Award No. 10128
Docket No. DC-9476

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

John Day Larkin, Referee

PARTIES TO DISPUTE:

JOINT COUNCIL DINING CAR EMPLOYES, LOCAL 351

ERIE RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of Joint Council Dining Car Employees Local 351 on the property of the Erie Railroad Company for and on behalf of Waiter-in-Charge Walter Hicks that he be reimbursed for net wages lost, account 30 days suspension from service effective February 27, 1956, said discipline assessed in violation of effective Agreement in that no charges were placed against Claimant by Carrier and Carrier failed to accord Claimant a fair and impartial hearing.

OPINION OF BOARD: Claimant Walter Hicks was assigned as Waiter-in-Charge of Carrier's Train No. 5, departing Jersey City on December 22, 1955. Some four weeks later Carrier's Passenger Traffic Manager received a letter of complaint from one who alleged that he had been mistreated by Hicks. A copy of the same letter was directed to the Superintendent of the Dining Car Department, J. M. Collins, who promptly sent the following communication to Hicks:

"Personal File—Walter Hicks
Jan. 23, 1956

Walter Hicks
Apt. 9B
22 Madison Ave.,
New York, N. Y.

"Investigation will be conducted in this office, 721 Jersey Ave., Jersey City, N. J. at 10:00 A. M., Feb. 9, 1956, charges being preferred by one of our passengers who wrote a letter to our Passenger Traffic Manager, copy to me, which I quote:

'Mr. A. G. Oldenquist,
Passenger Traffic Manager,
Erie Railroad
Midland Building
Cleveland, Ohio

January 19, 1956

'Dear Mr. Oldenquist:

'I doubt if words can accurately describe the inefficient, rude and insolent treatment I received from your Walter Hicks on Train #5 leaving Jersey City, December 22, 1955.

'On that evening departure was considerably delayed due to the lateness of the bus from New York. The passengers, including myself, who had not taken the bus and were on the train prior to its normal departure time were privileged to watch Hicks walk back and forth in his red suspenders until he was ready to serve. This was at 8:45 P. M. To those passengers who inquired about the delay he replied the railroad was so cheap it would not permit him to report for work enough in advance of departure to have the car serviced. This kind of talk I think should concern the railroad but is not any part of my complaint.

'The waiter who served my dinner did so in an efficient manner. For some reason Hicks elected himself as sole beverage dispenser and his service was both inaccurate and so unnecessarily slow that it was agonizing. When he presented his beverage check and said he was getting ready to close, I asked him to bring me another drink and told him I thought his service had been very poor, He replied if that was the way I felt the bar was closed right now and I could not have the drink.

'Upon his remarking that he would see me in the morning, I told him I always had breakfast in my room. This he told me would not happen tomorrow morning because the porters were not licensed food carriers and he was sure his waiters would be too busy to carry anything back. He was good as his word. Between Salamanca and Cambridge Springs he would not permit the porter to get me anything nor would he let a waiter serve it.

'I have been traveling on Trains #5 and #6 between New York and Cambridge Springs for forty years and until now have never had anything but the finest of service from your entire organization. You will agree, I believe that no passenger should be subject to such insolence.

'This man is a discredit to the Erie Railroad.

Very truly yours,

K. H. Dunbar"

"We will review your record at this investigation.

"At this investigation you may have present representative if you so desire.

"If you are unable to attend the investigation, you should contact the undersigned at once giving the reasons, as failure to report at the time and place stipulated will be considered as an admission of guilt and grounds for discipline.

Very truly yours,

ERIE RAILROAD COMPANY

J. M. Collins
Supt, Dining Car Department.

"JMC/ABB

"TO WHOM IT MAY CONCERN:

I affix my signature below to acknowledge receipt and understanding of this letter.

/s/ Walter Hicks"

By agreement the date for hearing this matter was deferred until February 15, 1956. Claimant appeared with his representative, General Chairman W. S. Seltzer, who promptly protested that the notice to Hicks indicated that he was called to answer "charges being preferred by one of our passengers." Thus he insisted that Carrier had not preferred any charges. We think it unnecessary to dwell upon this technical objection, since obviously the purpose of the investigation was to look into the matters complained about in the letter.

Mr. Hicks denied having mistreated any passenger. The only evidence of misconduct on his part was that in the letter of the stranger who claimed to have been a passenger who further claimed that he was mistreated by Hicks, some eight weeks prior to this investigation.

When, in the course of the proceedings, Mr. Collins, who was conducting the investigation, made the statement that he was not going to decide the matter, but refer it to Cleveland, General Chairman Seltzer again raised the technical objection that the decision should be rendered by the officer who conducts the investigation. In argument before the referee, this position has been supported by the citation of prior awards of this Division. See Award 6087. A later award, with the same referee (Whiting) sitting, has also been called to our attention, Award 7088. The following language in the opinion accompanying the latter award is to the point:

> "The plain meaning of such a rule is that the official who conducted the investigation, heard the evidence and saw the witnesses will evaluate the evidence and decide whether the employe was guilty or innocent of the charge against him. Then within 30 days after completion of the investigation that decision must be placed *in writing and transmitted to the employe.* ***Such a decision may or may not include the imposition of discipline if found guilty. The investigation may have been conducted by one not authorized to impose discipline and such action may be taken by the proper official on the basis of the decision mentioned . . .*** " (Emphasis ours).

In short, much depends upon what procedure is prescribed in the governing rule of the agreement. It is a well-known fact that in administering discipline which involves either discharge or suspension, many companies require the lower eschelon officials to check with higher officers before imposing a final penalty of such severity. Such may be considered good personnel practice. The one thing which most of the cited awards bears out is that one man should not, at the same time, act as prosecutor, jury and judge. Especially necessary is some appeal from the decisions of those who make the initial determination in such matters.

