

Award No. 11975
Docket No. DC-11643

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Joseph S. Kane, Referee

PARTIES TO DISPUTE:

JOINT COUNCIL DINING CAR EMPLOYEES, LOCAL 370

**THE NEW YORK, NEW HAVEN AND HARTFORD
RAILROAD COMPANY**

STATEMENT OF CLAIM: Claim of Joint Council Dining Car Employees, Local 370 on the property of the New York, New Haven and Hartford Railroad Company, for and on behalf of Cook James James, that he be allowed to exercise seniority as Second Counterman and compensated for net wage loss since June 1, 1958, account of Carrier arbitrarily demoting claimant in violation of the agreement.

EMPLOYEES' STATEMENT OF FACTS: Claimant, regularly assigned as Second Counterman on Carrier's trains 174-175, was notified on or about June 3, 1958 that he had been disqualified for work as Second Counterman on these trains account of a report received by Carrier on June 1, 1958 from dining car Steward Cousins. (Transcript page 1).

Under date of June 9, 1958, Employees protested claimant's unilateral and arbitrary demotion and requested that a hearing be held in accordance with the requirements of schedule Rule 17. (Employees' Exhibit A.) Carrier summoned claimant to its office on July 9, 1958 for a so-called "investigation", at which he was interrogated with reference to the subject matter of Steward Cousins' report. (Transcript page 1.) Steward Cousins also testified at this "investigation". Organization's Local Chairman, although invited, declined to cross examine Steward Cousins on this occasion, stating, in effect, that he would wait for written charges and formal hearing; that he was not prepared to adequately defend claimant until he was apprised of what claimant was being charged with, and that, as a consequence, would not inject himself into the "investigation". (Transcript page 13.) Stenographic record was taken of the entire proceedings.

On July 21, 1958, Carrier held "formal hearing" or "Second investigation" or supplemental proceedings to original investigation, pursuant to which claimant was charged with:

- "1. Poor service as second counterman.

employ and reduce the undue pressure on his abilities by restricting him to Third Cook duty, thus relieving him of any further frustration. Carrier has a duty to the individual employe and to the public which it serves. We submit that, based on the whole record, Carrier took the only reasonable action possible. Carrier was well aware that disciplining this employe for failure to follow proper instructions was not the answer. The only just (not only for the Carrier, but for Mr. James personally) and reasonable solution that could be reached was to restrict Mr. James to a position consistent with his temperament and capabilities.

Carrier's action was neither unjust, arbitrary, or unreasonable and should not be disturbed.

The claim should be denied.

All of the facts and arguments used in this case have been affirmatively presented to Employees' representatives.

(Exhibits not reproduced.)

OPINION OF BOARD: On June 1, 1958 the Claimant, a Second Counterman on Diner train 175 between Boston, Massachusetts and Washington, D.C., was engaged in a controversy with the Steward over his failure to get orders out, losing two checks in the garbage cans and refusal to permit a replacement at the counter.

The Dining Car Manager ordered the Claimant to report to him on June 3, 1958 in order to determine responsibility. The Claimant failed to appear and as a result was demoted to dishwasher.

On July 9, 1958 a preliminary investigation was held at the request of the Local Chairman who in letter dated June 9, 1958 stated:

* * * * *

"We understand that you have arbitrarily removed James James from his position as Second Counterman. . . ."

* * * * *

"We request a full hearing and we will at that time show and prove why Steward Cousins is prejudiced against James James. We are prepared to prove incidents that have caused this dissatisfaction. . . ."

The charges against the Claimant were:

1. Poor service as second counterman.
2. Failure to follow instructions of steward and first counterman.
3. Threatening to hit steward in face.

Formal hearing was held on July 21, 1958 at which time the Claimant was found guilty of charge one and two, charge three was dismissed and his demotion to dishwasher was sustained.

The issue presented herein is: Was the Claimant demoted arbitrarily and in violation of the Agreement?

The Claimant contends that Rule 17 — Discipline provides that he be kept in service until after the hearing and decision rendered determining his guilt or innocence. He was demoted to dishwasher June 3, 1958 prior to the hearing of July 21, 1958.

"RULE 17 — DISCIPLINE

"... employees who have been in the service over ninety (90) days will not be suspended or dismissed without a fair and impartial hearing; ..."

It is the Carrier's contention that Rule 17 expressly provides for situations where a suspension or dismissal exists, whereas herein the Claimant was demoted and Rule 18 applies, the grievance rule.

"RULE 18 — REPRESENTATION AND APPEALS

* * * * *

"Should an employee have any grievance with respect to any matter covered by this Agreement, other than discipline, the employee affected or the duly accredited representative on his behalf may within thirty (30) days present the case in writing to the employee's immediate superior. ..."

In support of this contention the Carrier offers letter dated June 9, 1958 from the Local Chairman which has been quoted above and appears to crystalize the situation at the time of the incident.

This letter indicates that the Local Chairman proceeded under Rule 18, by considering a demotion and hearing as the proper course to pursue. In addition, the Carrier contends that discipline was not involved due to the fact that the Claimant was demoted because of his inability to perform the work of Second Counterman. However, under Rule 18 if the Claimant was of the opinion he could do the work, he had a grievance and should and did proceed under Rule 18 as the Local Chairman's letter of June 9, 1958 indicated he was doing. That discipline refers to misconduct rather than inability to do the work and provided for in Rule 17.

Upon an examination of the entire record and briefs submitted we are of the opinion that the contention of the Carrier should be upheld and that Rule 18 applies rather than Rule 17, as the Claimant was not suspended or dismissed as provided therein but demoted and thus protected by Rule 18 which was applied. Furthermore, the Claimant had a full hearing as provided under Rule 18.

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 Employees involved in this dispute are respectively Carrier and Employees 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: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 13th day of December 1963.