Award No. 6103
Docket No. DC-5610

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Fred W. Messmore, Referee

PARTIES TO DISPUTE:

JOINT COUNCIL DINING CAR EMPLOYES, LOCAL 354

MISSOURI PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of JOINT COUNCIL DINING CAR EMPLOYES, LOCAL 354, for and on behalf of NORMAN ROSS, Waiter on the property of MISSOURI PACIFIC RAILROAD COMPANY that NORMAN ROSS be restored to service with seniority unbroken and accumulated and compensated for net wage loss, said NORMAN ROSS having been discharged by Carrier in violation of the current Agreement.

OPINION OF BOARD: The Carrier contends the claim should be denied for failure to appeal within time limit set forth in Rule 17 (i) of the Agreement, which reads: "If further handling is desired following decision of the highest official designated by the railroad to whom appeals may be made, the proceedings must be instituted within thirty (30) days from date of such decision, otherwise the case will be considered closed."

In this connection, the Carrier's Chief Personnel Officer, the highest designated official of the Carrier to whom appeals may be made, denied Claimant Norman Ross' appeal November 15, 1950. On November 16, 1950, the General Chairman of the local union wrote to the Chief Personnel Officer to the effect: "If this is your final position I assume that a conference to discuss the matter would not be of any service. Please be advised that this matter will be turned over to the Joint Council of Dining Car Employes for further handling. However, if you prefer discussing with me my appeal, I will withhold this action pending your decision."

The Carrier asserts, if the Organization did nothing more, the time in which it could have instituted proceedings would have started.

The Carrier responded to the General Chairman's letter of November 16, 1950, on November 17, 1950, suggesting that the parties meet in conference even though no direct request had been made for a conference. Apparently the conference was held either November 27 or 29, 1950.

On December 12, 1950, Carrier denied the claim again, explaining by letter that Claimant was given a fair and impartial hearing, and Claimant was dismissed from service on the evidence adduced at the investigation held October 5, 1950.

The Carrier asserts nothing more was heard of the claim until it received notice from the Secretary of the Third Division of the intention of the Employes to file ex parte proceedings before this Board, April 26, 1951. Consequently, the Carrier contends the case is closed under the above cited rule.

We are not in accord with the Carrier's contention in such respect. We conclude the Employe's instituted proceedings by the letter of November 16, 1950. No part of the rule requires instituting proceedings before this Board, or filing proceedings before the Board. It is apparent the later conference which has not requested, could not constitute a surrender of notice to proceed further as stated in the Employes' letter of November 16, 1950.

We desire to say at this point that the Employes' defense of past practice is not applicable here because they negotiated this very rule with the Carrier May 24, 1948, and, in addition, the point made by the Employes that simply the local union is bound by the rule and that the rule does not apply to "The Joint Council of Dining Car Employes." The latter organization is an agent of the local union and bound by the contracts entered into by the local union. To hold otherwise would unset present procedure of labor negotiations in the railroad industry. Both unions, insofar as the Railway Labor Act is concerned, are the same insofar as a claim of the nature of the one before us is concerned.

As previously stated, we turn the question of jurisdiction on the rule as we conceive it. The awards cited by the Carrier from this Division deal with a different and more concrete rule. We take jurisdiction on the merits.

The Claimant, Norman Ross, a waiter employed by the Carrier was charged with violating Rules 12 and 34 of the Missouri Pacific Lines General Rules Book.

Rule 12 reads as follows: "Civil, courteous deportment is required of all employes in their dealings with the public, their superiors, their subordinates, and each other. Boisterous, profane, or vulgar language is forbidden. Courtesy and attention to patrons is demanded. Employes must not enter into an altercation or fight with any person, no matter what the provocation. Report of violation of this rule must be made to employes' supervising officer. Playing practical jokes, scuffling, wrestling, or fighting on Company property or in crew quarters, as well as throwing tools or materials * * *."

Rule 34 provides: "Employes in charge are in full charge of the employes of their units and their authority must be respected. Should any employe feel that he is not receiving fair treatment, he must continue to perform his assignment and carry out instructions as they are given until his tour of duty is completed and his home terminal is reached. A report covering the circumstances must be made to the proper official."

More specifically, the charge was "fighting, striking Steward J. F. Hartman, improper and unbecoming conduct, use of profane, vulgar and abusive language and not respecting the authority of the Steward in performing your assignment as Bus Waiter, resulting in your removal from Diner 10039 which left St. Louis, Missouri, on train 31, at Broadway Station, St. Louis, Missouri, on September 4th, 1950."

