Award No. 8713
Docket No. DC-10055

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Harold M. Weston, 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 Employes Local 385 on the property of Chicago, Milwaukee, St. Paul and Pacific Railroad Company for and on behalf of H. L. Slaughter, Waiter, that he be reinstated in Carrier's service with compensation for net wages lost since August 29, 1957, and with seniority and vacation rights unimpaired account Carrier's dismissal of claimant in violation of effective agreement.

OPINION OF BOARD: The Claimant, a waiter in the Carrier's Dining Car Service since August 15, 1945, was dismissed by the Carrier on August 29, 1957, on charges of misconduct and insubordination.

By letter dated August 21, 1957, Claimant was notified of the charges which allege that on August 12, 1957, while on duty on a diner at Los Angeles, (1) he disregarded the Steward's request relative to use of chocolate milk by dining car crew, (2) he used vulgar, vile and profane language toward the Steward, (3) the language he used was so vile and profane that it was necessary for a Union Pacific Commissary Officer to instruct him to discontinue its use at once, (4) he attempted to provoke an altercation with the Steward and (5) his actions and conduct toward the Steward were threatening and belligerent.

On August 27, 1957, a hearing was held on the afore-mentioned charges pursuant to Rule 8 of the applicable Agreement which stipulates that an employe with over 120 days service shall not be disciplined or dismissed without a hearing. Claimant attended the hearing, denied the charges and exposed himself to interrogation and cross-examination. Neither the Steward nor the Union Pacific Commissary Officer were present at any time during the hearing, although their signed statements were made part of the record.

While the facts relating to this case are very much in dispute, it does appear beyond question that Claimant was insubordinate toward the Steward when the latter rebuked him for drinking chocolate milk, notwithstanding the fact that the Steward might have handled the situation in a more competent manner. Appropriate discipline was accordingly in order. The only question

is whether the punishment meted out is so severe that, under both the circumstances of this case and the principles developed by this Board, we must find that the Carrier arbitrarily exceeded the very considerable latitude it possesses in assessing discipline.

Insubordination is a serious offense and statements of the character Claimant allegedly made can not be countenanced. Accordingly, if in this case a proper hearing had been given the Claimant, we would sustain his dismissal, despite the extreme nature of that penalty, his considerable service and satisfactory employment history.

However, the very material defect in the hearing is that Claimant had no opportunity to question the Steward or Union Pacific Commissary Officer, although their written statements constitute the only basis for the dismissal. Without that opportunity, the hearing in this discharge case is incomplete, even under the most informal rules and procedure. The essential requirement of a hearing is that it be fair and seek to develop and determine the relevant facts. We are mindful of our limited powers of review and that technical rules of evidence are not applicable in this type of industrial hearing where the sole purpose is to determine what, if any, discipline is warranted. It is, however, a non sequitur to argue that because hearings are informal under our principles, they may be relaxed further by eliminating safeguards fundamental to any sound system of inquiry into the truth. By a process of constant whittling down these hearings could be rendered meaningless.

Where a hearing is required by contract or other obligation, we are not disposed to sustain such extreme disciplinary action as dismissal when the disciplined employe has not had a fair opportunity to question any of the witnesses whose statements comprise the sole evidence on which that penalty is based and no valid justification appears for not affording that opportunity. In the present case, the chief complaining witness is an employe of the Carrier and not a passenger or customer whose appearance might pose unreasonable public relation problems.

Although many of the prior Awards that hold to the contrary are distinguishable from the present case either because lesser penalties were involved or the witnesses in question were passengers, it is recognized that our holding here is squarely at variance with at least several Awards (e.g. 2978 and 3213). While uniformity in our Awards may be desirable where possible, we nevertheless are persuaded that sound principles of justice require us to adhere to the proposition laid down in the immediately preceding paragraph in order to insure a fair and impartial hearing.

In the light of the foregoing, we cannot affirm the Claimant's dismissal. However, we are satisfied that, viewed in its entirety, the record does establish insubordination of sufficiently serious nature to warrant material disciplinary action. We will, therefore, limit Claimant's back pay to the net wages lost beginning March 1, 1958. In all other respects, the claim is affirmed.

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 dismissal is arbitrary and unwarranted under the circumstances of the present case.

AWARD

Claim sustained in all respects, except that back pay is limited to net wages lost since March 1, 1958.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 4th day of February, 1959.

DISSENT TO AWARD NO. 8713, DOCKET NO. DC-10055

The conclusions expressed in the Opinion above, warranted a denial Award. The majority stated, among other things, that:

> "* * * it does appear beyond question that claimant was insubordinate * * *." and
>
> "However, we are satisfied that, viewed in its entirety, the record does establish insubordination of sufficiently serious nature to warrant material disciplinary action."

