

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Fred W. Messmore, Referee

PARTIES TO DISPUTE:

JOINT COUNCIL DINING CAR EMPLOYEES, LOCAL 370

**THE NEW YORK, NEW HAVEN AND HARTFORD
RAILROAD COMPANY**

STATEMENT OF CLAIM: Claim of the Joint Council Dining Car Employees, Local 370, on the property of the New York, New Haven and Hartford Railroad Company, for and on behalf of Mr. Clarence E. Strong, that he be returned to his former assignment with pass privileges, progressive rates of pay, seniority and vacation rights unimpaired and compensated for all time loss.

OPINION OF BOARD: This is a discipline case. The Claimant, Clarence E. Strong, entered the service of the Carrier December 27, 1937. He reported for work at 1:00 P.M., December 19, 1951, in the capacity of a stationary pantryman. The Steward in charge of the dining car, at about 2:00 P.M., reported to Mr. W. A. Duprey, Assistant Superintendent of Dining Cars, that Claimant was not performing his work in a satisfactory manner, in that when he reported for work he did not have on the uniform required by the Rules of the Dining Car Department, and unduly delayed putting supplies aboard the car. He was directed to, and did report to, the office of the Assistant Superintendent of Dining Cars. An investigation was held in connection with Claimant failing to report to the Commissary in uniform prepared to work and being slow in putting away his supplies after arrival in the car, which caused Commissary trucks and baskets to be tied up. The Claimant's reason for not appearing in proper uniform was on account of a sore leg. He was told to be prepared to work in uniform clothes. He was then asked by Duprey why the delay in putting the supplies away after they got to the diner. He replied that he did not understand. Duprey told him that he chattered too much with the men, and that was the reason for failure to handle the supplies properly. The Steward stated when he talked to the Claimant about the supplies, the Claimant told him he knew his job and nobody had to tell him what to do. The Steward told Claimant that maybe Mr. Duprey would talk to him about, and Claimant replied: "Nobody can make me". The Claimant told Duprey that was not so. Duprey said he would do the talking now. The Claimant said, "this man is lying on me". Duprey told the Claimant to wait a minute, he would ask the questions. The Claimant said: "That is a lie that he said Mr. Duprey". Duprey said: "Alright put a man in his place, Mr. Murphy". The Claimant replied: "Put a man in my place and you will suffer for this if you are going to have a man come up here and lie on me. Make up your lie good". Duprey told the Claimant to leave the office. The Claimant said: "I will not until I get ready". Duprey said he would have a policeman come up and take Claimant out. The Claimant said: "Do whatever you want to". Duprey called the Police Department.

As a result of the foregoing a hearing was set for December 27, 1950. The Claimant was notified to appear on that date for hearing. He was charged as follows:

- (1) Refusing to leave the Dining Car Office when ordered to do so.
- (2) Calling supervisors "liars".
- (3) Threatening Mr. Duprey with bodily harm.
- (4) Attempting bodily attack on Mr. Duprey (but restrained by Railroad Police Officer and others).

The hearing proceeded. The Claimant appeared with his representatives. The charges were taken up in order.

We will refer to the Assistant Superintendent of Dining Cars, Mr. Duprey, as Duprey, and the Claimant as Strong.

We summarize the evidence on each charge in order.

There is no question but that Claimant was ordered to leave the office and refused. He felt he had received unjust treatment and wanted further clarification of the reason why he was called into the office, but Duprey ignored his request, walked out and sent for the police.

Police Officer, Walter C. Byrne, an employe of the Carrier, testified in substance, that about 3:00 P. M., December 19th, he was notified to see Mr. Duprey in the Dining Car Office. He contacted Duprey and asked about the trouble. Duprey said he had a man in his office he wanted removed. This witness went into the office and found Strong and told him why he was there. He then went back to see Duprey to ask him about the trouble because he had to have a charge. Duprey told the officer that Strong was out of service for refusing instructions. The Officer reported this fact to Strong, but Strong insisted on seeing Duprey before he would leave. This went on for some time. The Officer told Strong he would have to leave the property and Duprey would not come in and see him. After a little wrangling Duprey was at the door and the Officer was using the telephone. Duprey asked the Officer if he heard a threat. He did not. Strong came out and went down stairs and proceeded to the car to change his clothes. The Officer's Sergeant and another Patrolman came over. Strong came out and was on the sidewalk when the Officers left at 4:05 P. M. Strong remained in the office one hour and fifteen minutes. The Officer talked to him about twenty minutes before Strong left the office.

The Steward testified with reference to the second charge as follows: In the office Strong said, "This man is lying on me". Strong also said to Duprey, "Make the lie a big one while you're at it".

