

Award No. 9517

Docket No. CL-9201

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Frank Elkouri, Referee

PARTIES TO DISPUTE:

UNITED TRANSPORT SERVICE EMPLOYES

THE PENNSYLVANIA RAILROAD COMPANY

STATEMENT OF CLAIM: That the Pennsylvania Railroad Company improperly suspended Francis K. Howard during the period of July 1 to 14, 1956, inclusive, on unproven charges and hearsay testimony.

Further, that the record of Francis K. Howard be cleared of the charges in this case, and that he be reimbursed for all time lost during the period of suspension as a result of Carrier's improper action.

OPINION OF BOARD: Claimant Francis K. Howard was suspended for a period of fourteen days on the basis of the Carrier's finding that he was guilty under a charge of disrespect toward a passenger and damage to the passenger's personal property.

Some eleven years ago the Referee who is participating with the Board in the present case emphasized the unfairness of proceedings wherein the only evidence in apparent support of charges against an employe is the word of a complaining passenger whom the employe was never given a chance to face, such evidence never being made subject to opportunity for testing by cross examination. See Award 4325, involving the same Carrier that is involved herein. The importance of cross examination in the search for truth was clearly stated in Award 3288 (Referee Simmons participating with the Board):

"For two centuries in America it has been recognized that the right of testing the truth of any statement by cross examination is a vital feature of any investigation devoted to truth development. No safeguard for testing the value of human statements is comparable to that furnished by cross examination and no statement should be used as testimony until it has been subjected to that test or the test waived. It is a device for the discovery of all the truth. A witness on direct examination may disclose but a part of the necessary facts. The opposing party has the right to probe for the remainder. Qualifying, illuminating and often discrediting answers are secured by this process. * * *"

In the present case the only evidence against the accused employe is the statement of a complaining passenger; that passenger was not made available at the hearing (the Carrier does not say it attempted and failed to secure opportunity for Claimant at any time to face the passenger), nor was his

statement made available to the employe prior to the hearing. Nor was there any waiver of the test of cross examination. The passenger first made an oral statement to a Carrier Supervisor (in the Record as repeated by the Supervisor) on March 28, 1956, at Pennsylvania Station in New York City, two days after the alleged incident; the Record contains no indication that the Carrier made any attempt to call in the accused employe or his representative at that time for identification or cross-examination purposes. The next day, on March 29, 1956, the passenger addressed a letter to the Carrier, reducing the complaint to writing. The Carrier filed charges against the employe on April 2, 1956, and at that time gave notice that the hearing would be held on April 9, 1956. The hearing was actually conducted on April 24, 1956, having been postponed to that date. At no time during the interim from receipt of the passenger's written statement, which as we have noted was addressed March 29, 1956, until the hearing on April 24, did the Carrier furnish the employe or his representative with a copy of the passenger's statement, nor did the Carrier furnish the passenger's address (which it might be noted was also in New York City, creating no distance problem in regard to giving Claimant or his representative an opportunity to face the passenger). The first opportunity that Claimant or his representative had to examine the statement was at the hearing. There Claimant's representative strenuously objected to this procedure, and the objection was denied, to-wit:

"Mr. Schlossberg: I renew my objection at this time to the introduction of this letter and I ask that it be stricken from the record on the grounds that it is improper proof; it affords Mr. Howard no opportunity to confront the person making the complaint against him. It affords him no opportunity to cross examine this person. It does not even afford the railroad or its representative any opportunity to form an impression as to the veracity or possible prejudice of the person making the complaint; and in brief, the procedure being followed is a denial of due process and of a fair trial to Mr. Howard. I further request that, if this hearing is to proceed, the railroad make the person complaining available at the hearing.

"Mr. Roach: Mr. Schlossberg, your request is denied but will be made a part of the record. I would like to call your attention that this is not a criminal or a civil court proceeding."

It is true that in numerous cases this Board has accepted, as reliable, statements not subjected directly to cross examination. It should be noted, however, that in some of those cases the accused employe admitted at least some sort of misconduct (as in Awards 3109, 8300; also see 3775); or there was other evidence to support the charge (as appears to be the case in Awards 5667, 5861, 6103, 6866, 7139, 7866, 8334); or the statements came from separate and independent eyewitness sources, thus corroborating one another (as in Award 8504 and also apparently in 8503); or the accusing statements were made by special investigators (as in Award 7863); or the employe "had been informed prior to the filing of the charge against him" of the passenger's letter (as in Award 3775); or the accused employe refused to exercise the opportunity, given him, to confront the authors of the statement prior to the hearing (as in Award 7907); or the full name and address of the author of the statement was given to the accused employe by the Carrier at the hearing with a clear offer by the Carrier, which the employe did not choose to take advantage of, to adjourn the hearing long enough for the employe to contact the author (as in Award 8829, where there was also other evidence to support the charge); and other of those cases appear otherwise distinguishable from the present case [in some cases the Parties by their Agreement had expressly

provided that in certain types of cases statements could be used without any right to confront their author]. It is very significant, too, that in the Awards in which statements not subjected directly to cross examination were given probative weight, the Board rarely, if ever, stated unequivocally that the statements were the only evidence in apparent support of the charge; also, in those cases there was rarely any indication in the Award of vigorous and timely protest by the Organization at the hearing against use of the only evidence against the accused employe without according him opportunity of cross examination. Moreover, it must be remembered that probably no two discipline cases are identical in all respects, and that in discipline cases probably more than in any other type, each case must be decided largely on its own.

In the present case it must be concluded that the Claimant was denied a fair hearing. In view of this conclusion it is not necessary to examine the merits of the other contentions of the Organization as to failure of proof of the charges.

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 Claimant was denied a fair hearing.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 4th day of August 1960.

Dissent to Award No. 9517, Docket CL-9201

While the majority in Award 9517 cites a previous Award on this same Carrier in which this same Referee emphasizes the unfairness of proceedings wherein the only evidence in apparent support of the charges against an employe is the statement of a complaining passenger not present at the investigation; emphasizes the importance of cross-examination; states the facts in the instant case, and distinguishes those facts from facts involved in several of many denial Awards cited in behalf of Carrier in this case, the majority does not expressly disclose the basis for its conclusion in the instant case that the Claimant was denied a fair hearing. In any event, our Awards are legion in recognizing the propriety of written statements as evidence, particularly where, as here, there is nothing in Agreements which specifies the type of evidence which may be submitted at a hearing, or which requires a Carrier to produce its witnesses in person at any hearing; it also is recognized that

Carriers lack authority to demand the presence of non-employees at hearings. In many of these Awards, written statements constituted the only evidence in support of charges.

Award 9517 is in error and we dissent.

/s/ R. A. Carroll
/s/ W. H. Castle
/s/ C. P. Dugan
/s/ J. E. Kemp
/s/ J. F. Mullen