# Award No. 5367
# Docket No. DC-5253

## NATIONAL RAILROAD ADJUSTMENT BOARD

## THIRD DIVISION

**Alex Elson, Referee.**

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## PARTIES TO DISPUTE:

## UNITED TRANSPORT SERVICE EMPLOYES

## SOUTHERN RAILWAY COMPANY

**STATEMENT OF CLAIM:** This claim is filed on behalf of James A. Moore, Jr., Waiter, currently employed in the Dining Car Department of the Southern Railway System, who was suspended from service for thirty (30) days without pay on a charge of "insubordination and conduct unbecoming an employe while in my (F. C. Thomas, Superintendent of Dining Cars) office, January 18, 1950."

It is the position of the Organization that this charge was not proved and that Mr. Moore was not accorded a fair and impartial investigation as contemplated by the collective rules agreement with the Carrier. We also contend that since Mr. Moore was serving as a representative of an accused employe at a discipline hearing at the time (January 18, 1950) he was not in an employe relationship with the Carrier. Since this is a fact, the charges are improper, vague, prejudicial and unfounded.

Claim is for Mr. Moore's record to be cleared of the charges, and for Mr. Moore to be reimbursed at his regular rate of pay for all time lost because of his improper suspension.

**EMPLOYES' STATEMENT OF FACTS:** The Claimant, James A. Moore, Jr., appeared in the office of F. C. Thomas, Superintendent of Dining Cars of the Southern Railway System, in Atlanta, Georgia, on January 18, 1950, to represent Charles H. Walker, a fellow employe, on a discipline charge. Mr. Moore appeared in his official capacity as President and Chairman of the Grievance Committee of Local 326 of this Organization.

The hearing of January 18th was held in a most confusing manner with tempers flaring on both sides. Moore objected to Thomas' arbitrary insistence on leaving pertinent testimony out of the record, and as a result, the hearing adjourned without any conclusion being reached. (See Exhibit A, Charles H. Walker case.)

Under date of January 30, 1950, Mr. Thomas informed Mr. Moore by letter that he was charged with "insubordination and conduct unbecoming an employe while in my office, January 18, 1950." That letter set the date of February 3, 1950, for hearing on these charges. (Exhibit B.)

At the hearing of February 3rd conducted by H. O. Noack, Assistant Manager, Dining Cars, written statements were introduced to support Carrier's charges. The statements were remarkably similar in phraseology.

doing only the things it has agreed it would not do, but is not restricted from doing any of the things it has not agreed it would not do, and it has not agreed to relinquish its right to discipline or discharge its employes.

## CONCLUSION

In conclusion, respondent respectfully submits that:

It may properly refuse to continue in its service any person who shows himself to be dishonest, incompetent, inefficient, negligent, unfaithful to respondent's interests, or otherwise unfit for service. Dining Car Waiter Moore was unfaithful to respondent's interests when he was insubordinate and conducted himself as he did in Superintendent Thomas' office on January 18, 1950.

The charges preferred against Dining Car Waiter Moore were proven at the hearing at which he attended, duly represented by counsel of his choosing and testified.

Principles of previous Board Awards support position of respondent that claimant Moore was deliberately guilty of insubordination and wrongful conduct and no measure of discipline less than that of suspension for 30 days would have been adequate, and even that was the bare minimum as there was sufficient evidence to justify dismissal.

Waiter Moore was disciplined for good and sufficient cause and respondent did not act arbitrary, capriciously, in bad faith or abuse its discretion in doing so. There was no violation of the agreement.

Dining Car Waiter Moore was disciplined as a reasonable consequence of his actions; therefore, the claim should in all things be denied, and respondent respectfully requests that the Board so decide.

All factual data submitted in support of respondent's position has been submitted to the representative of employes and is a part of this dispute.

(Exhibits not reproduced.)

**OPINION OF BOARD:** This is a discipline case, an outgrowth of one of the hearings involving claimant Walker in Award No. 5366. The claimant, James A. Moore, Jr., a waiter currently employed in the Dining Car Department of the Carrier, was suspended for a period of 30 days for insubordination and conduct unbecoming an employe while in the office of F. C. Thomas, Superintendent of Dining Cars on January 18, 1950.

