Award No. 16888
Docket No. DC-17486

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Jerry L. Goodman, 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 Employes Local 849 on the property of the Chicago, Rock Island and Pacific Railroad Company, for and on behalf of

(1) Waiter-In-Charge B. T. Moore, that he be restored to service with seniority and vacation rights unimpaired and compensated for net wage loss account of carrier dismissing claimant from service on April 27, 1967;

(2) Porter-Waiter M. A. Wilson, that he be compensated for net wage loss with seniority and vacation rights unimpaired account of carrier suspending claimant from service for sixty days on April 27, 1967; and,

(3) Chef Grannerson Reames, that he be compensated for net wage loss with seniority and vacation rights unimpaired account carrier suspending claimant from service for thirty days on April 27, 1967,

each of which actions by the carrier were in violation of the Agreement and in abuse of its discretion.

OPINION OF BOARD: Discipline was assessed against each of the Claimants after formal investigation pursuant to notice reading in material part as follows:

". . . while you were assigned as Waiter-in-Charge, Porter-Waiter and Chef respectively to club diner 426, Train 17, January 18, 1967 you served and/or permitted to be served, food items to passenger within the club diner and that you made collections and/or permitted collections for these items without having first issued a DC-23 meal check to cover as was determined on checking reports for club diner 426 for the date in question, thereby depriving this Carrier of revenue therefrom which is in violation of Rule 'N'. . . ."

The Organization seeks a sustaining award on the theory that the Agreement has been violated because of:

"1. Carrier's failure to hold the investigation within fifteen (15) days from the date its General Superintendent Dining Cars had knowledge of the offense.

2. Carrier's failure to furnish Employes a copy of the reports which formed the basis of the charge prior to the investigation as requested by Employes."

The provision of the Agreement to be considered in connection with Organization's first contention is Rule 11. Discipline and Grievances, subparagraph (d) which provides:

"Investigation shall be held within fifteen (15) days from the date the General Superintendent Dining Cars, has knowledge of the offense . . ."

In support of its first contention, the Organization argues: that the alleged offense occurred on January 18, 1967, that reports concerning the alleged offense were mailed to the Superintendent of Dining Car Department on January 19, 1967, that the reports bear a stamp showing they were received by Carrier February 24, 1967; therefore, the General Superintendent Dining Cars had knowledge of the offense as of February 24, 1967 and should have scheduled the investigation within fifteen days from that date.

However, the reports bear another stamp indicating they were received by the General Superintendent Dining Cars on March 6, 1967. Moreover, the General Superintendent Dining Cars testified that March 6, 1967 was the date on which he actually received the reports.

Other than the evidence of the dates the reports were mailed to and received by someone for Carrier, Organization has introduced no evidence to show when the General Superintendent Dining Cars actually received said reports and thereby had knowledge of the offense.

Thus, Organization has failed to meet its burden of proving that the General Superintendent Dining Cars had knowledge of the offense more than fifteen days before the date of the investigation.

Consequently, Organization cannot prevail on its first contention. See Award 14187 (Harr).

In support of its second contention, Organization argues that Claimant was denied a fair and impartial hearing when Carrier refused Organization's request that the letter be furnished with copies of the reports of the offenses prior to the investigation.

However, Organization cites no rule or provision in the Agreement which confers upon any employe a right to such pre-investigation discovery. Moreover, we note that the author of the reports of the alleged offense was present during the investigation and was ably cross-examined by the Employes' representative. Thus, Organization cannot prevail on its second contention. See Awards 13670 (Weston), 13671 (Weston), 14069 (Rohman), 14187 (Harr), 15927 (Ives).

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

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 January, 1969.

LABOR MEMBERS DISSENT TO AWARD 16888, DOCKET DC-17486

This Award is in error as it writes a new rule into the Agreement. The reports on Claimant were received by the Carrier February 24, 1967 and checked February 27, 1967. Carrier's General Superintendent Dining Cars claims no knowledge of the alleged offenses until March 6, 1967.

As this Board held in Award 16031:

> "We therefore find that Carrier was responsible for the delayed delivery of the message in time for its proper use by the Cincinnati District Office at the beginning of the sign-out period."

Thus this Board has written a new rule simply stated, if the Carrier delays proceedings, the delay is acceptable.

It is hard to believe that this is the intent of Rule 11(D). If it is important enough to place secret operatives on trains, it would only be logical to see that the General Superintendent receive their reports promptly.

For this reason I dissent.

George P. Kasamis
Labor Member

CARRIER MEMBERS' REPLY TO LABOR MEMBERS' DISSENT AWARD 16888, DOCKET DC-17486

Contrary to the dissenter's contention that this Award conflicts with the intent of Rule 11(d) and writes a new rule, the Award properly gives effect to the plain intent of Rule 11(d).

The rule plainly states that an investigation shall be held within fifteen days from the date the General Superintendent Dining Cars has knowledge of the offense. All of the evidence on the point indicates the said Superintendent did not have knowledge of the involved offense until March 6, 1967. Carrier scheduled the investigation for March 17, 1967, hence it was scheduled within fifteen days.

The Employes asked the Board to apply a different rule. They argued in their submission that they —

> ". . . objected to the investigation because it had not been scheduled within fifteen (15) days from the date carrier received notice of the alleged offenses . . ."

Thus, in prosecuting this claim the Employes were frankly seeking a decision that would have had the effect of amending Rule 11(d) by substituting the words "the date Carrier received notice" for the words "the date the General Superintendent Dining Cars, has knowledge." This Board has no jurisdiction to thus change the agreement.

In Award 14187 (Harr), which involved these same parties and agreement and the same contentions of the Employes, this Board recognized the obvious fact that Rule 11(d) requires knowledge on the part of said Superintendent, not merely notice to other Carrier representatives; and to prove a violation of the fifteen day provision the Employes must show that said Superintendent had actual knowledge of the offense more than fifteen days before the date the investigation is scheduled to commence.

While ignoring Award 14187, which is directly in point and controlling, the dissenter quotes out of context from Award 16031, which involves a tardy work assignment and is expressly based on a rule that provides assignments "shall be made by Management as early as possible . . ." Certainly a finding that unreasonable delay of Management in making a work assignment violated that rule is irrelevant.

It should further be noted that even if Carrier had been tardy in scheduling the investigation, that fact alone would not have justified a decision avoiding all discipline for the offense committed. See Award 16172.

G. L. Naylor
P. C. Carter
R. E. Black
W. B. Jones
G. C. White

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