Award No. 8513
Docket No. DC-9597

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Edward A. Lynch, Referee

PARTIES TO DISPUTE:

JOINT COUNCIL DINING CAR EMPLOYEES LOCAL 849

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Joint Council Dining Car Employees Local 849 on the property of Chicago, Rock Island and Pacific Railroad Company for and on behalf of Dining Car Waiter John A. Walker, that he be restored to service with seniority and vacation rights unimpaired having been dismissed by Carrier from its service in violation of the agreement.

OPINION OF BOARD: The Agreement here applicable provides, under "Rule 11—Discipline and Grievances," as follows:

> "(e) Transcript of evidence and testimony taken at the investigation shall be furnished to employee upon his signing same and a decision will be rendered by the General Superintendent, Dining Cars, within fifteen (15) days thereafter. A copy of the investigation will be furnished the General Chairman.
>
> "(f) If an appeal is made from the decision rendered following an investigation, such appeal shall be made in writing within ten (10) days to the General Superintendent, Dining Cars, who shall render the final decision of the Dining Car Department within fifteen (15) days."

The Agreement between the parties places upon the General Superintendent, Dining Cars, a grave responsibility—that of sitting in judgment on any employe charged by Carrier under Rule 11 and rendering a decision after investigation of the charges made. Under paragraph (f) he has the additional responsibility of rendering the final decision, should appeal be so taken, of the Department as to the guilt or innocence of the employe charged and the penalty to be imposed.

Despite these responsibilities stipulated by the Agreement, he chose, in this case, to travel from Chicago to Kansas City on September 4, 1956, with two associates—a claim agent and a railroad patrolman—there to board a specific Santa Fe train the following morning "for the purpose of identifying John Atwood Walker on Santa Fe Train No. 20 due through Kansas City September 5, 1956, if he happened to be on the train."

On September 11, 1956, the General Superintendent, Dining Cars, wrote Claimant Walker a letter notifying him that an investigation would be held September 18 "to develop the facts and determine your responsibility if any, for failure to be available and appear for service with this Carrier on September 5, 1956, August 11th, August 14th, August 25th, August 30th, and September 2nd, because you were working elsewhere without permission."

The investigation was held and the same General Superintendent, Dining Cars, while not the only witness, was the principal witness. A Carrier witness was Commissary Agent Bonesteel, who exercised supervision over waiters. The other two witnesses were Messrs. Laren and Snell, who accompanied the General Superintendent, Dining Cars, on his trip to Kansas City.

Seven days later, the General Superintendent, Dining Cars wrote Claimant Walker that his "employment with this Company and any and all seniority rights held by you have been terminated" as of that day.

In other words, he acted in the triple capacity of chief investigator, principal witness and sentencing judge.

Argument offered in behalf of Carrier, however, asserts:

> "When an employe leaves his work on one Carrier to accept employment on another, he is not entitled to an investigation because by his own action he has terminated his employment status. He is no longer an employe. The moment Claimant reported for work on the Santa Fe on August 11, when he was supposed to be working on Trains Nos. 505-506 for the Rock Island, he forfeited all rights to further work on the Rock Island."

Three awards of this Division and three of the First Division are cited in support of this position.

Argument in behalf of Carrier continues:

> "From the foregoing awards we see that the Employes are in the position of alleging procedural defects in an investigation, when in fact, Claimant had voluntarily forfeited his rights as an employe on the Rock Island, and was not entitled to an investigation."

Such a contention cannot be accepted here.

"Rule 11—Discipline and Grievances" states very clearly:

> "(a) An employee who has been in actual service ninety (90) days or more, or whose application has been approved, shall not be disciplined or dismissed without an investigation."

Claimant here was in Carrier's service ten years.

In its original ex parte submission to this Board, the Organization, after reciting the roles played by Carrier's General Superintendent, Dining Cars, and quoting Rule 11, observed:

> "Carrier denied claimant a fair and impartial investigation in such a grossly prejudiced manner that the entire procedure by which

claimant was tried by Carrier assumes no more status than a kangaroo court. Carrier is bound in proceedings of this sort to observe the necessary requirements that the investigation be fair and impartial and free from prejudice.

"While it has never been considered that investigations of this sort on the property must comply with the technical requirements of evidence and procedure observed in the courts of law, this Board has always considered that it is the duty of this Carrier, and every other Carrier, when conducting such investigations to conduct them in an atmosphere free of prejudice and in a manner calculated to produce a result based solely on the evidence."

Award 6087 (Whiting), cited by the Organization, held in part:

"A rule requiring that an investigation be afforded to an employe who is disciplined or dismissed is designed to protect an employe against arbitrary, capricious or discriminatory action by the carrier by assuring a fair consideration of and decision upon the evidence presented to support the charges against him. * * *

"Where, as here, the decision is not rendered by the official who conducted the investigation but is made by the official who preferred the charges against the employe and who acted as chief complaining witness at the investigation, it cannot reasonably be said that the employe has been afforded an investigation and decision in compliance with the rule."

In reargument before the Referee, Carrier Member offered several Awards of this Division in support of Carrier position here.

Among them was Award 8503 (Daugherty), particularly this portion:

"* * * the Board does not operate with the strictness and rigidity of criminal courts in respect to possible technical defects in procedure on a carrier's property. Where such defects may exist, the compelling question is: Were the accused's rights actually prejudiced thereby? Was he thereby really denied due process of law, his 'day in court', or other substantive rights properly his as a citizen in an industrial democracy?

