

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Arthur W. Sempliner, Referee

PARTIES TO DISPUTE:

JOINT COUNCIL DINING CAR EMPLOYES LOCAL 516

GREAT NORTHERN RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of Dining Car Employes' Union Local 516 for and on behalf of James Wallace, Club Car Attendant, on the property of Great Northern Railway Company, that claimant be restored to service in Carrier's Dining Car Department with seniority and vacation rights unbroken and compensated for all time lost account Carrier's dismissal of claimant from its service in violation of the agreement and in abuse of Carrier's discretion.

OPINION OF BOARD: The claimant, James Wallace, on December 25, 1956, was a Club Car Attendant on the Great Northern Railway Company train No. 4, between Grand Forks, N. D., and Fargo, N. D. A coach passenger, together with her two sons, age 10 and 11, boarded the train on that day at Grand Forks for passage to Fargo. Shortly after boarding the train, leaving her children in the coach, the passenger visited the club car in company with her sister, where the passengers consumed several drinks prior to returning to the coaches. When the train arrived in Grand Forks, the brakeman informed the trainmaster at Fargo, Mr. Wainio, that he had been told by another passenger that a woman had been injured on the train. The trainmaster located the injured woman in one of the coaches (not the one in which her two sons and sister were riding). She had a cut on her leg, and was sobbing. The cut had stopped bleeding and appears to have been of little consequence. She stated that she was getting off at Fargo, and that her coat was with her luggage in the coach ahead. The trainmaster took her to the coach ahead, located her coat, and on ascertaining that the baggage had already been put off by the porter at the time her sister and two sons had detrained, he helped her to the station platform where she was met by her sons and sister.

At this time the injured passenger informed the trainmaster that she had been hurt in the club car kitchen where she and her sister had been invited by the club car attendant to have a drink. She did not know how she had been hurt, and in answer to the direct question, if the club car attendant had molested her, she replied "He was anything but a gentleman." No complaint had been made of improper conduct or advances to the conductor or any other member of the train crew during passage. Nor had the passenger made complaint to, or returned to, her sister and family in the car ahead, though when found by the conductor she had traversed the train from the club car on the rear, through the diner to the dome car.

As the train had departed, further investigation was requested of the trainmaster at St. Cloud, a Mr. C. A. Keil, who boarded the train at St. Cloud in company with Patrolman J. V. Lynch. In answer to questions, complainant club car attendant James Wallace gave his name, and denied having anyone in his kitchen. He refused to disclose to Trainmaster Keil his address, saying "You guys are the investigators, you find out." In describing the demeanor of Wallace, Keil reports he was evasive and surly.

Two days later, on December 27, 1956, the injured passenger, in a jurated statement, elaborated on her oral statement of December 25th to Trainmaster Wainio, to the extent that after she and her sister had been invited into the kitchen and had a drink, that her sister left to go to the coaches and that then club car attendant James Wallace attempted to embrace her; that in freeing herself from Wallace her leg struck a basket causing a small cut.

At the investigation January 3, 1957, the claimant denied categorically—

1. That the passenger was in his kitchen.
2. That she was cut in the club car.
3. That he had attempted to embrace her or in any way molest her.
4. That he knew anything about the incident.

It is interesting to note that Claimant Wallace's testimony at the investigation is puzzling in the following respects: On page twelve of the transcript he says:

"Well, there were three ladies that came in together. I noticed that this lady was one of the ladies that got hurt and, they ordered three drinks, and I served them three drinks."

yet on page 14 of the transcript Wallace says:

"He asked me if a lady got hurt. I said I didn't know anything about it. I said she didn't get hurt back here, not to my knowledge. I said she might have got hurt in the dining car."

At the conclusion of the investigation, objection was made that "the accused and his representative have been totally denied the identity of one 'omitted', notwithstanding affidavits supposedly signed by her."

There are several other charges made in relation to the investigation being improper. One that the investigation was the first of its kind held in the office of the dining car superintendent. This objection appears to be without merit. There is no evidence that this was prejudicial to the rights of the accused, or in violation of the contract. The further objection is raised that the hearing officer at the time of hearing injected an issue not contained in the charges, viz.: that the failure of the claimant to answer questions was an act of insubordination, an offense not set forth in the charges on which the hearing was called. No objection was made to this at the time of hearing.

The offense, as charged, "taking indecent liberties with 'omitted', a revenue passenger," is a serious charge and of great import to both the claimant and the carrier. While the degree of proof required is not as great here, as it would be in a criminal proceeding, fundamental rights cannot be entirely disregarded.

The accused has a fundamental right as in this case where statements had been taken, to see those statements prior to the hearing, including the signatures thereon. This right was denied.

In the instant case, the hearing officer did not have the witness in front of him, but only her statement. He therefore was in no better position to judge the credibility of the witness than this board. We do have certain circumstantial evidence which casts doubt on the credibility of the statement. No complaint was made to the conductor, the brakeman, or any member of the train crew. No complaint was made to other passengers, or even to her own sister or family. She did not return to her sister but seated herself in the adjoining coach where she was found by the trainmaster. Even then she did not complain to the trainmaster until she was off the train, and only on his direct inquiry. We cannot speculate as to the reasons for this, but it was not a normal reaction. There were other things which were abnormal. Her sister had seen fit to remove the children from the train and the baggage, yet leave the accuser's coat on the train. The accuser had been drinking, and by her own statement she had accepted a drink in the claimant's kitchen (which is denied by the claimant).

There is reasonable ground to believe that James Wallace, the club car attendant, had acted contrary to company rules, but not to the extent as charged. The record does not disclose evidence to sustain any charge of a lesser included offense which could justify the punishment inflicted. The hearing officer was undoubtedly influenced by his charges of insubordination.

We sustain the claim that the Carrier's assessment of discipline imposed was in abuse of the Carrier's discretion, without just cause. James Wallace should be returned to service with his seniority unimpaired but being partially at fault, he should not be compensated for loss of wages.

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 Employee involved in this dispute are respectively Carrier and Employee 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 dismissal of the claimant was not justified and therefore in violation of the Agreement.

AWARD

Claim sustained in accord with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 17th day of December, 1958.