

Award No. 8503
Docket No. DC-8804

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Carroll R. Daugherty, Referee

PARTIES TO DISPUTE:

JOINT COUNCIL DINING CAR EMPLOYEES, LOCAL 385

**CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC
RAILROAD COMPANY**

STATEMENT OF CLAIM: Claim of Joint Council Dining Car Employees Local 385 on the property of Chicago Milwaukee St. Paul and Pacific Railroad Company, for and on behalf of George Body, waiter, that he be restored to service with seniority rights unimpaired with compensation for net wages lost, account having been removed from service by Carrier in violation of Rule 8 of the current agreement.

OPINION OF BOARD: Claimant Body, a waiter in Carrier's Dining Car Service Department since 1947, was dismissed from Carrier's service as of January 6, 1956, following an investigation announced on December 30, 1955, and held on January 4, 1956, on charges of his misconduct on December 24, 1955. There were four specific charges: (1) failure to report in proper physical condition; (2) inability to perform duties from reporting time (12:15 p.m.) to time of removal from assignment (1:45 p.m.); (3) violation of safety rule requiring employees to exercise care to prevent injuries; and (4) being under the influence of intoxicant while on duty.

On January 13, 1956, General Chairman Hamilton wrote to Carrier's Assistant to Vice-President Downing appealing the dismissal decision of Carrier's Assistant Superintendent Kusch. Said letter ended with these words: "If conference is necessary time and date may be set by your office." Downing replied to this letter on January 26, 1956, stating that "* * * so far as the Carrier is concerned a conference is not necessary," and affirming Kusch's decision.

The Organization contends that (1) Carrier failed to accord Claimant a full, fair, and impartial hearing, thus violating Rule 8(a) of the Parties' Agreement; and (2) Carrier failed to handle the appeal in accordance with the requirements of Rule 8(b). As to the alleged violation of Rule 8(a), the Organization argues that (a) Carrier failed to sustain the charges against Claimant, particularly the one alleging intoxication; (b) Carrier's evidence was in the form of written statements, so that the defendant and his representative had no opportunity to cross-examine witnesses; and (3) Carrier used Claimant's past record to determine him guilty of the instant charges.

This Division's Award No. 8431 set forth a summary of principles that the Board, in a long series of awards, has developed and applied to various kinds of discipline cases. To those so set forth should be added the following: In applying said principles the Board does not operate with the strictness and rigidity of criminal courts in respect to possible technical defects in procedure on a carrier's property. Where such defects may exist, the compelling question is: Were the accused's rights actually prejudiced thereby? Was he thereby really denied due process of law, his "day in court", or other substantive rights properly his as a citizen in an industrial democracy?

With all the above in mind, these principles are now to be applied to the facts of the instant case and to the Organization's contentions. The Board rules as follows: (1) The rules of the Carrier involved in this case are reasonably related to the orderly and efficient operation of its business. (2) There is no evidence that Claimant did not know of said rules and of the penalties for failure to conform thereto. (3) There is no evidence that Carrier was enforcing said rules in a discriminatory manner, to the prejudice of Claimant. (4) Substantial evidence sustained the charges, particularly that alleging Claimant's behavior under the influence of intoxicants while on duty. (5) The hearing and the announcement of the decision were timely, i.e., met Rule 8(a)'s time requirements. (6) A reading of the transcript of the investigation does not persuade that the hearing was conducted in an arbitrary or biased fashion, prejudicial to the substantive rights of the defendant-Claimant. (a) Numerous awards of this Division have held that written statements of witnesses not present at the hearing are admissible evidence, and the rights of an accused employee are not prejudiced by the inability of the defendant or his representative to cross-examine the writers thereof. The Board here reaffirms this opinion. (b) Claimant had representation, did introduce the statements of witnesses, and had opportunity to have them present at the hearing. (c) The official who conducted the hearing was not acting as a witness as well as prosecutor. (d) The Organization failed to establish that the introduction of Claimant's past record at the hearing was prejudicial to a fair decision on the instant charges lodged against Claimant. That is, there is no persuasive evidence that Carrier used said record to determine Claimant's innocence or guilt of said charges rather than merely to determine degree of discipline. (7) The degree of discipline imposed was reasonably related to the seriousness of the proven offenses and to Claimant's past record. (8) The fact that Downing's reply to Hamilton's letter of appeal came 13 days after the date of Hamilton's letter does not establish violation of Rule 8(b). The last sentence of said Rule states that "the officer appealed to shall render a decision within five (5) days after the date of the appeal hearing." There was no appeal hearing; Hamilton's letter left the holding thereof up to Downing. The Rule is silent about what is to happen and when it is to happen in such case. On this point this Board has no authority to write an addition to Rule 8(b). This conclusion is buttressed by the fact that there is no evidence of prejudice to Claimant's rights by the course the appeal took in this case.

In the light of all the above, the Board rules that Carrier's behavior in the instant case was not arbitrary, capricious, or unreasonable. There was no abuse of discretion. The claim cannot be sustained.

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 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 Carrier did not violate the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 30th day of October, 1958.