With reference to the third charge which related to Strong threatening Mr. Duprey, Duprey testified that Strong said "he would get me and get me good". Duprey asked the Officer if he heard it; the Officer did not hear any threat made by Strong. Strong denied he made any such threat and did not threaten Duprey.

The evidence with reference to the fourth charge appears in substance as follows: Duprey testified he went down stairs to direct the officers to the car with Strong and instruct them to get his clothes and see that Strong did not cause any disturbance. There Strong broke away from the Officers and followed Duprey to the Commissary door, and as Duprey was going up the stairs, Strong rushed upstairs past Duprey. Strong reached into his hip pocket as though he was going to pull a knife or instrument of some kind, and as Duprey turned to go back downstairs several persons congregated. Samuel M. Thompson, Jr., ran upstairs and threw his arms around Strong

and held him. The Officer followed and also attempted to get him out. Strong pulled out something metal. At first Duprey thought it was a knife, but it was a ball point pen that belonged to Duprey. Strong personally returned the pen to Duprey later.

The Officer's version of the incident is as follows: "Strong was going downstairs ahead of me. We were about half way down and Duprey started down. There were no threats made but I got in front of Strong because I didn't want him to go back upstairs. He didn't break away from me. I didn't have my hands on him."

Samuel M. Thompson, Jr., an employe of the Carrier, gave his version of the incident as follows: "I will tell you. I thought Mr. Duprey was talking to Strong but gathered it was an argument. The police had Strong at the top, and Duprey was at the bottom. I worked in between them. The police and I brought Strong down the stairs. Mr. Watson then came out. We took Strong out and talked to him. I came back to complete my job and Duprey asked me if the man had a knife and I told him 'No.' He asked me what he had in his hand and I said 'a ball point pen'. The only thing I can say is that they didn't attempt to pass any blows because the Railroad Police were there and I was in between Duprey and Strong. I had one arm and the Railroad Police had the other." Strong did not have a knife, but a pen.

Strong testified about the incident. He was so excited he did not remember anything. He did not raise his arm to strike Duprey. He had a ball point pen in his left hand. He picked it up from Duprey's desk to do some writing.

The witness Thompson testified that he did not see Strong reach in his pocket and pull his hand up. Both of his hands were in front of him with the pen in his hand.

Strong said he had a fair and impartial trial.

It is indicated in the record that the Carrier failed to supply Strong or his representatives with a copy of the proceedings of the investigation held December 19, 1950, and failure to so do denied other defenses that might have been interposed in behalf of Strong. It appears from the record that the Carrier, the Claimant, and his representatives agreed to confine themselves to the charges as heretofore indicated.

The decision reached by the Carrier was dismissal of the Claimant from the service effective January 3, 1951. Hence this claim.

As has been stated on numerous occasions involving cases of discipline, the following rules are applicable:

- (1) Where there is positive evidence of probative force will not weigh such evidence or resolve conflicts thereon.
- (2) Where there is real substantial evidence to sustain charges the findings thereon will not be disturbed.
- (3) If the Carrier has not acted arbitrarily, without just cause, or in bad faith, its action will not be set aside.
- (4) Unless prejudice or bias is disclosed by the facts and circumstances of record will not substitute its judgment for that of the Carrier. See Award 5974 and Awards cited therein.

This Board has also held: "Although this Board has the power to order reinstatement of an employe, it should be very cautious in the exercise of the power. It should not exercise it unless the evidence clearly indicates that the Carrier acted arbitrarily without just cause, or in bad faith. See Awards 135, 3342.

The Employes concede the Claimant was insubordinate to a degree and requested clemency in his behalf.

As we have stated on many occasions, the proof of the charge is purely a question of fact. Under such circumstances, in dispute of the character involved, this Division is committed to the doctrine that it is not the proper function of the Board to weigh the evidence.

We have often said that it is not the function of this Board to substitute its judgment for that of the Carrier or to determine what we might have done if it had been our duty to make the decision in the first instance. We interfere only where an examination of the record reveals that the action taken was unjust, arbitrary or unreasonable. Where the evidence produced in support of the charge, if believed, is sufficient to sustain it, then though there may be evidence directly in conflict, the imposition of discipline cannot be said to be unjust, arbitrary or unreasonable. It is not for this Board to determine the creditability of witnesses. If there is substantial evidence in the record to support the charge, even though contradicted, the Carrier's action in assessing discipline will not be disturbed. See Awards 2821, 4068, 5946.

From an analysis of the record, we conclude the evidence is sufficient to support the assessment of discipline. We hold the claim should be denied.

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 Carrier has not violated the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 26th day of February, 1953.