

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Bernard J. Seff, Referee

PARTIES TO DISPUTE:

JOINT COUNCIL DINING CAR EMPLOYEES
(Local 495)

THE CHESAPEAKE AND OHIO RAILWAY COMPANY
(Chesapeake District)

STATEMENT OF CLAIM: Claim of Joint Council Dining Car Employees Local 495, on the property of The Chesapeake and Ohio Railway Company, for and on behalf of Waiter Robert E. Kenner, that he be restored to service and compensated for net wage loss with seniority and vacation rights unimpaired account of Carrier dismissing Claimant from service on January 4, 1962, in abuse of its discretion and in violation of the Agreement.

OPINION OF BOARD: This is a discipline case involving the dismissal of Dining Car Waiter Robert E. Kenner for molesting a woman passenger on Carrier's Train No. 3 at Charlottesville, Virginia, shortly after 1:00 A.M., on December 27, 1961.

The passenger, Mrs. Phyllis T. Contee, said that Kenner put his hand on her and put his hand under her dress. Kenner said he saw the woman, apparently asleep, thought he recognized her and put his hand on her shoulder to request that she move over so he could sit alongside her since there were no other unoccupied seats in the coach. Another passenger in the coach, Mr. W. H. Baker, told the Conductor that he had heard Mrs. Contee scream and had seen Kenner leaning over the seat occupied by the woman. Thereafter, Conductor Glover and Porter Johnson, accompanied by the Complainant, located Kenner where Mrs. Contee identified Claimant and repeated her accusation against him. The Conductor, Porter, woman and Mr. Baker all signed statements setting forth what each either knew or had been told about the episode. The Chief Special Agent and Inspector Pugh later contacted Mrs. Contee, who related her version of the affair. Investigation was held on January 4, 1962, at which Kenner was represented by the General Chairman; the Conductor, Porter, Chief Special Agent and Inspector appeared as witnesses against Kenner, but neither Passenger Baker nor the Complainant were present. Following the investigation Kenner was dismissed from service. It is significant that Kenner had an eighteen year service record with no previous charges against him.

The record shows that after the occurrence of the incident Kenner made a number of visits to the Complainant urging her not to press charges against

him, although he was told by the Conductor not to bother Mrs. Contee. These visits are understandable in view of the fact that the Claimant knew the charge was serious and if sustained might result in the loss of his job.

An appraisal of the evidence shows that the Conductor, Porter, Special Agent and Inspector had no first hand knowledge of the incident. The testimony offered by them merely reiterated what was told to them by Mrs. Contee. Such testimony is not evidence, but is merely hearsay. Passenger Baker also had no personal knowledge of what transpired. He said that he heard the woman scream and saw Kenner leaning over her seat.

The only people who had direct knowledge were Mrs. Contee and Kenner. Kenner flatly denied that he had placed his hand under the woman's dress. This Board is mindful of the Carrier's responsibility to assure passengers of a safe, peaceful and unmolested trip. It is difficult to imagine a more serious complaint lodged by a passenger against an employe of the Carrier. If such an accusation was supported by substantial evidence, it would clearly constitute the basis of an immediate dismissal.

The sole issue in the case is whether there was substantial evidence in the record to support the discipline imposed.

As has been stated supra, none of the Carrier's representatives had personal knowledge of the incidents alleged to have occurred. Their testimony was hearsay and of no probative value. Mrs. Contee did not appear at the investigation and therefore her credibility could not be tested in the crucible of cross-examination. The Claimant categorically denied the charge. In order to sustain its action the Carrier had the burden of proof which must have been established by a preponderance of the evidence. In the posture of the case as presented, the story told by Mrs. Contee was cancelled out by Kenner's denial. Thus, the Carrier failed to sustain its burden of proof. Over against the statements of a passenger whose credibility is unknown, there is the denial of an employe who has had an unblemished record of 18 years of service. Under our analysis of the facts and the evidence the Carrier's dismissal of Kenner was not based on substantial evidence, was therefore arbitrary, and must be set aside. We are aware of Award No. 11342 wherein, on a substantially similar state of facts, the claim was denied. In our opinion this decision does violence to the accepted legal evaluation of what constitutes substantial evidence sufficient to sustain the Carrier's burden of proof. A Carrier's burden of proving its case by substantial evidence is not satisfied by hearsay and an uncorroborated signed statement.

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 the Board finds no substantial evidence sufficient to justify the discipline imposed by the Carrier.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 27th day of February 1964.

