Award No. 4771
Docket No. DC-4483

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Mortimer Stone, Referee

PARTIES TO DISPUTE:

JOINT COUNCIL DINING CAR EMPLOYES

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the Joint Council Dining Car Employes, Local 351, on the property of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, for and in behalf of Mr. Clay Brodie, waiter, to be returned to service with seniority rights accumulated and unbroken and with compensation for net wage loss as a result of unjust and unwarranted discharge in violation of the current agreement, particularly Rule 8, thereof, and in abuse of Carrier's discretion.

OPINION OF BOARD: Claimant, a dining car waiter, was dismissed from service on December 2, 1947, on the charge of reporting for duty on the night of November 23, 1947, in an improper condition to perform his regular duties as waiter on Train 17. Under date of December 4, the General Chairman served notice of request for hearing in his behalf in which he further requested "the presence of all witnesses involved in this case." In reply, the Chairman was advised that hearing would be held at 2:00 P.M. on December 12 "re: waiter Clay Brodie reporting for train No. 17 November 23rd in improper condition to perform his assigned duties." Hearing was held at the time stated and under date of December 20, letter was mailed by registered mail to claimant, advising him that the facts developed at the investigation proved he was under the influence of liquor when reporting for duty at the time mentioned in the charge and was not in proper condition to perform his duties and that he was dismissed from the service of the Carrier. This letter, however, was misdirected and did not reach claimant until January 3, 1948, whereafter on January 13 the General Chairman appealed from the decision, noting the failure of receipt of the letter advising as to the decision within the ten days provided by rule for its rendition.

Claimant first challenges the validity of his discharge on the ground that the decision was not rendered within ten days from date hearing was completed as required by Rule 8(a) of the Agreement. The purpose of the rule, as has been frequently said, is to insure prompt action. It is apparent that prompt action within the time provided by the rule was had. Claimant was not prejudiced by delay in formal notice and he was not in any way delayed nor was he denied right of appeal as a result of the misdirection of the letter advising him of the decision. Our conclusion is consistent with Awards Nos. 1513 and 4169.

Claimant further contends that he did not have a fair and impartial hearing. Notwithstanding his request for "the presence of all witnesses involved," no witnesses were present at the hearing. Instead, there were pre-

sented and read the signed statements of the dining car steward and the station conductor, both stating in detail the conduct of claimant indicating intoxication and the conclusion that he was under the influence of liquor on the occasion charged, as well as a telegram from the steward, received the morning after the offense charged, to the same effect, and a statement of the chef assigned to the dining car to the effect that claimant on the occasion involved had definitely been drinking and was not capable of performing his proper duties. It was admitted that copies of these statements had not been sent to claimant.

Claimant's representative then called attention to his request for the presence of all witnesses, and insisted on his right to have the accusers present, and Carrier's representative proposed that the investigation be continued and a date arranged in the near future to bring all the witnesses. This proposal was rejected by claimant's representative, who said:

> "That, we wouldn't be prepared to do for the reason that the Agreement does not provide and give us the right to set aside a date specified by the Carrier. You set this date, we did not. We had to come prepared under certain conditions to defend ourselves and as related above we are prepared to proceed with the investigation now. In other words, we feel the Carrier has had ample time to prepare necessary witnesses. I think Rule No. 8 of the Agreement is quite specific on that point."

He stated that he had a further investigation that afternoon and must be diligent in keeping that appointment and he thought "the investigation should be concluded along the lines you requested." Carrier's representative expressed belief that he could have his witnesses present by 5 o'clock that afternoon, or shortly after, and claimant's representative replied, "Have the records show that we are not prepared to wait longer, insofar as the defense is concerned, and we are considering the investigation closed."

A hearing on complaint of misconduct of an employe is not a criminal proceeding and recognized rules of service need not be followed except insofar as their nonobservance may indicate lack of fairness or good faith in the conduct of the hearing, nor may we substitute our judgment for that of management as to the merits of the claim investigated. Upon the management rests the obligation of safe operation of the railroad, the courteous treatment of its patrons and the working conditions of its employes. To maintain that obligation it is necessary that Carrier have the right for proper cause to discipline and to discharge. It may err in its judgment, but if exercised in good faith upon a fair hearing its judgment must prevail as part of its responsibility.

The right to require the personal appearance for cross-examination of witnesses is not essential to a fair hearing. In many cases that would be impracticable or impossible. But the right either to have the personal appearance of witnesses or information as to their identity and the nature of their statements, with reasonable opportunity to communicate with the witnesses and inquire into their statements, is essential.

It is not necessary nor desirable that a hearing be conducted with the formality of a court proceeding and it need not be concluded at one sitting. Full and fair opportunity and mutual accommodation in the development of facts should be allowed.

Considering the application of these general principles, which we deem both fair and supported by the decisions of the Board, we think claimant was entitled to the presence of adverse witnesses where practicable and where they were reasonably available, and where such was not the case, he was entitled to reasonable opportunity of investigation and inquiry as to their statements. Had the Carrier insisted on concluding the hearing based upon the written statements of its witnesses, without opportunity either of cross-examination or investigation and inquiry by claimant, either through advance notice of the names of the witnesses and the nature of their statements, or

otherwise, the hearing would have been most arbitrary and unfair, but we think the failure to have the witnesses present as demanded at the date and hour set for the hearing was not essentially arbitrary. At that time claimant was given full opportunity to learn the names and the nature of the statements of the witnesses against him, and the decision as to whether claimant was fair or arbitrary must depend upon whether claimant was then given opportunity of cross-examination of the witnesses against him, if practicable, or otherwise of investigation and contact with the witnesses, if he so desired. Here the Carrier representative offered to procure the personal attendance of each of the witnesses; he restricted each offer to no set time, but proposed that the investigation be continued to a date agreeable to claimant. When this proposal was rejected, it was the claimant's representative, not Carrier's, we think, who was arbitrary and unreasonable in refusing a reasonable continuance of the hearing and asking that it be then concluded. Thereby we think we waived the requirement of cross-examination or further inquiry and the sole question left for our consideration is whether there was substantial showing to support the charge against claimant, and we think the direct and signed statements of the dining car steward, the station conductor and the chef, of their own knowledge, was ample to support the charge.

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 claimant had opportunity for a full and fair hearing.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 21st day of March, 1950.