

NATIONAL RAILROAD ADJUSTMENT **BOARD**

THIRD DIVISION

Award Number 25478
Docket Number CL-25144

Martin **F. Scheinman**, Referee

(Brotherhood of Railway, Airline and Steamship Clerks,
(Freight Handlers, Express and Station **Employees**

PARTIES TO DISPUTE: (

(**The** Baltimore and Ohio Railroad Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (**GL-9777**) that:

(1) Carrier violated the Agreement between the Parties when, on May 19, 1982, it arbitrarily brought-to-trial Operator-Clerk James A. Jones for allegedly engaging in an altercation on April 6, 1982, **and** improperly imposed discipline of **"15-days** overhead suspension' which is noted on his service record, and

(2) Because of such impropriety, Carrier shall be required to remove the notation from the service record of Mr. Jones.

OPINION OF BOARD: At the time this dispute arose Claimant was regularly employed as an Operator Clerk at Carrier's office located in the Western Maryland Railway Station Building at **Elkins**, West Virginia. On Tuesday, April 6, 1982, Claimant reported for work at his regularly assigned time, 7:00 a.m. Shortly thereafter, **Carman** R. L. Corrick entered the office and asked Claimant to plug him into a short line so that he could talk to his Foreman **across** the track. Claimant refused, stating that he was busy. An argument ensued, followed by a physical altercation.

As a result of this incident, Carrier ordered Claimant to appear for a hearing, originally scheduled for April 28, 1982. It was postponed until May 19, 1982.

Following the hearing Carrier notified Claimant via letter dated June 10, 1982, that he was found guilty of engaging in an altercation with **Carman** R. L. Corrick on April 6, 1982. The disciplined assessed was

"15 days overhead suspension, [application to be] withheld **unless** there should be cause for further discipline by suspension (including overhead suspension) during the next six months."

On June 14, 1982, the Organization appealed Claimant's suspension. Carrier timely denied the appeal. Thereafter, the claim was handled in the usual manner on the property. It is now before this Board for adjudication.

The Organization asserts that the Claimant was not afforded due process with respect to the investigation held on May 19, 1982. For example, the Organization points out that Carrier denied its request to have six alleged witnesses to the event testify at the hearing. In the Organization's view such denial violated Claimant's right to a fair and impartial investigation.

As to the merits, the Organization contends that Carrier has failed to prove that Claimant engaged in an altercation on April 6, 1982. According to the Organization various witnesses testified that **Carman** Corrick, while standing over Claimant, who was seated, hit Claimant with his hands. These witnesses, the Organization alleges, did not see Claimant strike **Carman** Corrick. Thus, the Organization reasons that Claimant engaged in no provocative activity on that day. Therefore, the Organization concludes that the record does not contain substantial evidence to prove Claimant's guilt. Accordingly, it asks that the claim be sustained and that Claimant's record be adjusted to reflect this finding.

Carrier, on the other hand, asserts that Claimant's guilt is clearly established by the record. It points out that different witnesses testified that Claimant's tone was loud and abusive toward **Carman** Corrick. In addition, Carrier insists, it was free to credit the testimony of these witnesses as opposed to others who supported Claimant's version of the incident. Therefore, Carrier maintains that it acted appropriately in assessing Claimant fifteen days overhead suspension for his **improper** conduct on April 6, 1982.

As to the procedural issues raised by the Organization, we are convinced that they are without merit. While Carrier did not call every individual who the Organization wished to have present at the hearing, it did call those who were able to give direct testimony as to the events of April 6, 1982. Carrier is not obligated to have present individuals who cannot reasonably be expected to give relevant testimony.

In addition, Carrier's use of **"dual"** Hearing Officers, while not customary, did not deprive Claimant of a full and fair investigation. Similarly, we find no other procedural irregularities which denied Claimant his due process rights.

As to the merits, we are convinced that Carrier reasonably found Claimant guilty of engaging in altercation on April 6, 1982. An altercation has been defined as **"a noisy or angry dispute"**. (Webster's Seventh **New Collegiate Dictionary**). Various witnesses testified that Claimant was **"hot"** and that his words were loud, boisterous and abusive. Carrier chose to credit the **testimony** of these witnesses. Absent compelling circumstances to the contrary, it had every right to do so. No such circumstances exist here. Thus, we find that Carrier acted appropriately in finding Claimant guilty as charged.

However, we are convinced that the discipline assessed Claimant was excessive. It is undisputed that **Carman** Corrick provoked Claimant by hitting him (Claimant) with his hand. **Carman** Corrick was standing. Claimant was seated. Claimant did not retaliate by striking or attempting to strike **Carman** Corrick. Under these circumstances, **Carman** Corrick was clearly more culpable than was Claimant. However, both were assessed the same penalty - fifteen day overhead suspension. In our view, the recipient of the physical abuse should receive a lesser penalty than the aggressor. Therefore, we will reduce the discipline assessed Claimant to ten days' overhead suspension. In all other respects, the claim is denied.

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 discipline was excessive.

A W A R D

Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 23rd day of **May** 1985.