The Carrier's Superintendent of Dining and Parlor Cars notified Claimant October 2, 1950, to be present in his office at 10:00 o'clock A. M., October 5, 1950, at an investigation. The Claimant received the letter containing the charges as aforesaid October 3, 1950. On October 13, 1950, the Superintendent of Dining and Parlor Cars dismissed Claimant from service. The claim was progressed to Carrier's Chief Personnel Officer, the highest officer designated to handle appeals on the property. He denied the claim November 15, 1950.

The Employes contend that the Carrier violated Rule 17 of the current Agreement. Rule 17 (a) provides: "An employe who has acquired seniority and an employe relationship under Rule 12 (a) shall not be disciplined or discharged without an investigation, at which investigation he may be assisted by a representative of his own choice (an employe) who may examine witnesses giving testimony in the case. He may, however, be held out of service pending investigation."

Rule 17 (b) provides: "At a reasonable time prior to the investigation the employe shall be advised in writing of the charge or nature of the complaint and shall have reasonable opportunity to secure the presence of necessary witnesses and representative."

The first contention of the Employes is that under Rule 17 (b) above, the Claimant was not afforded a reasonable time to prepare his defense to the specific charges against him, and that he was required to appear to answer the charges in a period of time of less than forty-eight hours.

The incident out of which this claim occurred was on September 4, 1950. The Steward involved made his report to the Carrier September 6, 1950. The Carrier, under date of September 25, 1950, held the Claimant out of service.

The Claimant appeared at the investigation with a representative. He stated he received notice of the investigation but was leaving it up to his representative. No objection was made to proceeding with the investigation. No continuance was requested to procure witnesses or for any other reason. We believe Claimant was notified in a sufficient period of time and was fully acquainted with and had knowledge of the charges. We believe there was no prejudice in setting the hearing, and the Carrier did not violate Rule 17 (b) as contended for by Claimant.

The Claimant contends he was denied a fair and impartial investigation for the reason that the Carrier violated Rule 17 (b) by permitting an officer of the Carrier to conduct the investigation, who was prejudiced against the Claimant and prejudiced his guilt prior to the conclusion of the investigation; that this officer, the Superintendent of Dining and Parlor Cars who conducted the investigation, permitted the reception of incompetent evidence of a prejudicial nature over objection and upon request of Claimant's representative refused to adjourn the investigation until a chance was given the claimant and his representative to confer with a higher officer to obtain a fair trial. The Claimant further contends he was denied a fair and impartial hearing under Rule 17 for the reason that the contents of a letter written by a passenger and eye witness to at least a part of the incident, was placed in the record over objection; that the information contained in the letter was denied Claimant when ample time existed to inform him about it.

The Claimant further contends he was denied a fair and impartial hearing for the reason that the officer took all the witnesses and the Claimant into his office and spoke to them privately, without the presence of the Claimant's representative.

The Claimant further contends the Steward's testimony was not credible, and the Steward impeached his own testimony in the course of the investigation.

We will take up the aforementioned contentions of the Claimant later in the opinion.

The facts are in conflict. We summarize the facts as follows:

It appears from the record that the entire crew was present as witnesses and were on the car the date the difficulty occurred. The Steward admitted being present on the car on the date in question.

The Steward was asked if he had any difficulty with any members of the crew except Claimant. He said he did not, and that he had nothing personal against the Claimant.

Members of the crew were asked collectively if each or any of them had difficulty with the Steward. All but one stated that they had no difficulty with the Steward. The interrogator stated that he took it that the men got along with the Steward; that he was not hard to get along with; that he was

fair and reasonable in handling men; and that they could get along with any other Steward whose car they were assigned. If that statement was not correct, the crew was asked to please say so. The response was varied. Some of the crew expressed their answer in different ways. The questions were objected to. We believe these questions were of a foundational nature. In any event, they were not prejudicial to the Claimant. The balance of the testimony of these witnesses is to the effect that they did not hear the Claimant talk in a loud or boisterous voice, nor use any vulgar or abusive or profane language. Nor did they see the Claimant strike the Steward or scuffle with him. For the most part they testified to the effect that they were not in a position to see the fight. One witness testified that on his way to the toilet his attention was attracted because the Steward and Claiman were talking loud. One of the crew testified that a passenger he was waiting on commented about the incident. He walked out and set the man's soup down to him. The Steward was asking him if he saw the incident. The Steward took the man's address "I guess" and "I heard the Steward say if anything came up and he needed a statement he would write him."

