Award No. 6185
Docket No. DC-5977

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Adolph E. Wenke, Referee

PARTIES TO DISPUTE:

JOINT COUNCIL DINING CAR EMPLOYES, LOCAL 354

MISSOURI PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the Joint Council Dining Car Employes, Local 354, on the property of the Missouri Pacific Railroad Company, for and on behalf of Willie Jones that he be returned to his former assignment, that all rights, seniority and pay be restored as of April 23, 1951.

OPINION OF BOARD: This is a disciplinary grievance in which the Joint Council Dining Car Employes, Local 354, contends Car Attendant Willie Jones should be returned to his former assignment with all rights of seniority and pay unimpaired. It bases this contention on several different grounds.

The incident which resulted in Claimant being discharged occurred on April 11, 1951 between Kansas City and Paola, Kansas, on Train No. 11 to which he had been assigned as an extra and on which he was then working as a bus-waiter. This train was a through, streamlined, passenger train, running from St. Louis to Pueblo.

Carrier contends that the dispute is not properly before the Division because the appeal to this Division was not taken within the time provided by their Agreement for taking such appeals. In support of this contention it cites Rule 17 (i) of their Agreement which provides:

> "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 the date of such decision; otherwise the case will be considered as closed."

The record shows that on June 22, 1951, T. Short, Chief Personnel Officer and the highest official designated by the Carrier to whom appeals could be made, advised James Mathews, General Chairman of Dining Car Employes, Local No. 354, that Carrier was "unwilling to make any change in the decision of the Superintendent Dining & Parlor Cars in dismissing Jones from the service." To this letter Mathews replied on June 25, 1951, advising Short that: "I assume your letter of June 22nd is your final decision. Therefore, this will advise you of our intention to submit this case to the Joint Council Dining Car Employes for further handling." Carrier was notified of the intention to appeal to this Division by letter dated December 14, 1951 and received December 17, 1951.

The quoted rule does not specifically relate to appeals to the appropriate Division of the National Railroad Adjustment Board such as were

involved in Awards 5096 and 5574 of this Division. As stated in Award 6103 of this Division, involving the same rule: "No part of the rule requires instituting proceedings before this Board, or filing proceedings before this Board." We find Rule 17 (i) of the parties' Agreement does not relate to the time within which appeals must be lodged with the appropriate Division of the National Railroad Adjustment Board.

While the language of this rule is not too clear as to just what the thirty-day limitation period applies to, we find it means that if further handling of the matter is desired, after final decision has been made by the highest official of the Carrier designated to handle appeals, that Carrier must be notified of that fact within thirty days so it may handle its records accordingly. In other words, if no such notice is given within that period of time, Carrier may then consider the matter closed. Here, by the General Chairman's letter of June 25, 1951, notice was given Carrier that there would be further handling of the dispute by the Joint Council Dining Car Employes. This was within thirty days and fulfilled the requirements of the rule. This holding is in accord with the Opinion of this Division in its Award 6103.

Rule 17 (b) of the parties' Agreement 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."

On April 12, 1951, at Pueblo, Colorado, while on Train No. 12, Claimant was served with the following notice: "Arrange be present Trainmaster Moore's office Union Station Kansas City, Saturday, April 14th, 9:00 A. M., for investigation in connection with personal misconduct while on duty on Train No. 11 at Kansas City, Mo., April 11th, 1951. Representative should be present if desired." Hearing was held in accordance therewith.

Claimant contends the notice was not served on him a reasonably sufficient time before the hearing to enable him to properly defend against the charge by securing the presence of necessary witnesses and representation. Claimant returned to Kansas City on Train No. 12 on the morning of Friday, April 13, 1951. He was represented at the hearing by James Mathews, General Chairman of Dining Car Employes, Local No. 354. No showing was made as to any witnesses not being present whom Claimant desired to have present. We find this contention to be without merit. For a further discussion of this subject see Award 6062 of this Division.

It is also contended that the notice given did not sufficiently advise or inform Claimant of the charge or nature of the complaint brought against him. The notice advised him that the investigation would relate to his "personal misconduct while on duty on Train No. 11" on April 11, 1951. Certainly there could be no doubt in Claimant's mind as to what this charge related to, the nature thereof and what the hearing would be about.

In this respect it is contended that Claimant was not tried on the charge made against him but on another made by Trainmaster McQuade at the hearing. At the hearing Mathews requested a statement of the charge be made by McQuade. This McQuade did in the following language: "He is charged with altercation, profane, vulgar language, and aggression." This is not another or different charge than the one made against Claimant in the written notice served upon him but only a more detailed and specific statement of the "personal misconduct" with which he had been charged.

Statements of several persons were received in evidence. Objection thereto was made because these parties were not produced at the hearing so they could be cross-examined. There is nothing in the parties' effective Agreement which sets out the type of evidence which may or may not be

adduced. This Division has many times correctly ruled that under such circumstances no obligation rests on Carrier to produce the author of such a letter or statement at the hearing.

Rule 17 (f) provides:

> "Transcript of the evidence taken at the investigation will be furnished on request of the employe or his representative when formal investigation is held for disciplinary purposes."

There was some delay on the part of Carrier in fulfilling this requirement because one statement received in evidence had been mislaid. However, it was found and a copy thereof furnished. We find this requirement was fulfilled by the Carrier. There is no merit in the claim that the transcript of the evidence adduced at the hearing is not a true and correct record thereof. We find it is a true and correct transcript of the proceedings had at the hearing.

We come then to the merits of the charge. Carrier's General Rules for the guidance of all employes of the Dining Car Department, which Claimant had read and with which he was familiar, provided in Rules 14 and 12 as follows:

> "Arguments with patrons will not be tolerated, self control and restraint as well as tact and diplomacy must be practiced by all employes with their dealings with patrons."

> "Employes must not enter into an altercation, or fight with any person no matter what the provocation."

These are certainly reasonable and proper rules for Carrier to put into effect for employes who deal directly with its patrons in passenger service. Claimant admits he struck passenger Sergeant Raymond G. Curtis in the left eye, which caused it to swell and become discolored. This was a violation of these rules even though Claimant contends he only struck in self defense after Curtis had called him insulting names and swung at him.

But there was ample evidence adduced in the form of statements of Curtis, Kenneth Wilfong and Mrs. J. W. Scheffler, all passengers on the train, to the effect that Claimant did not strike Curtis in self defense. According to these statements the incident occurred while Claimant was selling passengers Curtis and Wilfong each a cup of coffee. Curtis and Wilfong were sitting in one seat. Curtis handed Claimant a quarter and Wilfong handed him a dollar in payment of the coffee. While Claimant was proceeding to make change Curtis remarked to Wilfong: "Why did you pay him, I have already paid him." Whereupon they state Claimant started to abuse Curtis by means of profane language and then struck him in the eye, causing it to swell and discolor, although Curtis had said nothing to him. Curtis did not fight back. Claimant's action also caused coffee to be spilled on Wilfong's clothes.

We find the evidence adduced fully supports Carrier's finding that Claimant was guilty of the misconduct of which he had been charged and that dismissal, particularly in view of his previous guilt of insubordination, was not unreasonable.

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 Carrier has not violated the parties' Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 30th day of April, 1953.