

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Carl R. Schedler, Referee

PARTIES TO DISPUTE:

JOINT COUNCIL DINING CAR EMPLOYEES, LOCAL 849

**CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD
COMPANY**

STATEMENT OF CLAIM: Claim of Joint Council Dining Car Employees Local 849 on the property of the Chicago, Rock Island & Pacific Railroad Company for and on behalf of Waiter John A. Walker that he be restored to service with seniority and vacation rights unimpaired and compensated for all time lost account of Carrier dismissing claimant from service on January 12, 1959 in violation of the existing agreement.

OPINION OF BOARD: This is a disciplinary case. The Claimant, a Dining Car Waiter, employed in the service of the Carrier had his employment terminated by the Carrier as of January 12, 1959 with the reason given that he failed to be available for service when required and needed by the Carrier because he was working elsewhere. The Claimant asserts that his termination was in violation of the existing agreement.

This Board in Award 8513 (Referee Lynch) set aside the dismissal of this same Claimant by the same Carrier and ordered his reinstatement. The Opinion in Award 8513 includes the following:

"We will sustain this claim for only one reason: the actions of Carrier's General Superintendent, Dining Cars, is violative of the basic principles involved in the right of an employe to a fair and impartial hearing. Such principles cannot be ignored. Had his activity been confined to the functions prescribed by the applicable agreement, this claim most certainly would be denied."

Upon receipt of Award 8513 the Carrier restored Claimant to service as directed and he was given, in writing, his first assignment on December 15, 1958 to a run commencing on December 16 and ending on or before December 22. The Carrier contends that at the conclusion of the run the supervisor verbally requested the crew to report for an assignment on December 24. All the members of the crew reported except the Claimant who testified that he was told he would be called, but that he did not receive a call. He accepted an as-

signment on the Illinois Central, and stated he called this Carrier again on December 25 and was told he would be called when needed.

It appears from the record that the Claimant has seniority on both the Rock Island and Illinois Central. By letter dated December 23, 1958 the Carrier requested the Claimant to appear at an investigation because of his failure to be available for work on December 24. The investigation was held on January 7, 1959 and the record contains a transcript of the hearing conducted that day by the Carrier and attended by the Claimant and a representative of his organization.

The Carrier states in its discharge notice to the Claimant that he is terminated because he failed to appear for service when required and needed, as he was working elsewhere. In other words, the Carrier had discharged the Claimant for two primary reasons, (1) he was not available when needed and (2) he was working elsewhere. The issue of his availability is in dispute. The Carrier contends he was informed verbally on December 22 to report for work on December 24 along with the other members of the crew. The claimant testified he was not told to report for work on December 24, when he finished the run on December 22, and customarily the Carrier called him when his services were needed, and when he had not received a call on December 23 he accepted assignment with another Carrier. The Claimant had not worked for this Carrier for about two years prior to his recall on December 16. We resolve this conflict in favor of the Claimant as we are not satisfied by the proof in the record that the Claimant was told on December 22 to report for work on December 24. Our finding is buttressed by the fact that Claimant obviously wanted to work as he did go to work for another Carrier on December 22. The second reason given by the Carrier for termination is the fact that the Claimant was working for another railroad. No rules were cited prohibiting the holding of an employment relationship on more than one railroad. Consequently, we find that the Carrier has treated the Claimant unjustly and in accordance with Rule 11, paragraph (h) of the Agreement must order his reinstatement.

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 violated.

AWARD

Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois this 25th day of October, 1960.

DISSENT TO AWARD NO. 9607, DOCKET NO. DC-11252

Discipline of employees is a very serious matter to the industry in rendering safe and efficient transportation service to the public. It must not be treated lightly as the Opinion indicates was done in this case.

In its consideration of claims involving discipline, certain general and fundamental principles repeatedly followed are that this Board will not weigh evidence or resolve conflicts therein where there is positive evidence of probative force; will not disturb the findings based thereon when there is real substantial evidence to sustain charges; will not set aside Carrier's action if it has not acted arbitrarily, capriciously, or without just cause, and will not substitute its judgment for that of the Carrier unless prejudice or bias is clearly disclosed by facts or circumstances of record. This Board has held many times that its function in such cases as this is merely to ascertain whether the judgment exercised and action taken by a Carrier was in abuse of its discretion.

The Opinion in Award No. 9607 displays no effort to conform with these fundamental principles, but instead incorrectly states certain facts of record and assumes a fanciful conflict in testimony which it resolves in favor of Claimant.

The Opinion states, "The Carrier contends that at the conclusion of the run (on December 22) the supervisor verbally requested the crew to report for an assignment on December 24." (Parenthetic interpolation added.)

The record shows that Carrier did not contend that Walker was informed verbally on December 22 to report for an assignment on December 24, and no conflict in this respect appears in the record. Actually, the contention of the Carrier was, as the Commissary Agent testified:

"Q. When he reported for the Dec. 16 assignment did you give further instructions?

"A. I told Walker and all the rest of the crew to report to me or the Commissary on his return to Chicago for further assignment as we were very busy and needed every employe available."

"Q. Did he report to you as instructed on his return to Chicago?

"A. No, he did not."

The testimony of the Commissary Agent continued:

"Q. When he did not report to you on his return to Chicago did you make any further efforts to contact him?

"A. On the morning of December 22 the crew had returned to Chicago and the men all started calling in except Walker. In the afternoon I called the telephone number that I had on file for him which was Turner 5-8259 and there was no answer. The morning of December 23 I called this same phone number again and was advised by a lady that Mr. Walker was not home. I asked this lady if she would be kind enough to have Walker call the Chicago Commissary when he returned. This he did not do."

Claimant did not report to Carrier's Chicago Commissary on December 22. On the contrary, he admitted in his testimony at the investigation that he called the Illinois Central Railroad and that, "* * * they gave me an assignment on Train No. 9 * * *." The investigation also shows that Claimant arrived at Chicago on Carrier's Train No. 2 between 5 A. M. and 6 A. M. December 22 and departed the same date on Illinois Central Railroad Train No. 9 at 1:00 P. M., working to Jacksonville, Florida, and back on that Carrier's Train No. 10, arriving at Chicago at 10 A. M. December 25, 1958. Claimant absented himself without leave. There was no room for doubt but that (1) he was not available when needed, and that (2) he was working elsewhere.

In light of the substantial evidence of record in this docket, Award No. 9607 is in error and we dissent.

/s/ J. F. Mullen

/s/ R. A. Carroll

/s/ W. H. Castle

/s/ C. P. Dugan

/s/ J. E. Kemp