On January 18, 1950, claimant appeared in the office of Thomas to represent Walker. He claims he appeared as a representative of Walker in his official capacity as President and Chairman of the Grievance Committee of Local 326 of the Organization. The Carrier claims he was present in no official organization capacity but as an employe of the Carrier representing another employe.

The transcript of the January 18, 1950, hearing shows that claimant and Walker both lost their tempers, made accusations that Walker was framed, interfered with the orderly conduct of the investigation, and at times attempted to conduct the investigation. Following the hearing on January 18, 1950, a hearing was conducted by the Carrier, discipline imposed and appeals taken from the decision denied.

Various contentions are made by the claimant with reference to the action of the Carrier. It is unnecessary to discuss all of these contentions. The fundamental issue in this case is whether the Carrier may discipline an employe for conduct on the Carrier's property in the course of an investigation of charges against another employe while the employe is acting as representative or counsel for his fellow employe.

This is a case of first impression. This Board has not been called upon previously to pass upon the issue. The parties have presented thorough and cogent arguments in support of their respective positions. The Organization contends that Moore was present in his official capacity as President and Chairman of the Grievance Committee of Local 326. It claims that the attempt to discipline Moore constitutes a violation of the Railway Labor Act (Sec. 2), as that Act has been construed by the Supreme Court of the United States, and that similar actions by employers outside of the railway industry have been condemned by the courts as a violation of equivalent provisions of the National Labor Relations Act and the Labor Management Relations Act.

The Carrier contends that Moore was not present in an official capacity. It claims that representation at an investigation conducted by the Carrier is not part of collective bargaining representation and is not taking part in the handling of a grievance because until the Carrier makes an adverse decision, there is no grievance. It asserts that it has not interfered in any way with the collective bargaining activities of the union, and particularly has not in any way attempted to intimidate its employes or otherwise influence them in the choice of their bargaining agent, and that in the absence of such conduct it was within its rights in disciplining Moore. It submits that its action against Moore was but the normal exercise of its right to select its employes and to discipline them. It finally contends that under the National Labor Relations Act, employes are not immune from discipline for misconduct of a gross character even if they do happen to be engaged in collective bargaining activities, and that the same principle should be applicable to the Railway Labor Act.

We may assume for purposes of discussion, that the conduct of Moore was seriously objectionable. Making this assumption, this Board is of the opinion that nevertheless the discipline in this case cannot be sustained and that the claim must be allowed.

We must determine at the outset Moore's capacity at the hearing of January 18, 1950. Rule 22 (b) of the applicable rules Agreement between the Southern Railway System and its Dining Car employes states:

> "(b) At a reasonable time prior to the hearing the employe is entitled to be apprised in writing of the precise charge or charges against him and he shall have reasonable opportunity to secure the presence of necessary witnesses and shall have the right to be there represented by counsel of his choosing."

It will be noted that this rule gives the employe the right to be represented at the hearing "by counsel of his choosing."

The transcript of the hearing held on January 18, 1950, contains the following:

> FCT: As you probably know, under the discipline rule of the Agreement applying to dining car employes, you are permitted to have representatives sit with you and assist you in the investigation. Do you have representatives?
>
> CHW: I do. James A. Moore, Jr.
>
> FCT: Moore, are you here to represent Walker?
>
> JAM: Yes, sir.
>
> FCT: Please state your name, organization, etc.
>
> JAM: James A. Moore, Jr., President and General Chairman, Grievance Committee, Local 326. UTSEA, CIO.

FCT: Moore, are you ready to go ahead with this investigation?

JAM: Yes sir.

Walker selected Moore as his counsel. During the investigation, Moore acted as counsel. The significant fact is that Moore was present **as counsel** under a collective bargaining rule designed to protect the fairness of hearings. In the light of this fact, we find it unnecessary to determine whether the Carrier's action amounted to a violation of the Railway Labor Act. Nor, as we see it, does it make any difference that Moore occupied the position of an officer of the Organization. Our opinion would be equally applicable if Moore had been just another employe without an official status in the Organization.

Great emphasis is placed by the Carrier on the fact that the employer-employe relationship between Moore and itself continued throughout. The Carrier bases its action on the principle that it is free to select and discharge its employes. But as we read the applicable rule, the Carrier may not apply this principle when to do so would render nugatory the right to counsel guaranteed to the employe.

