Award No. 6866
Docket No. DC-6844

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Jay S. Parker, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD TRAINMEN

SOUTHERN PACIFIC COMPANY (Pacific Lines)

STATEMENT OF CLAIM: Request of Dining Car Steward Bernard J. Rom, Northern District, for reinstatement with seniority unimpaired and claim for compensation for all time lost as a result of his dismissal from the service, August 12, 1952, for alleged violation of Rules 801, 802, 803, 804 and 847, Train No. 51, July 16, 1952 and Train No. 52, July 8, 1952.

OPINION OF BOARD: This is a discipline case, progressed to this Board by a joint submission, in which Claimant Bernard J. Rom, a Dining Car Steward, who was discharged from the service of the Carrier after a formal investigation on charges of violating its existing rules and regulations seeks reinstatement with seniority unimpaired and compensation for time lost.

The first contention advanced by Claimant as a ground for the sustaining of his claim is predicated on that part of Rule 20 (b) of the Current Agreement which reads:

> "When a formal investigation is to be held the steward shall be given written notice as to the specific charge, time and place, sufficiently in advance to afford him the opportunity to arrange representation and for the attendance of any desired witnesses . . ."

Basically the essence of Claimant's position on the point now under consideration is that the charges set forth in the notice of formal investigation were not as specific as the rule requires, hence his claim should be sustained on that premise. Let us see.

Limiting consideration to the particular portion of the notice involved it may be said the first paragraph thereof states:

> "You are hereby charged with responsibility for improper conduct while acting as dining car steward on Train No. 52 July 8, 1952, while enroute between Oakland Pier and Los Angeles; and while acting as dining car steward on Train No. 51 July 16, 1952, while enroute between Los Angeles and Oakland Pier, which may involve violation of the General Rules and Regulations of the Dining Car Department dated San Francisco, California, November 1, 1951, . . ."

And that following such statement reference is made to the specific rules, five in number, claimed to have been violated as a result of the conduct theretofore charged. These rules, it is to be noted, were described as 801, prohibiting immorality on the part of the employes; 802 requiring gentlemanly deportment in dealing with passengers; 803 and 804 stating that misconduct and wilful disregard of the Carrier's interests would not be condoned; and 847 directing that dining car employes should not occupy seats or enter into conversation with passengers.

We believe there is sound authority (See Award No. 6185) for holding the involved notice was precise enough to apprise Claimant of the charges so that he could adequately prepare a defense and hence complied with the requirements of Rule 20(b). But we need not here determine that question. Assuming such notice is not all that it should be from the standpoint of precision does not mean that the claim can be sustained for that reason. The record makes it crystal clear that Claimant knew, prior to the hearing, of the nature of the charges he was to face; that his representative talked with Carrier's representative regarding them before such hearing commenced; and that notwithstanding no requests for more definite charges were made. Moreover, it appears Claimant and his representative appeared and participated in the hearing for sime time without reference to lack of preciseness in the charges; that then no request for more definiteness or certainty was made; and that even now it is not pointed out or argued Claimant sustained any prejudice during the investigation as the result of any defects in such notice. In fact during the hearing he admitted he was acquainted with and understood the rules he had been charged with violating. Under all these circumstances we have little difficulty in concluding, as our decisions hold (See, e.g., Awards Nos. 4749, 4781, 5026 and 6006), that Claimant waived any and all defects in the notice and cannot now rely upon them for purposes of avoiding the discipline imposed.

Two of the propositions advanced by Claimant in support of his contention he did not receive a fair and impartial investigation are of such importance as to require special mention and discussion.

First it is argued the Carrier violated Rule 20(a) of the Agreement in refusing to permit a local official of the Brotherhood to sit in the investigation as an observer, notwithstanding Claimant had already selected the acting local Chairman as his representative who, we pause to note, was present at the hearing and serving in that capacity as contemplated by the rule. The record warrants a conclusion this so-called observer would have been acting as a second representative if he had been permitted to sit as requested. Nevertheless, even if it be assumed he was an observer, as is now claimed, we find nothing in the rule requiring the Carrier to permit him to sit in that capacity. Therefore it cannot be successfully argued its refusal to do so resulted in depriving Claimant of a fair and impartial investigation under the controlling contract to which he was a party.

Next it is urged Claimant was not permitted to hear the testimony of all the witnessess in violation of Rule 20(c) of the Agreement which, so far as here pertinent, reads:

> ". . . The accused and/or his representative shall be confronted with all of the evidence, may hear the testimony of all witnesses and shall be privileged to question any or all who may so testify . . ."

When analyzed the gist of all arguments in support of this claim is that the foregoing rule required all evidence introduced at the investigation to come from the mouths of witnesses who were personally present at the hearing so that they could be cross-examined by Claimant or his representative. Otherwise stated that the rule precluded the Carrier from using the written statements, introduced at the hearing, as evidence. The trouble with these arguments from Claimant's standpoint is that they have long since been

rejected by this division in well considered decisions, to which we adhere, holding that the use of statements for probative purposes in a disciplinary proceeding is proper and that under rules, similar to the one here involved, the right of cross-examination extends only to witnesses who are personally present and testify at the hearing. For just a few of the numerous decisions so holding, where all aspects of the subject are exhaustively discussed and considered, see Awards Nos. 2770, 2793, 2978, 3125, 3498, 4252, 4771, 4865, 4976, 5667, 6067 and 6185.

Finally Claimant insists that the evidence adduced at the investigation did not support the charges. On this point it would not enhance the value of our reports and certainly would not benefit the Claimant to here relate the sordid facts and circumstances, set forth in a long and tedious record, relating to alleged action on his part on the two dates specified in the notice of investigation. It suffices to say that when carefully reviewed such record discloses ample competent evidence, denied by Claimant but nevertheless of probative value, which if believed would sustain the Carrier in concluding Claimant's conduct was highly improper and of such nature it could neither be condoned or longer tolerated. In that situation it is not our province to weigh the conflicting evidence or even express a view as to the weight to be given it. Our duty, under all our decisions, (See, e.g., Awards Nos. 6103, 4749, 4269, 3985 and cases then cited) is to confirm the Carrier's findings and the discipline imposed unless the record convinces us its action with respect thereto was arbitrary or capricious. Under the confronting facts and circumstances we are unwilling to say the record is susceptible of any such construction and, as has been previously indicated, it does not warrant a conclusion Claimant was denied a fair hearing.

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 record discloses no sound ground for holding the Carrier's disciplinary action was improper or should be disturbed.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 31st day of January, 1955.