Award No. 10837
Docket No. DC-10519

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Roy R. Ray, Referee

PARTIES TO DISPUTE:

JOINT COUNCIL DINING CAR EMPLOYEES LOCAL 233

NEW YORK CENTRAL RAILROAD

STATEMENT OF CLAIM: Claim of Joint Council Dining Car Employees Union Local 233 on the property of the New York Central System (Lines West) for and on behalf of Waiter-in-Charge E. C. Washington that he be compensated for net wage loss suffered account 15 days suspension, said suspension being discipline assessed by Carrier in violation of agreement and in abuse of its discretion.

OPINION OF BOARD: On March 19, 1957, Claimant, Edwin C. Washington, received a letter from Carrier's Superintendent of Dining Car Service advising him to report for a hearing at Mattoon, Illinois, on March 26, on the following charge: "Insolence to Division Superintendent, Train 407, February 11, 1957." After postponement the hearing was held on April 16, 1957. Two days later the Hearing Officer advised Claimant that the evidence produced at the hearing clearly established his guilt of the charge and that he was suspended for twenty (20) days. Under date of April 26, 1957, the General Chairman appealed the decision to Carrier's Manager of Dining Service who denied the appeal on July 19, 1957, reducing the period of suspension to fifteen (15) days.

In its submission the Organization alleged that the Claimant was not given a fair and impartial trial as required by Rule 6(a) because the Hearing Officer: (1) Led the witnesses for the Carrier (2) Rendered his decision two days after the investigation hearing and before the transcript was available, thus showing that he did not base his decision on the record (3) Prejudged the case (4) Failed to hold the investigation as promptly as possible, (5) Failed to examine witnesses separately as required by Rule 6(a). For the substantive part of its claim the Organization contended that the evidence adduced at the hearing failed to establish the charge against Claimant, i. e. insolence to the Division Superintendent.

The procedural objections concerning the conduct of the hearing are either without substantial merit or were not timely and properly raised. While the record is replete with instances where the Hearing Officer led Carrier's

chief witness and sought to suggest the answers desired, the Organization Representative failed to object to this procedure and it cannot be raised here. With reference to reasons 2, 3 and 4 above, there is nothing in Rule 6 which indicates that a review of the transcript by the Hearing Officer is required before a decision can be made, and in fact the accepted practice is to the contrary. There is no suggestion that the decision of the Hearing Officer was the result of prejudice and no evidence to indicate that he prejudged the case. As to the claim that the hearing was not held properly, the record shows that the date fixed was the result of negotiation between the parties. Since the Organization agreed to the date, it is in no position to complain.

The complaint that the Hearing Officer failed to examine witnesses separately as required by Rule 6(a) is based on the theory that the rule means all witnesses except the one being examined must be excluded from the hearing room. This is a misconception. "Separately" means merely that the witnesses shall be questioned one at a time until a conflict in testimony of two witnesses appears. In the absence of a specific provision in the contract exclusion of witnesses from the hearing room until called to testify is not an indispensable requirement of a fair and impartial hearing.

Turning to the substantive part of the claim, it is essential to review certain facts. On February 11, 1957, Carrier's Division Superintendent entered the Dining Car in which Claimant was working as waiter-in-charge. Two days later he wrote a letter to the Manager of Carrier's Dining Car Service complaining of Claimant's conduct toward him, which letter formed the basis of the charge made against Claimant. The dining car had a total of eight tables but, on the date in question, food service was not being provided at the two tables at the opposite end from the kitchen because the crew consisted of only two waiters and a chef. After the Superintendent took his seat, he observed a young lady seat herself at one of the two tables not set up for service and saw the Claimant speak to her, after which she left the table and was seated at the Superintendent's table. The Superintendent asked Claimant why the lady and others were not being served at those two rear tables, to which Claimant replied that he was too busy to explain then. After he finished his meal, the Superintendent stopped by the pantry where Claimant was then working and asked to talk with him. Claimant again replied that he was too busy. There is a conflict in the testimony of Claimant and Superintendent as to the exact words which were spoken by the parties at both times. At the pantry, the Superintendent says that he asked Claimant if he could talk to him and that Claimant told him he had no business there, to "get out", he had no time to talk with him. Claimant denies this and says he merely told the Superintendent he was too busy to talk to him.

The evidence is clear, however, that the Superintendent did not identify himself to Claimant at any time during his questions and actually made his identity known only as he was leaving the pantry. In fact, the Carrier does not allege that Claimant knew the person making the inquiry was the Superintendent. There is no dispute that Claimant was extremely busy at all times the Superintendent sought to talk with him. The evidence also shows that, during his meal and prior to the time the Superintendent stopped at the pantry, he had already received from the other waiter, Bowman, a complete explanation of why the two tables were out of service and that this was done on instructions from the Dining Car Service, thus eliminating a reason for the Superintendent to pursue the matter further.

The only thing proved by Carrier concerning Claimant's conduct is that he did not take the time to answer the inquiry of a person whose identity he

did not know. His failure in this respect cannot, in the judgment of the Board, be considered "insolence" within any accepted meaning of that term. The Superintendent's own testimony bears this out. Though he wrote the original letter complaining of plaintiff's actions, he testified that he had never said Claimant was insulting—only that he did not take the time to answer his (the Superintendent's) questions. This failure is certainly mitigated by the failure of the Superintendent to identify himself.

A careful reading of the record shows that the charge of insolence is not supported by any substantial evidence. Under these circumstances, the assessment of a penalty of suspension for any period of time must be regarded as arbitrary and excessive. We hold that the action of the Carrier was an abuse of discretion and in violation of the Agreement.

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.

AWARD

Claim sustained. The Carrier is directed to compensate Claimant for the net wage loss suffered by reason of the fifteen day suspension.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 11th day of October 1962.