The report of the Steward is rather lengthy and to set it out in detail would unnecessarily lengthen this opinion. It is to the effect that when the Claimant reported for duty he started complaining to everybody in the car about going out as a bus waiter. He said: "If I knew I was going out as a bus waiter on this * * *" then the language used was vile. He carried on in this manner for an hour or so and even the waiters kidded him about it. One witness testified on this point: "Yes, he was talking there in the diner about it. When he first came in he found out he was going out as a bus waiter and he said if he had known he was going out as a bus waiter he wouldn't have gone out." The Claimant testified on this point: "We were just carrying on foolishness. I didn't know I was going to be a bus waiter. Sparks and I were just joking." Sparks told the Claimant that it would be easy to be replaced, if he desired to be. The Steward's report continues. He was preparing to leave the car to go to the depot to obtain change, when the Claimant demanded in a surly manner that he unlock the bar box and give him some soda to take to the coaches. He was told it was 4:30 P. M., and the Steward would be right back in five minutes then he would give him the soda before receiving time. Claimant immediately went into a rampage. The language of the Claimant was quoted. If true, it was vulgar and vile, and personally addressed to the Steward. The Steward walked away from the Claimant, left him shouting, and walked into the station. When the Steward returned to the car in a few minutes the Claimant was carrying a paper carton containing milk up to the coaches. When asked how many he had, he replied "ten", and went on. The Steward, after putting his change away, walked to the coaches to see what kind of a load there was. When he came upon the supplies he had given the Claimant he noticed fifty large paper napkins with the other supplies, and took them with him to the diner. The Claimant came back in about twenty-five minutes and started an argument about the Steward taking the napkins out of his box. The Claimant then used foul language, telling the Steward he had no right to do that as the things he had were charged to him. The Steward told Claimant he had no business with the paper napkins in the coaches, that if a passenger asked for one he could get it for him, but not to take a large amount of them with him.

The Steward stated in the report: "This is when he struck me in the face. Then grabbed me with his left arm around my head and began punching me in the head and on the face. When I pulled myself loose from him, I told him to take his apron off. It was then 6:00 P. M. I went into the coaches to get the train conductor and told him what had happened. I told him I had cut Ross' (Claimant) time off and wanted him put off at the Broadway station. This the conductor did." The Steward, before having the balance of the report read, added to the statement that Claimant, at the time the Steward requested the Conductor to put him off said in the presence of the Conductor: "I'll see you in the morning at the station when the train arrives." The Steward ignored this remark and went back into the car. The Steward told the Conductor about the occurrence with reference to the napkins; that Claim-

ant had cussed him out and had hit him, and showed the Conductor where Claimant had struck him on the left side of the face on the cheek bone, which was swollen. The Pullman Conductor who was present offered to get an ice bag to eliminate the swelling.

The Steward further testified that the Conductor seemed surprised that a waiter would go to that extreme, and naturally the only thing that could be done was to remove him from the car; and that the Claimant swung at him with his fists and either pushed or knocked him to his knees. He was sure the members of the crew near the buffet saw it. He did not know who they were; that G. Garrett, a cook, interceded to the point of hollering to the Claimant to leave the Steward alone. Rules 12 and 34 were read to the Claimant. He had not studied them.

The Claimant's testimony, for the most part, is a denial of the charge. In his statement he said the Steward asked him to check the soda, which he did. After the train backed down to the station, certain supplies were counted out. The Claimant asked for some cokes to ice up and was told he would have to wait. The Claimant told the Steward he was ungrateful after being helped out. The Steward said he did not give a damn, and walked off. When the Steward came back the milk was iced. "He asked what I had. I said ten, he didn't ask to see. Then I carried it on up to the car and came back to the diner, and the Steward went up to the coach, and I went up and asked the Porter if anyone had been in my basket. He said the Steward had. The napkins were missing. When I came back he pulled his rank, telling me he was boss." This fact was acknowledged, and Claimant told the Steward he was responsible for the items and would, if short, have to make the amount good. As to the napkins, Claimant asked the Steward why he took them. The Steward replied he needed them. The Claimant wanted to know if the Steward wanted him to walk back eight cars in the event a passenger wanted a napkin. He said "yes" and threw up his fist and said. "We're going to have this thing out." I was in constant fear that he had a gun since he made his threat then I merely grabbed him so as if he did have a gun I thought it would be in his drawer—I was merely holding him away from his drawer about middle way down the hall. After the 'rummage' was over he told me my time was cut off. I didn't say or do anything else but stayed close to him to keep him from going to his drawer or his locker. I thought in doing this if he should go get the difference that I would protect myself somewhat." With reference to the Steward having a gun, it appears at one time about six years previous he had a gun which he had purchased, and perhaps the Claimant examined it at that time. However, he had it at home—didn't carry or have it on the car.

The Claimant further testified that he held the Steward and was put off the car because he believed the Steward wanted to show his authority. No passenger, he believed there were three, said anything to him about the affair. The Conductor asked what was the matter, and the Claimant told him, and he said he "hated to do this." The Steward did not say anything. When he got off the train the Steward was not there. He did not say he would see the Steward in the morning. Concerning the incident that occurred at the buffet, the Steward was standing directly in front of the buffet and the Claimant testified he raised his arms. He believed the Steward was going to hit him.