CARRIER MEMBERS' DISSENT TO AWARD NO. 12252,
DOCKET NO. DC-14161

Award 12252 is palpably erroneous in sustaining the claim herein. It is inimical to the public interest and is based upon unsound conclusions concerning the evidence of record.

Carriers have a legal and moral responsibility to the public to discipline and to exclude the unfit from their service. In *M.St.P.&S.S.M. Ry. Co. vs. Rock*, 279 U.S. 410, the Supreme Court of the United States said:

"The carriers owe a duty to their patrons as well as those engaged in the operation of their railroads to take care to employ only those who are careful and competent to do the work assigned to them and to exclude the unfit from their service."

In *T. & N.O. R. Co. vs. Ry. Clerks*, 281 U.S. 548, the Supreme Court said:

"The Railway Labor Act of 1926 does not interfere with the normal exercise of the right of the Carrier to select its employees or to discharge them."

In Award 4771 this Division held:

" * * * Upon the management rests the obligation of safe operation of the railroad, the courteous treatment of its patrons and the working conditions of its employees. To maintain that obligation it is necessary that Carrier have the right for proper cause to discipline and to discharge. * * *"

The record shows that in the instant case the Carrier had proper grounds to discharge the Claimant. It shows that shortly after the Claimant boarded Carrier's passenger train at Charlottesville, a woman passenger approached the train porter with the complaint that a man had entered her coach at Charlottesville and had molested her. The train porter immediately contacted the conductor. The conductor and the train porter accompanied the woman passenger to other portions of the train to see if the man who had molested her could be found. When they came to the coach in which the Claimant was riding, the passenger immediately pointed out the Claimant and stated to him, in the presence of the conductor and the train porter, "You are the man that came back and put your hand on me and put your hand under my clothes and I am positive and not mistaken."

The conductor, the train porter, the woman passenger and the Claimant then returned to the coach where the passenger had been riding, and another

passenger, later identified as W. H. Baker, stated to the conductor that he had heard the woman passenger scream and that he had seen the Claimant leaning over the seat occupied by her.

At the investigation a written statement was entered into the record, signed by the woman passenger, giving full details of the occurrence, her identification of the Claimant, etc. The Carrier's Chief Special Agent and the Inspector of Special Agents testified as to their interview with the passenger, as well as their interview with the Claimant. The train porter testified as to the woman passenger's complaint, and of being present when she pointed out the Claimant as being the person who had molested her. The conductor testified as to being advised of the complaint, of the passenger's identification in his presence of Claimant as the person who had molested her; that passenger Baker had stated to him that he (Baker) had heard the woman passenger scream and that he had seen the Claimant leaning over her seat; of his warning Claimant a number of times not to bother the passenger further, and, finally, telling him that unless he returned to his own seat, he would be removed from the train.

The Referee apparently reached the conclusion that because the passenger was not present at the investigation, her statement should be ignored because "her credibility could not be tested in the crucible of cross-examination." This Division has, in a legion of awards, consistently held that written statements are admissible as evidence in disciplinary investigations without the writer being present. Some of the many awards adhering to this principle are: 2770 (Parker), 2793 (Shake), 2978 (Douglas), 3125 (Youngdahl), 4865 (Kelliher), 4976 (Boyd), 6067, 6185 (Wenke), 7139, 7140 (Cluster), 6866 (Parker), 7863, 7866 (Smith), 8334 (Shugrue), 8987 (Johnson), 9311 (Schedler), 9455 (Grady), 9624 (Begley), 10595, 10596 (Hall), 11237 (Sheridan), and 11342 (Stark). Many of the awards were written by judges and others most learned in the legal profession.

The signed statement of the passenger, which was properly admissible at the investigation, together with the statements of the conductor, the train porter, the Chief Special Agent, and the Inspector of Special Agents constituted substantial evidence to support the charge against the Claimant. The Division has consistently held that it will not attempt to pass upon the credibility of witnesses, or to weigh the evidence, but if the evidence is such that, if believed, it supports the findings of the Carrier, the Carrier's action will not be disturbed. (Awards 10791, Ray; 3149, Carter; 2633, Shake; 3127, Youngdahl; 5861, Jasper; 7139, 7140, Cluster; 9046, Weston; 9322, Johnson; among others.)

Under sound and well established principles consistently adhered to by this Board, and considering the serious nature of Claimant's offense, the claim should properly have been denied.

For the foregoing reasons, we dissent.

P. C. Carter
D. S. Dugan
W. H. Castle
T. F. Strunck
G. C. White