Application of Rule 8 (f) (quoted in Employes' Position) in these circumstances required denial of the claim.

Award 8713 indicates a refusal to apply certain cardinal principles which are essential in discipline cases. It shows a failure to realize that we are not authorized to shield the guilty when guilt is clearly evident. In disregarding such principles and in providing a technical loophole in this case for claimant to escape from deserved discipline, the majority admitted that:

> "Although many of the prior awards that hold to the contrary are distinguishable from the present case either because lesser penalties were involved or the witnesses in question were passengers, it is recognized that our holding here is squarely at variance with at least several Awards (e.g. 2978 and 3213)."

One of the principles developed by the Board and applied in numerous Awards is that written statements of witnesses not present at hearings are admissible evidence and the rights of employes are not prejudiced by the inability of defendants or their representatives to cross-examine the writers thereof at the hearing. In addition to the two Awards cited in the Opinion, supra, one of which (2978) was on the same Carrier as here, two other more recent Awards (8503 and 8504) in dismissal cases between the same parties joined here and under the same Agreement reaffirmed this principle. Thus, this Carrier was most assuredly right in acting as it did, conforming with the principles repeatedly expressed in our Awards.

Another of the principles consistently adhered to is that the Board does not operate with the strictness and rigidity of criminal courts in respect of possible technical defects in procedure on a Carrier's property. The conduct of hearings and appeals in disciplinary proceedings does not require adherence

to all the attributes of hearings and appeals on criminal cases in the courts. It appearing to the majority "beyond question that claimant was insubordinate"; and it appearing that the majority was "satisfied that, viewed in its entirety, the record does establish insubordination of sufficiently serious nature to warrant material disciplinary action", no rights of claimant were prejudiced by the absence of the writers of statements which were admitted as evidence at the hearing on the property.

In disciplinary matters the enforceable rights of an employe can only be found in the applicable Agreement. In the absence of prejudicial procedural defects, conceding that the claimant was guilty of insubordination as charged and that material disciplinary action was warranted, was equivalent to conceding that no grievance existed under the Agreement. Rule 8 (f) requires that a dismissed employe shall be returned to service and paid for all wages lost, less amounts earned in any other service, provided the charges against him are NOT sustained. The charges having been sustained, Award 8713 is palpably wrong. No authority exists in the Agreement in such circumstances to return him to service, nor to pay him for any part of wages lost. In the face of substantial evidence of guilt, this Board had no authority to substitute its judgment for that of the Carrier.

The Finding that dismissal of claimant was arbitrary and unwarranted under the circumstances of the present case, is contrary to the well considered and deeply grounded principles developed and applied in our review of discipline cases. Award 8713, by awarding claimant's return to service and limiting back pay to net wages lost from an arbitrary date having no factual relationship to the record, without Agreement rule support, emphasizes the impropriety of the arbitrary digression from such principles in this case.

For the above reasons, among others, we dissent.

/s/ J. F. Mullen
/s/ R. M. Butler
/s/ W. H. Castle
/s/ C. P. Dugan
/s/ J. E. Kemp

REFEREE'S COMMENT RE DISSENT TO AWARD 8713, DOCKET DC-10055

The dissenting opinion contains no persuasive consideration that counterbalances the reasoning and logic of Award 8713. In arriving at our decision, we carefully took into account all points made in the Dissent but no valid basis was perceived for reaching a different result.

We do not dispute that strict rules of criminal court procedure are inapplicable to hearings of the type in question or that the Carrier has wide latitude in assessing punishment. In that connection, it should be noted that this Referee has consistently endorsed and applied these principles to the cases of this Board that have come before him. However, the point of the present case is that no matter how informal and relaxed procedures of these disciplinary hearings required by collective bargaining agreements may be, they must nevertheless conform to certain recognized standards and possess certain basic essentials in order to qualify as fair and impartial hearings. Otherwise the provisions of agreements requiring hearings are devoid of meaning.

One of the most significant of these standards and basic essentials is fair opportunity to cross-examine the accuser, particularly where the accused is being deprived of very substantial rights. This is consistently recognized in this country to be a necessary requirement for hearings, even when they are of an informal or administrative character. In all the many court cases cited by the carrier, this requirement has been met. It is true that some of this Board's prior awards hold to the contrary but we are not disposed to follow their lead and thus perpetuate serious hearing defects that should be corrected. As pointed out in the majority opinion, we are prepared to make exceptions to the rule when some valid justification appears for doing so.