Moore was present at the hearing solely for the purpose of representing a fellow employe as counsel. He occupied a mixed status at the time of his appearance. True, he was still an employe of the Carrier, occupying the position of dining car waiter, but at the hearing he was not performing any services for the Carrier, and in fact was appearing in a sense in an adversary capacity to the Carrier. He was there as counsel. The employe could have obtained as counsel an attorney-at-law, another officer of the Organization not an employe of the Carrier, or anyone capable to act for him. If any such representative indulged in conduct attributed to Moore, not being an employe of the Carrier, he could not have been disciplined as was Moore in this case.

Awards have been cited to this Board attempting to analogize this case with other cases in which discipline has been sustained by this Board against employes for personal conduct while not on duty. Most of these cases are cases where employes have become intoxicated off duty on the Carrier's property, or have engaged in acts which have brought them into conflict with the law. These cases are not helpful to this issue, and even their reasoning, if applicable, would not apply in this case. It has been generally held that conduct while off duty must in some way interfere with the operation of the railroad or demonstrate the unfitness of the employe. In this case the operations of the railroad were not affected. The fact that the Carrier saw fit to retain the employe would negate any contention that the employe's conduct in this case demonstrates that he was unfit to be a dining car waiter.

The plain fact of the matter is that at the time of the incident in question, Moore's capacity as an employe must be disregarded. He was entitled to be treated as any other counsel. His capacity as employe should not have exposed him to any sanction not equally available to the Carrier for other counsel of the employe who would not be an employe of the Carrier. In other words, what the Carrier is attempting to do here is to use Moore's capacity as an employe as a means of imposing a penalty against him which it could not impose against him were he not an employe of the Company.

This Board is also moved by other important considerations. Counsel for an employe in an investigation of charges which may result in discipline or other serious penalty must have considerable latitude in representing the employe. He should be permitted to express himself freely, to make his contentions vigorously, and to do everything in his power to assist the employe. If the action by the Carrier in this case is sustained, no official representative of the employe also occupying a position of employe of the Carrier could know how far he could go in being an advocate. At all times he

would be fearful that something he might say would transgress the Carrier's standards of propriety and result in discipline to himself. There would be varying degrees of inhibition depending upon the representative, the result of which might be to deprive the employe of adequate representation, and certainly to limit his right to counsel. Furthermore, the Board recognizes that the right to counsel at hearing under Rule 22 may in fact be more important than representation in the grievance machinery. Adequate development of the facts during the hearing may result in dismissal of the charge or mitigation of the penalty. Once discipline is imposed, there is little this Board can do under the principles which govern it. The right to counsel under Rule 22 is a valuable right. The action of the Carrier if permitted to stand, would reduce the value of the right to the extent that an employe might as a practical matter be compelled to forego representation by a fellow employe and look elsewhere for counsel.

The Carrier has referred to the presiding officer as in the nature of a judge and to the hearing as in the nature of a court trial, and suggests that the penalty imposed in this case is similar to a penalty for contempt of court imposed by a judge. We think the comparison is far fetched. The proceeding was characterized by the Carrier itself as an investigation rather than a trial. It was a private investigation not open to the public. The policy reasons which underly grant of power to courts to protect itself against contemptuous conduct do not apply. The court is symbolic of the law. We are a government of law and not of men, and it is important continuously and constantly to remind litigants and their attorneys, that whatever their opinion may be of the judge in question, they must at all times show due respect for the court. The power to punish for contempt, therefore, is essential to the administration of justice. The same policy reasons do not apply to an investigation conducted by a Carrier. As a matter of fact, administrative agencies of the government do not have the power in effect contended for by the Carrier. That is not to say that the Carrier is powerless to protect itself against conduct of the kind complained of in this case. The Carrier's representative could have prevented what occurred by prompt adjournment of the hearing as soon as it became apparent that it was getting out of hand, and a refusal to go ahead with the hearing unless assurances were received that an orderly presentation of the evidence would be permitted.

We believe that the attempt of the Carrier to discipline Moore would impair the right to counsel given to the employe under Rule 22. For this reason, we believe the claim should be allowed in full.

**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 violated by the Carrier.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 20th day of June, 1951.