In the case now before us, it was Mr. Collins who, according to the rules agreement, notified Claimant within the prescribed 30 days what penalty

was being assessed. Since he was the one who conducted the investigation, this technical objection, raised by the General Chairman at the investigation, does not appear to be well-founded.

The pertinent language is found in Rule 8 (b) as follows:

> "Employes who are covered by these rules whose applications for employment are approved and who have established a roster standing as stipulated in Rule 4, shall not be disciplined by record, suspended (except pending investigation) or dismissed without proper investigation. Investigation shall be held as promptly as circumstances will permit, the employes being notified in advance of the charge and the time of the investigation.
>
> Such employes may have representatives and witnesses of their own choice (except discharged employes) present. Copy of employe's statement when taken in writing will be furnished to the employes on their verifying and signing same.
>
> The right of appeal through the regular channels to the Chief Operating Officer designated is conceded. However, appeals from decisions rendered must be made within thirty (30) days. All decisions concerning grievances progressed in the regular manner will be made in writing, if requested.
>
> Any employe disciplined, suspended or dismissed, who, after a fair investigation is found blameless, shall be reinstated without loss of seniority and compensated for any wage loss, less amount earned in other capacities."

Further technical objection was raised on the Carrier's side regarding the fact that the statement of claim failed to specify the rule allegedly violated. But quite obviously the claim that discipline was "assessed in violation of effective Agreement" could only have reference to the above-quoted Rule 8 (b). Also, there is some confusion as to the proper date of the pertinent Agreement. However, it is clear to us that the Rules Agreement of May 1, 1945, is the one referred to in the claim.

Apart from these technical objections, we come to the further question as to whether Claimant was given a fair hearing and whether there is proper proof in the record to justify the penalty imposed by Carrier. There is no evidence to justify the disciplinary action other than the letter from one not present to testify and be cross-examined. Nor was there any investigation to determine what manner of man the writer of the letter is, or was on the evening of December 22, 1955. Certain things are quite obvious from his statement: He was first unhappy over the fact that he could not get his drinks soon enough to suit him; and secondly, he was most unhappy that the Waiter-in-Charge would not extend the serving of drinks beyond the scheduled closing time, which was several hours after he boarded the train and began demanding service. And finally, while there is no evidence in the record that the writer of the letter was an invalid, we note that he considered himself mistreated when the Waiter-in-Charge would not have his breakfast served in his bedroom. Quite obviously, the writer of this letter considered himself a man of importance, for whom special service should be provided.

In short, there is no proof before us that the letter writer was a businessman, reputable or otherwise. And, in the words of Referee Shake,

"Assuming that he was, we know of no principle that would require that more weight be given to his statements than to those of a trusted Pullman porter. Business success does not create any presumption of good reputation for truth and veracity; nor does the fact that a man occupies a humble station in life justify the conclusion that he is not to be believed." Award 2634

The Carrier has called our attention to the fact that a previous passenger complaint had been made of poor treatment by Claimant Hicks. But we note that this earlier complaint was made some eight years before the incident of December 22, 1955. For a man whose duties are those of Waiter-in-Charge of a car where drinks are served, this is a remarkably good record, not a poor one. Anyone who has spent much time travelling in accommodations of this kind has seen the travelling public at times in good spirits; but not infrequently there is someone who feels himself aggrieved. There are those among such passengers who are prepared to make trouble for anyone who does not readily subscribe to their views. And the most frequent victim of their ill temper is likely to be the one whose duty and responsibility it is to keep an orderly place.

While the letter now before us is evidence, it is by no means conclusive without some corroborative evidence to support it. It should not be accepted as controlling against the testimony of a long-trusted and perhaps long-suffering servant of the travelling public. People travelling sometimes make unreasonable demands. And it is evident from the contents of this letter that the writer was making such demands. To accept this on its face as wholly credible, as the Carrier has done, would be to establish a dangerous precedent.

As we said in Award 7812:

"Written statements, submitted in lieu of witnesses or oral testimony, have often been accepted as evidence by this Board. Such statements are taken for what they are worth and usually require some corrboration in the form of circumstantial or other supporting testimony. Here we have none . . . .

While we are reluctant to substitute our judgment for that of management in discipline cases, it is our duty and responsibility to see that punitive actions are for proper cause and are supported by substantial evidence, not a mere allegation of one disgruntled passenger. After a careful examination of the record in this case we can only conclude that the disciplinary action taken was arbitrary, unreasonable under the circumstances and without just cause."

Governing Rule 8 (h) has been violated.

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 Employe involved in this dispute are respectively Carrier and Employe 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.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 19th day of October, 1961.

DISSENT TO AWARD NO. 10128—DOCKET NO. DC-9476

Since Award 10128 is not based on the issues wherein it came to this Board nor on an objective consideration of the facts contained in the record, it is in error and we dissent.

After holding that the "two reasons" advanced by the Organization in presenting this claim to the Board had no merit, the Referee proceeded to sustain the claim on speculation and conjecture concerning the character of the complaining patron.

A mere reading of the patron's letter as set forth in the Opinion demonstrates that not only are the Referee's assumptions totally unwarranted but are downright insulting. The Opinion also manifests insistence to hold that room service of meals is limited to invalids although it is common knowledge to even the occasional traveler that such service is open to all who desire it.

For the foregoing reasons we dissent.

/s/ R. A. Carroll

/s/ P. C. Carter

/s/ W. H. Castle

/s/ D. S. Dugan

/s/ J. F. Mullen