

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Howard A. Johnson, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD TRAINMEN

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of Dining Car Steward, Thomas W. Burns, for compensation for time lost from and after date suspended from Carrier's service, August 26, 1954, until reinstated to such service, on February 1, 1956, account unjustly and improperly dismissed in violation of the existing Agreement.

OPINION OF BOARD: The claim is that Claimant's dismissal was in violation of the Agreement and that he should have compensation for time lost between October 1, 1954 and February 1, 1956, when he was reinstated "with the question of pay for time lost to be submitted" to this Division for determination.

It is urged on behalf of the Carrier that the appeal to this Board was not taken within the proper time after the dismissal. But the record shows that after the dismissal on October 1, 1954, negotiations continued until January, 1956, when an agreement was finally reached for Claimant's restoration to service on February 1, 1956, with the understanding that the Organization would progress to this Board the question of pay for time lost. Thus the Carrier waived any right to make such an objection.

The Discipline Rule, Article 12 (a), reads as follows:

"Article 12 (a). **DISCIPLINE.** A steward who has been in the service more than one hundred twenty (120) days, or whose application has been formally approved, shall not be disciplined or dismissed without investigation, at which investigation he may be represented by one or more employees of his choice. He may, however, be held out of service pending such investigation. The steward shall be promptly advised in writing of the precise charge against him. Such investigation shall be held within ten (10) days from date the Superintendent of Dining and Parlor Cars has knowledge of the offense, or, five (5) days after the steward charged with the offense arrives at home terminal, unless investigation is postponed to a later date by mutual agreement. A decision will be rendered within ten (10) days after

completion of the investigation. After the investigation has been held and discipline or dismissal results therefrom, the steward shall have the right to appeal up to and including the Chief Operating Officer designated by the Railroad to whom appeals may be made. If an appeal is taken, it must be filed within ten (10) days after the decision is rendered."

Thus it does not provide how or by whom the investigation shall be ordered or held, or what kind of evidence shall be considered.

The Labor Members' brief summarizes the issue presented as follows:

1. Was Claimant Burns accorded a fair and impartial hearing as required by the Agreement?
2. Was the charge of rude and discourteous treatment fairly established by competent evidence?

It states further that the procedural aspects under the first issue are as follows:

"(a) That Carrier's General Superintendent of Dining Cars, one Dolan, acted in the tripartite capacity of witness, prosecutor and judge, and further, that in denying the individual Claimant's appeal he was passing upon the credibility of his own testimony.

"(b) That evidence of record discloses the individual Claimant's guilt to have been prejudged.

"(c) That Carrier withheld evidence.

"(d) That Carrier misrepresented to the individual Claimant the reason why the complainant passenger was not present at the hearing."

Since the Rules do not specify the procedure to be followed, the procedural question is not whether technical requirements were followed, but whether in fact Claimant's right to a fair hearing was denied.

The first procedural objection is that the General Superintendent "acted in the tripartite capacity of witness, prosecutor and judge, and * * * in denying the individual Claimant's appeal he was passing upon the credibility of his own testimony."

The General Superintendent, being the Company's Employing Officer, notified Claimant of the investigation and of the decision. But he did not preside at the hearing and took no part as prosecutor. He testified, but only on the charge of willful disobedience, which was not involved in the decision. Consequently, whether he made the decision (as implied from the suggestion that he acted as judge), or denied Claimant's appeal (as stated under the first procedural objection), he did not act upon his own testimony or credibility. His direct testimony appears on pages 47 and 48 of the record. It consists of less than one page, and relates only to Claimant's failure to wait at his office for a requested conference. Ten or twelve pages of the record then show cross-examination by Claimant's representative, largely upon matters concerning which he had not testified, of which he had no personal knowledge, or which were immaterial.

To the extent to which Claimant's representative questioned General Superintendent Dolan upon matters to which he had not testified as the Company's witness, he was Claimant's witness, and Claimant cannot complain.

The second procedural objection is that the record shows Claimant's guilt to have been prejudged. It is based upon a letter to Claimant from the attorney for the woman patron who had complained of Claimant's conduct; in it he stated that in a letter written to Mr. Dolan on September 3, 1954, twenty days before the hearing, she had stated that she did not consider her treatment "in and of itself sufficient to warrant the discharge of the steward. For that reason, she refused to attend a hearing to identify the steward who had been discourteous to her."

It may be that Claimant's possible discharge was mentioned, but we cannot conclude that therefore the Company had predetermined his guilt or discipline.

The third procedural objection is that the Carrier withheld evidence because it did not introduce Miss Doane's letter of September 3, 1954, at the hearing. There is no indication that it had any bearing upon the issue of Claimant's guilt, or that it impeached in any way her original complaint which appears in the record. Consequently, we cannot fairly conclude that any relevant evidence was withheld. Certainly not all correspondence should be introduced regardless of its pertinence.

The Company is further accused of withholding evidence because it did not introduce a letter from Waiter Brone, who apparently waited upon Miss Doane on the occasion in question, but who had stated that he would be unable to identify any of his patrons, male or female. The contention is that it should have been introduced "however inconclusive, * * * for what it might be worth, favorable or unfavorable."

But, as noted above, the purpose of an investigation is to bring out pertinent facts, not to build up a record of immaterial statements. Presumably, Claimant would have used Brone's statement or testimony if he had considered it helpful.

The final procedural objection is that the Carrier misrepresented to Claimant the reason why the complainant passenger was not present at the hearing. The Carrier stated at the hearing that it had requested her to attend but that her work, which took her out of town quite often, would not permit her attendance.

Later during the appeal proceedings, and in her attorney's letter above quoted, it was stated that she had refused to appear. Her reason for not appearing has no bearing upon the issues involved and can have had no effect upon the outcome.

Finally, the contention is made that the charge of rude and discourteous treatment of a passenger was not sufficiently proved by the passenger's written statement, as against Claimant's denial and the testimony of one waiter and written statements by two others that they had not observed any such conduct. The contention is not that written statements are incompetent as evidence. On the contrary, Claimant introduced two statements himself. It is well established that in view of the parties' lack of subpoena powers, the use of such statements is necessary and proper.

This Board cannot conclude from the record that the Carrier was not entitled to believe the passenger's statement as against Claimant's denial and the negative statements of three waiters that they had not observed the conduct complained of.

The record showed that the Carrier had contacted the complaining passenger by telephone and otherwise, had discussed the incident with her, had verified her presence and had established her status and responsibility. Certainly there is nothing in her statement or in the circumstances to cast any doubt upon her truthfulness, or to indicate any suspicion of her bad faith, or any suggestion why she should complain of Claimant without reason.

The record does indicate that the complaining passenger was perhaps unduly affected by the occurrence, but it is precisely because results may not always be foreseen that extreme courtesy and tact must be required of Carrier's employees.

The record indicates also, not only that dismissal was excessive discipline under the circumstances, but that the Carrier recognized that fact by restoring Claimant to service at the Organization's long continued insistence, thus reducing the discipline to a suspension of slightly over seventeen months. But we cannot conclude from the record that such suspension was excessive, or that Claimant should receive compensation for time lost.

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 Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: F. P. Morse
Acting Secretary

Dated at Chicago, Illinois, this 21st day of September, 1959.