

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 22325
Docket Number M-22292

Abraham Weiss, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Fort Worth and Denver Railway Company

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that :

(1) The dismissal of **Trackman** J. A. Rich was unjust, with insufficient cause and based upon unproven and disproven charges /System File F-7-76/G-90 (MW)].

(2) **Trackman** J. A. Rich be returned to service with seniority and all other rights unimpaired and he be **reimbursed** for all wage loss suffered."

OPINION OF BOARD: The pertinent facts in this case are as follows:

Claimant was a member of Section Gang 22 engaged in routine track maintenance work, under the supervision of Foreman Simons. **Claimant was** dismissed, following an investigation, on the grounds that he threw a spike maul some 8 to 10 feet which struck a shovel in the vicinity of other members of the gang. When Foreman **Simons** questioned Claimant about his actions, Claimant took exception and was told to leave. Claimant, however, proceeded to hit his foreman and engaged in a tussle or altercation with him. Foreman Simons was injured.

Claimant's version of the incident is that he "was swinging at a tie plate and a shovel was lying there, and I **missed** the tie plate and hit the shovel and it flew about three or four feet.*

Petitioner asserts that Claimant was mentally and physically provoked, citing testimony of two witnesses, members of the **Section** Gang, that Foreman **Simons** was antagonistic and abusive toward Claimant. However, these **same** witnesses **testified** that nothing happened to justify fighting; that Claimant was insubordinate; that the foreman did **not** antagonize **Claimant** or provoke the scuffle; and that the foreman did not treat Claimant differently from other members of the gang.

Although the foreman's behavior in questioning Claimant **about** the incident and directing him to leave the scene may not have been a textbook model of supervisory behavior, it by no means warranted Claimant's **striking** him and subsequent physical altercation.

Petitioner asserts that Claimant was charged with certain infractions, but was disciplined for others. Such contentions, however, were not **advanced during the appeal on the property** and are not, . therefore, properly before us. **Nevertheless**, while Petitioner concedes "that Rules 57, 661, and **664** reasonably relate to the charges..." it takes issue with Carrier's citation of General Rules C, **H**, and J. These latter three rules deal with safe discharge of duty by **employees**, exercise of care by **employees** to prevent injury to others, and employees who persist in unsafe **practices, respectively**. Claimant's own testimony with respect to these three rules disposes of the issue raised by Petitioner. **More-**over, neither Claimant nor Petitioner, **during** the investigation, protested the application **of** these rules to Claimant's conduct which led to the discipline of dismissal..

Petitioner **also** charges that reference to a prior incident between Claimant and his foreman was prejudicial to Claimant and denied him a fair hearing. In fact, **however**, the record shows that Claimant's representative first introduced this information at the hearing and neither **Claimant** nor his representative objected to such material appearing in the **record**. Consequently, Petitioner cannot, after the fact, object to information it broached and discussed during the Investigation.

In the final analysis, the record bears out that Claimant was guilty of attacking his foreman, and such action merits the discipline assessed in this case. Under the circumstances, there is no basis for a sustaining award.

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**;

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That this Division of the Adjustment Board has jurisdiction
over the dispute **involved herein;** and

That the Agreement was not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of **Third Division**

ATTEST: *A.W. Pauls*
Executive Secretary

Dated at Chicago, Illinois, this 28th day of February 1979.