NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 21017

THIRD DIVISION Docket Number CL-20885

Irwin M. Lieberman, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes

(Robert W. Blanchette, Richard C. Bond, and John H. McArthur, Trustees of the Property of Penn Central Transportation Company, Debtor

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-7674) that:

(a) The Carrier violated the Rules Agreement., effective February 1, 1968, particularly Rule 6-A-1, when it assessed discipline of 15 days suspension, later reduced to 5 days on appeal, on Claimant R. W. Flight, Ticket Clerk at the Carrier's 30th Street Ticket Office, Philadelphia, Pennsylvania, Eastern Region, Philadelphia Commuter Area.

(b) Claimant R. W. Flight's record be cleared of the charges brought against him on May 18, 1973.

(c) Claimant R. W. Flight be compensated for wage loss sustained during the period out of service.

OPINION OF BOARD: This is a discipline dispute in which Claimant, a Ticket Clerk, was given a fifteen day suspension, later reduced to five days, for allegedly refusing to sell a commutation ticket to a passenger and being rude to that passenger.

Petitioner's position is essentially that Carrier has not met its burden of proof in this case, since it did not establish evidence of the alleged refusal to sell and no evidence whatever with respect to discourteous treatment. Further, Petitioner objects to the fact that the conclusion of guilt and assessment of penalty was rendered by a person other than the Officer who conducted the hearing.

With respect to the procedural issue, Carrier asserts that it is its practice to have the hearing officer's review of the facts and his recommendation passed to another officer for concurrence and issuance of the final verdict, which took place in this dispute. It is noted that the issue of the signator of the finding was not raised on the property. Additionally, there is nothing in the Agreement that prescribes who shall prefer the charges, conduct the hearing or who must render the decision and assess the discipline. This Board has dealt with this issue on numerous occasions and we do not concur in Petitioner's objection (see Awards 16347, 20828, 20602 and 18106 among a host of others).

Both parties agree that the crux of this dispute is the credibility question. The only evidence in support of Carrier's conclusion consisted of a complaint statement filed with Supervisor Carpenter on the day of the alleged incident followed by a letter from the passenger addressed to Carrier's Passenger Agent, A study of the transcript of the investigation reveals that there was indeed a controversy between Claimant and the passenger with the difference being Claimant's version of the unreasonableness of the passenger's ticket request. Further, it is clear from the record that several of Claimant's statements were inconsistent and at variance with the testimony of others. For example, Claimant testified that Supervisor Traynor came to the window and told the passenger that the ticket in question was not sold at the win&w; Traynor later testified that he was not called to the window by either the passenger or Claimant and did not know of the incident until later. It is well recognized that this Board cannot make credibility findings and must rely on the findings of the hearing officer in this respect. We do so in this case.

The question of the nature of Carrier's evidence is raised by Petitioner. Can Carrier rely on the written statement of the passenger alone? Though we feel that it is highly desirable for an accuser to be present at an investigation and be subject to questioning by Claimant, we recognize that it is not always possible. In this dispute, Carrier testifled that the passenger was contacted and stated that he could not be present at the hearing. At the hearing, Claimant had the option of requesting a continuance so that he could secure a deposition or other statement from the complaining passenger; such option was not exercised (Award 4976). This Board has on numerous occasions sanctioned the use of passenger statements as evidence in disciplinary hearings. In Award 15981 we said:

> ". . ..In the investigation the Claimant's representative protested because the writers of the letters of complaint were not present at the investigation. No rule of the Agreement describes the type of evidence that may be adduced at investigations, and the Board has many times held that written statements are admissible in investigations without the writer being present. (Awards 14267, 12816, 11342, 11237, 10596, among others.) There is no evidence in the investigation that the Claimant was denied the right to present any witnesses that he desired."

It must also be noted that the Organization failed to raise the question of the unavailability of the complaining passenger for questioning either at the hearing or in the further handling on the property, insofar as the record before us discloses.

In view of the foregoing we must conclude that there was substantial evidence in support of the finding of guilt; further, the modified penalty imposed was neither arbitrary nor capricious. Accordingly, the claim must be denied.

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.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: G. W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 31st day of March 1976.