"With all the above in mind, these principles are now to be applied to the facts of the instant case and to the Organization's contentions. The Board rules as follows: * * * (6) A reading of the transcript of the investigation does not persuade that the hearing was conducted in an arbitrary or biased fashion, prejudicial to the substantive rights of the defendant-Claimant. * * * (c) The official who conducted the hearing was not acting as a witness as well as prosecutor. * * *"

Award 8503 also had this to say, prefacing the findings above quoted:

"This Division's Award No. 8431 set forth a summary of principles that the Board, in a long series of awards, has developed and applied to various kinds of discipline cases. * * *"

Award 8431, with the same Referee Daugherty participating, held, in part:

"In a long series of awards on discipline cases since the inception of this Board, the following principles have been developed and applied: (1) A carrier has the right to discipline an employe for just cause, including mainly violation of Carrier rules. (2) The Board will not presume to substitute its judgment for that of a Carrier and reverse or modify Carrier's disciplinary decision unless the Carrier is shown to have acted in an unreasonably, arbitrary, capricious, or discriminatory manner, amounting to abuse of discretion. (3) A Carrier's disciplinary decision is unreasonable, arbitrary, capricious, or discriminatory when * * * (g) at the hearing the Carrier's managerial representative acted as chief witness as well as interrogator and judge (it is permissible for said representative to act as interrogator and judge). * * *"

In the case before us, Carrier's General Superintendent, Dining Cars, acted as chief investigator in securing the evidence and as principal witness in presenting the evidence at the investigation in face of the obligation mandated upon such officer by the Agreement to render a decision thereon, as sentencing judge.

We will sustain this claim for only one reason: the action of Carrier's General Superintendent, Dining Cars is violative of the basic principles involved in the right of an employe to a fair and impartial hearing. Such principles cannot be ignored. Had his activity been confined to the functions prescribed by the applicable agreement, this claim most certainly would be denied.

The claim will be sustained for the reasons herein set forth.

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 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.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 13th day of November, 1958.

DISSENT TO AWARD NO. 8513, DOCKET NO. DC-9597

To show the complete absurdity of this Award, it is necessary to state certain facts of record. Claimant J. A. Walker was a Rock Island dining

car waiter with enough seniority to have held a regular job; however, at the time this dispute arose he was protecting extra work by his own choice. During August of 1956, the Carrier was so short of help that additional waiters were being hired, and in some cases it was necessary to cancel the programmed vacation of regular waiters. On August 9, Claimant laid off work in the middle of a cycle of trips, claiming that he was too sick to work. When Claimant failed to report, the Carrier telephoned his home on August 17, 25, and 30, and September 2, 5, and other dates, and on each occasion the Carrier either received no answer, or was informed that Claimant was still too sick to work. On August 28, when Claimant came to the Commissary to pick up his pay check, he was asked when he would be able to return to work, and Claimant again insisted that he was still unable to work. In the meantime, rumor reached Rock Island officials that on some of the dates Claimant had refused work on the Rock Island, he had been working as a waiter on Santa Fe dining cars.

On September 5, 1956, General Superintendent, Dining Cars, M. V. Dolan, along with a Claim Agent and an Inspector of Police, observed Claimant's working as a waiter on Santa Fe dining car No. 1556, east of Kansas City. Claimant was then timely charged with failure to be available for service because of working elsewhere without permission on August 11, 14, 25, 30, and September 2 and 5.

An investigation was held at which Claimant was represented by his General Chairman. While five Carrier witnesses testified to the facts, it was not necessary to consider any of their testimony because Claimant freely admitted guilt of the offense with which he was charged. At the investigation, Claimant freely admitted, in the presence of his representative, that he had been working as an extra waiter for the Santa Fe since 1952, and that he had made four trips as a Santa Fe waiter between Chicago and Oakland, California, during the period from August 1 to September 5, 1956.

In handling this claim on the property, the Organization never questioned the fairness or impartiality of the investigation, but simply insisted that an extra man could stay away from work up to 30 days any time he pleased. The issue of whether or not the investigation afforded Claimant was fair and impartial was not raised by the Employes until their third submission in this docket.

Despite the clear and undisputed facts which commanded the denial of this claim, the Referee concluded that Claimant was not afforded a "fair and impartial" hearing. The basis for this conclusion is found in his absurd assertion that the General Superintendent, Dining Cars, was the chief investigator and principal witness. The record shows that the General Superintendent, Dining Cars, was merely one of three witnesses who observed Claimant's working as a Santa Fe waiter on one day only, September 5, 1956, and all three witnesses testified to that fact at the investigation. However, even if the Referee had deemed the testimony of all three witnesses inadmissible, there was no escaping the fact that Claimant had freely admitted working for the Santa Fe on each of the six dates specified in the charge.

Rule 11 specifically provides that the General Superintendent, Dining Cars, shall have "knowledge of the offense," and that he shall render the decision. Nothing in Rule 11 precludes the General Superintendent, Dining Cars, from having "knowledge of the offense" by his own personal observation, or precludes him from testifying to the fact if he does have such knowledge.

The investigation was held to develop facts. Claimant's admission of guilt resolved any doubt thereof and prevented his being prejudiced one whit by any action of the General Superintendent, Dining Cars. Claimant had perpetrated a fraud upon the Carrier and his fellow employes, was caught, and was disciplined for his own acts. A guilty party should not be permitted to escape the consequences of his guilty acts on a technicality, especially where, as here, the technicality is without basis under the Agreement and is manufactured to fit the occasion.

An Award such as this, which acquits a Claimant on a guilty plea and indicts a Carrier official for performing his obligation to investigate and detect fraud is in serious error and makes a farce of the appellate jurisdiction of this Board.

/s/ R. M. Butler

/s/ W. H. Castle

/s/ C. P. Dugan

/s/ J. E. Kemp

/s/ J. M. Mullen