibility for ensuing events came from his own descriptions of what he had said.

Both men had a responsibility to avoid the brawl. Neither appeared to have made serious effort to do so, although one was on duty and the other knew it. Carrier was entitled to assess discipline against both of them, although it failed to establish who struck the first blow, since neither sought to stop it until Gardner choked Claimant into submission. The one witness saw them squared off like pugilists, in a bout which included choking, scratching, biting and gouging, as well as punching.

Should the additional penalty given Claimant, taking him out of service on June 22 and thereafter, have been imposed? Carrier cannot be held to have acted arbitrarily when it did so, since not only was Claimant a participant in the fight, but there is little doubt that his words sparked it. While words may not justify physical combat, he who uses them and joins in the fray may fairly be adjudged more culpable than his adversary, and disciplined accordingly.

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

That the parties waived oral hearing;

That the Carrier and the Employees involved in this dispute are respectively Carrier and Employees 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 not violated.

#### AWARD

The claim is denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of THIRD DIVISION

ATTEST: S. H. Schulty  
Executive Secretary

Dated at Chicago, Illinois, this 6th day of March 1968.