

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Norris C. Bakke, Referee

PARTIES TO DISPUTE:

JOINT COUNCIL DINING CAR EMPLOYES, LOCAL 516
GREAT NORTHERN RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the Joint Council Dining Car Employees Local 516, on the property of the Great Northern Railway Company, for and on behalf of Walter Humburd, train porter, that he be restored to his former position; that he be compensated for all time loss; that his seniority and vacation rights be restored unimpaired.

OPINION OF BOARD: This is a discipline case in which a train porter was dismissed from the service because of misconduct at Devils Lake, North Dakota, on May 8, 1952. No question is raised as to his guilt or innocence. Questions of procedure alone are involved, and for purposes of this case we need consider only two of those.

The Organization says:

1. The hearing officer, A. W. Deleen disregarded Rule 21 (which guarantees employees a full and impartial investigation, etc.) in that the hearing was held without the porter or his representative being present.
2. That Deleen did not notify said porter within the five days after he (Deleen) was advised of the incident as fixed by the rule.

In reaching a decision in this case there are two fundamental rules we must bear in mind, the first, that the Carrier has the burden to prove its charges by at least a preponderance of the evidence, the second, that the employee, seeking a reversal at our hands has the burden of showing that the Carrier violated the Agreement, and it is this latter rule that must be met by the Organization here.

Reverting now to the Organization's contentions. It is true that the investigation by the Carrier was held without either the porter involved or his representative being present, but the record shows that the date for the hearing which had been originally set for May 23, 1952 was postponed at the request of the Organization and reset for May the 26th. What happened on the morning of that day is beyond our ability to resolve, but in any event the hearing was held without the parties above named present. Art. 7, Rule 21 does not say that the hearing cannot be held without the presence of the employee or his representative. The Organization contends that a second postponement was granted by someone other than the hearing officer, but that they fail to establish by preponderance of the evidence.

Now as to the alleged failure of the Carrier to give the original notice within five days after the incident of May 8th, the Organization says, "A. W. Deleen did on May 20, 1952 write a letter to Claimant notifying him of an incident that reportedly occurred on May 8, 1952, but no where in that letter or in any subsequent communication with Claimant did A. W. Deleen or any Carrier officer state the time Claimant's supervisor had received knowledge of any irregularity * * *."

The record is silent as to when Deleen was advised of the incident complained of, and the Organization seizes upon that fact as something sinister apparently and argues, "The supervisor's failure to state the time of his receipt of knowledge of the incident is a deprivation of a basic right of the Claimant, the right to know when the supervisor received knowledge of the alleged irregularity of May 8, 1952." There is nothing in this record to show that the porter or his representative ever asked for that information. What happened was that the Conductor on the train on May 8th notified his Division Superintendent at Grand Forks, North Dakota, who relayed the information to Mr. Deleen in St. Paul, Minn. There could very well have been a delay in the report reaching Deleen before May 15. In that event Deleen was within the rule, but in any event the burden is on the Organization to show the violation, which it has failed to do.

We conclude that the Carrier did not violate the Agreement.

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 did not violate 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 14th day of May, 1954.

SPECIAL CONCURRING OPINION AWARD NO. 6615, DOCKET NO. DC-6619

We are in complete agreement with the proposition "that the employe, seeking a reversal at our hands has the burden of showing that the Carrier violated the Agreement, and it is this latter rule that must be met by the Organization here."

We disagree with the proposition "that the Carrier has the burden to prove its charges by at least a preponderance of evidence," for the reason

that there is implied in such proposition a requirement for the Board to "weigh the evidence" and "to pass upon the credibility of the witnesses."

In awards too numerous to cite this Board has consistently maintained these fundamental and correct propositions—

(1) It is not the proper function of this Board to weigh the evidence (Award 6108).

(2) It is not the proper function of this Board to judge the credibility of the witnesses and determine as in the first instance an independent conclusion of our own (Award 5536).

/s/ J. E. Kemp

/s/ R. M. Butler

/s/ W. H. Castle

/s/ C. P. Dugan

/s/ E. T. Horsley