Award No. 10569

Docket No. DC-10034

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

D. E. LaBelle, Referee

PARTIES TO DISPUTE:

JOINT COUNCIL DINING CAR EMPLOYEES LOCAL 385

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of Joint Council Dining Car Employes' Union Local 385 on the property of Chicago, Milwaukee, St. Paul and Pacific Railroad Company for and on behalf of E. E. Hooper that discipline of disqualification of claimant to operate on assignments as attendant or waiter-in-charge be removed and claimant be compensated for net wage loss account said discipline being imposed in violation of the agreement.

OPINION OF BOARD: This is a case involving discipline. There were two separate charges filed, the first one dated August 12, 1957 in a letter from Mr. M. P. Ayars, Superintendent, Sleeping and Dining Car Department, reading as follows:

> "Charges are pending against you as Attendant on train #111 July 24, 1957 for failure to serve guest beverage requested, although such beverage was carried on the menu and has been a standard well known beverage for years.
>
> "Charges are also pending against you as Attendant on train #111 leaving Chicago, Thursday, August 1st, 1957 to have the proper ingredients for making an Old Fashioned drink, and for failure to be able to give the proper recipe for making an Old Fashioned drink.
>
> "You are further charged as Attendant on #111 August 1st, for failure to properly serve your car necessitating a passenger coming up to the bar to ask for service, although at this time you were not performing any service.
>
> "Hearing to determine your responsibility of the above charges will be held in this office on August 20, 1957 at 8:00 A. M. central standard time."

Also under date of August 12, 1957, a second charge from Mr. M. P. Ayars reading as follows:

> "You are charged with responsibility as Attendant on train #112 in charge of Pub Car leaving Denver, Thursday, July 25, 1957 for sale of liquor without monetary collection.

"You are further charged with furnishing employe of the Carrier with alcoholic beverage for personal consumption, while such employe was on duty and while you were on duty in charge of dispensing of this liquor.

"It is further charged that the above charges are in violation of rules which have been in effect for a number of years.

"Hearing to determine your responsibility for the above charges will be held in this office at 8:30 A. M. central standard time on August 20, 1957.

"This hearing will also include a review of your past record."

The first contention of Employe relative to the foregoing charges relates to the second charge wherein Carrier's proof relative to the furnishing of alcoholic beverage, without monetary consideration, to an employe of the Carrier while on duty.

The basis for the charges relative thereto was a written statement from Operative Observer #8 on train #112 the City of Denver, leaving Thursday, July 25, 1957 wherein said Observer set forth that he personally saw Claimant pour about 1½ oz. drink of liquor for a waiter, afterwards identified as waiter #7, a description of said waiter being set out in detail in said report. It was further stated said liquor was drunk by the waiter. No written order was made out and there was no exchange of money. An objection was made at the using of the statement to prove the charges and that Operator 8 be present to answer the questions the Representative of the Organization would like to ask.

The objection was made a part of the record, with the statement on the part of the Carrier, that said Observer could "not be made available for questioning in this case because of the very nature of this person's work, to disclose the Observer's identity would nullify his future benefit to the Carrier."

This question has been before this Board and it has been held in past decisions that the use of investigators is necessary, also, under investigation rules, there exists no prohibition as to the use of investigators reports and that their presence at this hearing was not mandatory (See Awards 7863: 7866:).

Organization further contends that the Carrier denied the request of the Organization, that one of its employes, whom it was charged the liquor was given to, be identified and that Carrier have him present at the hearing. The record shows that the waiter to whom it was claimed a drink was given, was identified only as Waiter #7. The record with reference to said Waiter #7, is as follows:

"MR. HAMILTON: Mr. Ayars, who was the waiter?

MR. AYARS: You better ask the Hearing Officer in regard to that I would suggest.

MR. HAMILTON: The Hearing Officer was not there. I would like to ask the Operator.

MR. AYARS: The waiter was the #7 waiter.

MR. HAMILTON: I have already objected to the report because we do not feel the man, the employe has the right to question these

people who made the report. We feel the employe has the right to question these people and first he said waiter—blank—and then went further and said no cash registered and we do not know whether any transaction was made or collections or not—and we are somewhat confused.

MR. JONES: Mr. Hamilton, I will state for the record in the report received from Observer #8 where the waiter is mentioned and I used the term blank—the #7 will be inserted and that will be in the transcript.

MR. HAMILTON: The office has a record of who waiter #7 is and he should be brought in and we can question him and see if he did get a drink."

No further questions were asked as to the identity of the Waiter, no request was made for a continuance so that the waiter be identified, interviewed and called as a witness by the Claimant, if he so desired. It has been held that a Claimant, the accused, either before or after the hearing is commenced if he asks it, shall be afforded reasonable time to contact any person or persons and to make his own investigation and call such persons or person as witnesses. Awards 2793, 3125. Carrier does not have the right of subpoena and was under no obligation to call the waiter as its witness.

The next contention of Employes is that Claimant was not afforded a fair and impartial hearing in that Carrier's Superintendent of Sleeping and Dining Car Employes preferred the charges against Claimant, he was the chief complaining witness and in fact the only witness appearing in the hearing against Claimant and that the same official made the decisions.

With reference to the first charges made against Claimant, the record shows that there was offered in evidence a written statement from A. J. Johnson, Assistant Superintendent and also a written statement from Superintendent M. P. Ayars in addition to testimony from Claimant. Mr. Ayars took the stand and repeated parts of his statement and was subjected to cross-examination by representative of the Organization.

Relative to the second charge, the evidence relative to the whiskey being given by Claimant to a waiter depends entirely upon the statment of Operative Observer No. 8. Mr. Ayars was called in to hearing room to present a memorandum of a telephone conversation with Operative Observer No. 8: he had no personal knowledge of the occurrence.

In connection with the claim of the Organization relative to testimony of Superintendent Ayars, no objection to his testifying, to the limited extent that he did, was made thereto, on the property and we hold that any rights relative thereto have been waived.

The next question to be resolved is that the fact the decision was made by M. P. Ayars, Superintendent: that he was not the hearing officer, one W. R. Jones, Assistant Superintendent was. The letter from Mr. Ayars to Claimant contained this paragraph:

"It is therefore the decision of the Carrier that effective after your arrival at Chicago on Train 112, August 25, 1957, you will not be permitted to operate on assignments as attendant or waiter-in-charge."

Rule 8 of the Agreement provides for a decision within ten (10) days from date of decision, but makes no provision for any particular officer to make it.

We adhere to the Award in 9817 wherein Organization contended "that Claimant was denied a fair and impartial Investigation and Hearing by the Carrier on the ground and for the reason as argued before us, that the Officer conducting the Hearing was not the same person as the Officer making the decision of Carrier." As stated in said Award:

> "After a thorough review of the record we conclude that the first contention of the Organization is not supported in the record. A reference to Award 2608 of this Division, without a Referee, is applicable here. Since this Board has upheld the principles of procedure as here involved, in many Awards, we conclude that such contention is not well taken and is contrary to the Opinion and Findings in Award No. 2608."

Award No. 9819 had the same question involved and in that Award it was held:

> "From a review of the record here we have no authority to read into Rule 8 of the Agreement, that which would require the Hearing Officer designated by Carrier to make the decision as argued by the Organization. Such a requirement can only be reached by negotiation and conference between the Organization and Carrier."

In view of the foregoing, we find that the action of the Carrier was justified and that its action was not unjust, unreasonable or arbitrary and that Claimant had a fair and impartial hearing. That the claims should be denied in their entirety.

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 did not violate the provisions of the effective Agreement between the parties.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 27th day of April 1962.