Award No. 14267
Docket No. PM-15361

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Don Hamilton, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF SLEEPING CAR PORTERS
(For and in Behalf of R. L. Harden)

CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: * * * for and in behalf of R. L. Harden who is now, and has been for several years past, employed by the Chicago, Rock Island and Pacific Railroad Company as a sleeping car porter.

Because the Chicago, Rock Island and Pacific Railroad Company did, through General Superintendent M. H. Bonesteel, Dining and Sleeping Cars, take disciplinary action against Mr. Harden, under date of October 9, 1964, in which he was given an actual suspension of ten (10) days without pay allegedly for violation of Rule "N" of the General Notice and General Rules of the Rock Island Road.

And further, because this disciplinary action was based upon a charge, or charges, that were not proved and the action taken by the Chicago, Rock Island and Pacific Railroad Company in this instance was unjust, unfair, arbitrary, harsh, cruel and in abuse of the Company's discretion.

And further, for the record of Mr. Harden to be cleared of the charge in this case and for him to be reimbursed for the pay loss he suffered as a result of this unjust action, as provided for under the rules of the Agreement governing the class of employes of which Mr. Harden is a part.

OPINION OF BOARD: Claimant was assigned as a sleeping car porter on Train No. 17, July 30, 1964. A report was made to the Chicago, Rock Island and Pacific Railroad Company by two operatives, Irene and Wallace Ouderkirk, employes of the E. M. Burch Company, concerning their observations while acting as customers in the dining car of said train.

As a result of said report the following letter was transmitted to Claimant:

"CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY

Dining and Sleeping Car Department

M. Bonesteel
General Superintendent

J. S. Antink
Assistant Superintendent

164 West 51st Street
Chicago 9, Illinois

September 9, 1964
File: PR-8450
PR-SC-9214

REGISTERED — RETURN RECEIPT REQUESTED

Mr. E. C. Cave
2112 Pillsbury Ave., So.
Minneapolis, Minnesota

Mr. R. L. Harden
524 Carrell
St. Paul 3, Minnesota

Gentlemen:

You are hereby notified that an investigation will be held for and in your behalf at Minneapolis, Minnesota, Tuesday, September 15, 1964 at 9:00 A. M., C. S. T. in the Conference Room of the Milwaukee-Rock Island Passenger Depot to develop the facts, discover the cause and determine your responsibility, if any, in connection with a report received in this office on September 1, 1964 that on July 30, 1964 while you were on Dining Car 421, Train 17, arriving Kansas City, Missouri, certain food items were permitted to be served to a Sleeping Car Porter which were received by him without benefit of a properly prepared DC-23 Meal Check to cover service of this Trainman's meal. Also, on checking reports prepared covering the operation of Dining Car 421 for the above date, it was found that no remittance was made for this trainman's meal, thereby depriving this Carrier of revenue in violation of that part of Rule N of the General Notice and General Rules, Form G-147 which reads as follows:

> 'Employes who are . . . dishonest . . . will not be retained in the service.'

or the violation of any other rule in connection therewith.

Please arrange to be present with your respective representatives and any such witnesses you may desire as provided for in your Agreements presently in effect with this Carrier.

Yours truly,

General Superintendent
Dining and Sleeping Cars

cc: Mr. L. O. Tengblad
Mr. M. P. Webster."

The investigation, originally scheduled for September 15, 1964, was continued by agreement on September 11, 1964 to be held on a subsequent date which was to be agreed upon by the participants. Thereafter and on September 16, 1964, the investigation was scheduled for September 24, 1964. Thereafter and on September 24, 1964, the investigation was postponed on account of the illness of a witness for the Carrier, until September 29, 1964.

The investigation was conducted on September 29, 1964 and thereafter, and on October 9, 1964 Claimant was suspended from service for 10 days, by the Carrier.

This claim was processed to this Board on three premises:

(1) That Rule 23 of the existing agreement was violated when Carrier assessed disciplinary action against Claimant without apprising him of the charge against him before the investigation was held, and

(2) That the "charge" that came out of the investigation and on which Carrier based its disciplinary action was not substantiated, and

(3) That the disciplinary action was "unjust, unfair, arbitrary, harsh, cruel and an abuse of discretion."

In considering the first assignment of error we must look at Rule 23. Paragraph 2 of Section (b) reads:

> "An employe who is not held out of service pending a hearing will within a reasonable time before the investigation is held, be apprised in writing of the charge against him."

The notice printed above leaves much to be desired. It is beyond our imagination why Carrier cannot be more explicit and say what it means in these discipline cases. We have held many times that all we require is that the employe be made aware of the charges pending against him so that he may properly defend himself against such charges. The burden of preparing his defense is ample responsibility for the employe. He should not have the additional burden of constructing a charge out of a paragraph of meaningless words and phrases.

In applying the usual test to this case, we find that the Carrier managed somehow to meet the most minimal standards possible to advise Claimant that something was amiss. The fact that the charge includes the offense of receiving food contrary to the rules, is the only thing that keeps this so-called notice from being nullified as violative of due process of law.

We therefore find ourselves in sympathy with the first assignment of error, but we believe that the letter gave Claimant enough idea of the existing problem to let him prepare his defense to the charges.

The second assignment of error is that the charge which came out of the investigation was not substantiated. This question involves a matter of fact. The record indicates that all of the witnesses in this case cannot be reporting the facts as they occurred. However, we are not to weigh the evidence in these

cases. We do not have the witnesses before us, and we have no way of knowing how truthful or accurate their memory actually appears.

We hold that the Carrier established a prima facie case which was not successfully refuted by the Claimant. Therefore we do not find error number two valid.

Error number three concerns an alleged abuse of discretion on the part of Carrier in applying a ten day suspension to the Claimant. Carrier asserts that it has proven a case of dishonesty. (The Organization says if in fact this were the case, the employe would have been dismissed instead of suspended).

We have held that the Carrier submitted the fundamental elements of the allegations and we are therefore of the opinion that a 10 day suspension is not an abuse of discretion.

One problem which concerns us in this case is the question of the veracity of the witnesses. The Carrier says we cannot determine that because the witnesses are not before us. Yet, it is possible to conclude from this record that the Carrier officer who made the decision in this case, did not see the witnesses either.

On page 16 of Exhibit E, the hearing officer said:

> "It is not for me to judge, I merely am attempting to develop the facts so that the reviewing officer can determine as to whether or not a company regulation was violated."

And Exhibit H, a letter from Mr. Mallery to Mr. Webster, makes reference to "Superintendent Bonesteel, before reaching his decision in this case."

We believe that there is sufficient reasonable doubt to allow us to think that the officer who handed down the decision in this case was not the officer who heard the case, and therefore he doesn't know anymore about the truthful appearance of the witnesses than do we or anyone else. However, this was not raised on the property or in the submission or argument to this Board. Therefore, the question is not properly before us in this case.

It should be noted however, by the Carrier, that we expect the officer who hears these cases, to make a written recommendation to his superior as to his findings of fact and suggestions of proposed action, if in fact he does not actually make the final decision.

Now, no doubt, a good portion of this opinion will be brushed aside by some as "dicta." We would suggest however, that the Carrier could avoid many problems if it would pay attention to the thoughts enunciated in these rather difficult situations involving discipline.

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 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 24th day of March 1966.

Keenan Printing Co., Chicago, Ill. Printed in U.S.A.