The quotations taken out of context from Award 8713 and used in the Dissent merely means that, even though we ignore the statement of the Steward who was not exposed to cross-examination, there is sufficient competent evidence, based on claimant's admissions considered in the light of the entire record, to satisfy this Referee that claimant was guilty of at least some of the misconduct charged. However, this limited evidence was not an adequate basis for sustaining dismissal and therefore a lesser penalty was indicated. This Board has had frequent prior occasion to modify a carrier's disciplinary action and there is nothing novel in our action in that regard.

In our opinion, Award 8713 is entirely proper and sound.

/s/ *Harold M. Weston, Referee*

We also concur in the foregoing "REFEREE'S COMMENT RE DISSENT TO AWARD 8713, DOCKET DC-10055".

/s/ G. Orndorff
/s/ J. W. Whitehouse
/s/ J. H. Sylvester
/s/ C. R. Barnes
/s/ R. C. Coutts

REPLY TO REFEREE'S COMMENT RE DISSENT TO AWARD 8713, DOCKET DC-10055

The Referee's comment on Carrier Members' Dissent to Award 8713 correctly holds:

> "We do not dispute that strict rules of criminal court procedure are inapplicable to hearings of the type in question or that the Carrier has wide latitude in assessing punishment. In that connection, it should be noted that this Referee has consistently endorsed and applied these principles to the cases of this Board that have come before him. * * *"

His comment continues:

> "However, the point of the present case is that no matter how informal and relaxed procedures of these disciplinary hearings required by collective bargaining agreements may be, they must nevertheless conform to certain recognized standards and possess certain

basic essentials in order to qualify as fair and impartial hearings. Otherwise the provisions of agreements requiring hearings are devoid of meaning."

But his personal viewpoint of the recognized standards and basic essentials of disciplinary hearings is in conflict with controlling principles repeatedly annunciated by our awards and followed practically universally in the railroad industry. More specifically, his viewpoint expressed in Award 8713 to the effect that the absence of Carrier witnesses for cross examination at the hearing caused a material defect and incomplete hearing is diametrically opposed to the considered opinions of outstanding and experienced Referees on this point. In the face of overwhelming authority, of which he was aware, he says:

"It is true that some of this Board's prior awards hold to the contrary but we are not disposed to follow their lead and thus perpetuate serious hearing defects that should be corrected."

The inference in this statement is that such awards are few in number and defective in quality.

One of the early awards bearing on this subject was Award 1086 rendered without the assistance of a referee by the ten permanent members of the Board. There we said:

"At the hearing both the employe and his representative were given ample opportunity to present any facts or arguments pertinent to the charges. There are no rules specifying the types of evidence that must be submitted at the hearing, and the evidence adduced by the carrier under the circumstances of this case was not such as to detract from the fairness or impartiality of the hearing."

In Award 2770 by Referee Parker (now Chief Justice of the Supreme Court of Kansas) it was likewise held:

"In our approach of the problem it can be said that this Division is definitely committed to the proposition that there is nothing in the Agreement which specifies the type of evidence which may be submitted at a hearing (Award 1144), also to another, that there is no obligation resting on the Carrier to produce its witnesses in person at any hearing (Awards 2541, 2637). If, therefore, a discipline case may proceed to final decision based on evidence consisting of statements only, what is the meaning of the heretofore quoted language which appears in the Contract? Briefly stated our view is it means that when witnesses are present and produced at the hearing the accused shall have the privilege of questioning them. On the other hand when statements are relied on exclusively for probative purposes they are proper and the accused cannot, as a basis for a finding of unfairness stand upon the proposition the persons making them were not produced at the hearing on his demand, if from all facts and circumstances surrounding the hearing the Division is convinced he had had a reasonable opportunity to go out and prepare his defense and has not been deprived of a fair hearing by some act of the Carrier. What reasonable opportunity is, until such time as the parties see fit to promulgate an agreement, the terms of which clearly and concisely cover the various phases of the point in question, must necessarily in each instance depend, when cases are brought here for

review, on the conclusion we reach on the subject after consideration of all the facts and circumstances revealed from our examination of the particular case involved. What has been said is not intended to imply a person about to have a hearing is not to have an opportunity to confront the witnesses, as has been held in some of our decisions (See Awards 2613 and 1989), nor is it in conflict with what was there said on the subject. It simply means that if the record of proceedings affirmatively establishes that in some manner the accused has acquired information, and we care little about the source from which it came or when he acquired it so long as he had it, regarding the identity of the witnesses who are going to be used against him to prove the details which establish the specific dereliction of duty with which he is charged, he is deemed to have had opportunity to confront the witnesses and likewise deemed to have been accorded the privilege of questioning the witnesses giving testimony in the case."

