NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 19748
THIRD DIVISION Docket Number CL-19726

Irwin M. Lieberman, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks, (Freight Handlers, Express and Station Employes
(George P. Baker, Richard C. Bond, Jervis Langdon, Jr., and (Willard Wirtz, Trustees of the Property of (Penn Central Transportation Company, Debtor

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-7083) that :

(a) The Carrier violated the Rules Agreement, effective February 1, 1968, particularly Rule 6-A-1, when it assessed discipline of dismissal on A. H. Harris, Usher, Pennsylvania Station, New York, N.Y., Metropolitan Seniority District.

(b) Claimant A. H. Harris's record be cleared of the charges brought against him on July 17, 1971.

(c) Claimant A. H. Harris be compensated for wage loss sustained during the period held out of service.

OPINION OF BOARD: Claimant, en Usher et Pennsylvania Station in New York, was working a regular shift of from 6:45 A.M. to 2:45 P.M. on Saturday June 26, 1971. In a letter dated July 6, 1971 a patron wrote to the President of the Carrier stating that on June 26, 1971 he had been abused and discourteously treated by Claimant after he had asked whether the train on Track 11 was the train for Boston. By letter dated July 17, 1971 Claimant was notified to attend an investigation on July 21, 1971, in connection with the following charges:

"1. With your activities while working es Usher at or about 2:00 P.M., Saturday, June 26, 1971 at Pennsylvania Station, New York, N.Y. in that you were discourteous by "sing profane language to a patron of the Company in violation of Rule 3, of the General Rules For Employes Not Otherwise Subject to the Rules for Conducting Transportation.

2. While on duty as Usher at or about 2:00 P.M., Saturday, June 26, 1971 at Pennsylvania Station, New York, N.Y. you acted in such manner es to bring discredit upon the Company in violation of Rule 8, of the General Rules for Employes not Otherwise subject to the Rules for Conducting Transportation."

On July 23, 1971, following the investigation, Claimant was dismissed from service. Subsequently, as a matter of leniency because of 26 years of service, Carrier reduced the discipline to suspension and returned Claimant to service on August 20, 1971.

The transcript of the investigation reveals that the only testimony was that of the Assistant Station Master, the Claimant and the letter from the customer. The letter, taken at face value, indicates that some employee of Carrier was discourteous and abusive; this employee was later identified for the patron by the Assistant Station Master, based on work location or assignment. The Assistant Station Master could only testify on his conversation with the customer - and presumed identification. The testimony of Claimant, unrefuted, indicated that he was not on the platform in question at the time of the incident and of course denies participation in any incident with a customer on that day.

Petitioner raises the issue of the admissability and propriety of the passenger's written statement, in view of the fact that no cross examination or confrontation was possible. Though we feel that it is highly desirable for the "accuser" to be present at an investigation such as this, we recognize that it is not always possible. However we have said (Award X13464):

> "There is no question that the Carrier may use written passenger's statements in considering the imposition of disciplinary penalties. However, in doing so it runs the risk of challenge if the passenger's statements are unsupported by other evidence, or if they fail in the light of testimony by witnesses at the disciplinary hearing."

It should be noted, however, that this Board has rarely ruled on a disciplinary matter where the only evidence in support of the charge was a written statement from one passenger, with no corroboration whatever. The Carrier has emphasized, properly, its concern with service and courtesy to its patrons, and its concomittant responsibility to impose discipline. In this case, however, several serious omissions appear, in view of these concerns. It is difficult to understand why Carrier made no attempt to make a positive identification on the day of the incident; it is also somewhat incredible, in view of the concerns above, why Carrier made no attempt to even discuss the matter with Claimant, until after the complaining letter addressed to Carrier's Resident was received and the charge was served. Further, in view of the seriousness of the charge, and potential remedy, the Carrier must do its best to secure the attendance of the complaining patron; in this instance, at least a letter should have been sent, not merely unsuccessful phone calls.

A careful review of the transcript reveals that there is insufficient evidence to support Carrier'8 conclusions. There is substantial doubt as to the identity of the employee involved in the incident (see Award 2797) and we do not find that the weight of probative evidence can support the charge or the Carrier findings. For these reasons we find that Claimant did not have a fair and impartial investigation as required by the Agreement and he shall be made whole in accordance with Rule 6-A-l(h) of the Agreement.

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 violated.

A W A R D

Claim sustained (in accordance with Rule 6-A-l(h)).

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 11th day of May 1973.