The balance of the Steward's report was read. One of the passengers, after the Claimant was put off the train, told the Steward "that man won't have a job tomorrow, will he." The Steward said he did not know, he would have to take it up with the Company. The passenger said the Claimant was a dangerous man, should be fired. The Steward asked the passenger if he would give his name and address and if he would volunteer the information if needed. The passenger said he would. At this point a letter by this passenger dated September 25, 1950, was read. The passenger gave a brief description of what he observed regarding the difficulty between the Steward and the Claimant. The cardinal part of this description is in substance as fol-

lows: The waiter was talking in a loud voice: The Steward's words were indistinguishable. In a moment he looked up, as he did he saw the waiter grab the Steward around the neck with one arm and swing at him with the other. The force of the lunge and the blows toppled them both over. As they fell they disappeared from view. At the sound of the scuffle several other waiters rushed to the scene. "I presume, separated them as sounds of the scuffle ceased shortly thereafter." The presence of business made it impossible for him to be present. The investigating officer stated he was reading the letter to make the contents available. He would not reveal the passenger's address or name at that time.

A witness testified he saw the Steward the morning after he had the trouble and the Steward told him about it. The Steward had a slight reddish spot, or reddish mark, under his left eye.

We believe further statement of the facts unnecessary.

With reference to the Superintendent of the Dining and Parlor Cars conducting the hearing, if it be contended he acted in the capacity of a prosecutor and judge, and took part in a preliminary investigation and conducted the trial, we believe while it might be advisable as well as desirable to have a neutral party conduct the trial, such as we have here, the rules do not so provide, and until the parties agree on such procedure this Division has no power or authority to require it. See Award 5701. We find nothing prejudicial in trial officer talking to the Claimant and the witnesses in his office without the presence of the Claimant's representative. We have no record of what transpired at that time or as to what was said. Certainly in the absence of what was said and done so that it may be reviewed, we have nothing to base a finding on whether prejudicial error existed or not.

The conduct of a hearing is a disciplinary proceeding and does not require adherence to all attributes of a trial in a criminal proceeding. The Carrier's trial officer represents it in making a decision. It is a matter of contract compliance in which the trial officer interprets the Agreement in the light of the evidence in the first instance. As some of our awards point out, disciplinary action is not criminal action, and not governed by the same rules.

The Carrier must show that it acted upon the evidence that warranted the application of discipline, or, stated inversely, it must show that it did not act unreasonably or arbitrarily. It is the function of the Carrier's trial officer in representing it to make this determination.

We find nothing in the conduct of the trial officer to warrant the charge he was prejudiced in conducting the trial. See Award 4840.

With reference to the contents of a letter read into evidence and the Claimant not being privileged to have the benefit thereof prior to trial and not confronted by this witness with the right to cross-examine him, we are unable to gather from the record just what weight the trial officer gave to this evidence. We are inclined to the view that there is a question as to how proper evidence of this nature is. In certain cases evidence of this nature has been admitted and held to be proper in proceedings of this type. In any event, in the light of the record we conclude it was not prejudicial. We are mindful in this respect that this is not a criminal proceeding in a court of law. The Rules of the Agreement do not define the type of evidence that may or may not be introduced.

As to the proof of the charge, this is purely a question of fact. Under such circumstances, in disputes of the character here involved, this Division is committed to the doctrine that it is not a proper function of the Board to weigh the evidence. Put differently, the evidence produced by the Carrier at the investigation, if believed, is amply sufficient to sustain the charge made. For this Board to interfere with the action taken by the Carrier under these

circumstances would require us to pass upon the credibility of the witnesses involved, a function we have consistently declined to perform. We have often said, and we think correctly, that it is not the function of this Board to substitute its judgment for that of the Carrier or to determine what we might have done if it had been our duty to make the decision in the first instance. We interfere only where an examination of the record reveals that the action taken was unjust, arbitrary, or unreasonable. Where the evidence produced in support of the charge, if believed, is sufficient to sustain it, even though there may be evidence directly in conflict, the imposition of discipline cannot be said to be unjust, arbitrary or unreasonable. It is not the function of this Board to weigh the evidence or to determine the credibility of witnesses. If there is substantial evidence in the record to support the charge, even though contradicted, the Carrier's action in assessing discipline cannot be said to be arbitrary or capricious. See Awards 2621, 5946, 4068.

It is also apparent the Claimant's former service with the Carrier was taken into consideration by the Carrier, in assessing the discipline.

From an analysis of the record we conclude the trial was fairly and impartially conducted. The evidence was sufficient to support the assessment of the discipline. For the reasons given herein, the claim should be denied.

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 Carrier has not violated the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 26th day of February, 1953.