Award 2793 by Referee Shake (former Associate Justice of the Supreme Court of Indiana) confirmed our prior holdings in the following language.

"We pointed out in Award 2637 that the Management possesses no power to compel the attendance of witnesses at disciplinary hearings; and in Award 2770, where the subject was exhaustively considered, it was held that the right of cross-examination extends only with respect to witnesses who are personally present at the hearing. Both of said awards recognize, however, that the person on trail must be afforded a reasonable and timely opportunity to perpare and submit his defense. This means that the names and addresses of the persons whose written statements are to be used against him shall not be arbitrarily withheld from him, and he shall be afforded reasonable time, either before or after the hearing is commenced, if he asks it, to contact said persons and to make his own investigation as to the truthfulness of their statements. In this case there is no showing of a request for the names of the witnesses or for further time to prepare a defense; nor does it appear that the Claimant was taken by surprise by the nature of the evidence produced against him."

In the instant dispute, Docket No. DC-10055, Award No. 8713, the Record is clear that no request was made on the Carrier at the time of the investigation to postpone it in order for Claimant and/or his Representative to make investigation as to the truthfulness of the statements submitted by the Carrier at the investigation.

Award 2978 by Referee James M. Douglass (former Chief Justice of the Supreme Court of Missouri) likewise held:

"The record shows no objection was made to the genuineness of the written statements offered to prove the charge. The fact that the persons who made the statements were not present to testify in person does not render the hearing unfair. This has been ruled numerous times by this Division. The claim Williams did not have a fair hearing must also be denied."

Award 3125 by Referee Youngdahl (former Associate Justice, Supreme Court of Minnesota, since—Judge, U.S. District Court, Washington, D.C.) in the following explicit language also clearly outlined the "Contrary View" to Award 8713:

"We have held in several previous awards that the fair hearing contemplated by the Agreement does not mean that employes have

the right to have witnesses present at the hearing. It does mean that the person on trial must be afforded a reasonable and timely opportunity to prepare and submit his defense. As we said in Award 2793:

> 'This means that the names and addresses of the persons whose written statements are to be used against him shall not be arbitrarily withheld from him, and that he shall be afforded reasonable time, either before or after the hearing is commenced, **if he asks it,** to contact such persons and to make his own investigation as to the truthfulness of their statements.'

"There was no request in this case for further time to prepare a defense, nor was there any request for names of witnesses; nor does it appear that Claimant was taken by surprise by the nature of the evidence produced against him. We believe there has been no violation of the rule as to a fair hearing." (Emphasis supplied.)

Award 4865 by Referee Kelliher also follows the sound reasoning in prior Award 2793.

Award 4976 by Referee Robert O. Boyd (now Member, National Mediation Board) also contains explicit language, as follows:

> "The issue raised here as to whether statements of witnesses not present at the hearing may be received in disciplinary proceedings has been before this Division a number of times; and the Division has decided in many cases that such statements may be received and if they contain facts worthy of belief, may form the basis for discipline. See Awards 3498, 4771 and 2770."

Award 6067 by Referee Wenke (Associate Justice of the Supreme Court of Nebraska) held:

> "It is next contended that the letter written by Miss Lillian M. Pickett should not have been received and considered by the Carrier in determining his guilt or innocence of the charges made because the author thereof was not present at the hearing and consequently neither the Claimant, nor his representative, had an opportunity of interrogating her. There is nothing in the parties effective Agreement which sets out the type of evidence which may or shall be adduced. This Division has many times correctly ruled that under such circumstances no obligation rests on the Carrier to produce the author of a letter or statement at the hearing. Such absence may and should be considered in determining the weight to be given thereto but in no way affects the admissibility thereof."

Award 6185 by Referee Wenke is to like effect.

Some others are:

Award 3213 by Referee Carter
Award 4771 by Referee Stone
Award 4716 by Referee Robertson
Awards 7139 and 7140 by Referee Cluster
Awards 7774, 7863, 7866, 7907 by Referee Smith
Award 7808 by Referee Larkin
Award 8334 by Referee Shugrue

The impression that the authors of the aforesaid awards were all "out-of-step", in our opinion is unjustified.

As to the Referee's comment that:

> "This Board has had frequent prior occasion to modify a carrier's disciplinary action and there is nothing novel in our action in that regard."

Award 8713 itself correctly indicates that it is not analogous with awards which simply modified excessive discipline, but is one in which the Referee injected an unwarranted concept as to the basic essentials of a fair hearing to support a modification of discipline which it otherwise admits was a proper penalty for the offense committed.

/s/ J. F. Mullen
/s/ R. M. Butler
/s/ W. H. Castle
/s/ C. P. Dugan
/s/ J. E. Kemp