

Award No. 11308

Docket No. DC-13317

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Wesley Miller, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD TRAINMEN

**CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC
RAILROAD COMPANY**

STATEMENT OF CLAIM: Claim of Dining Car Steward J. E. Stevens for time while attending investigation, August 18, plus payment for time lost from August 23 to and including December 30, 1961, for being dismissed from service on account the Carrier alleged that he did not perform his duties as a dining car steward in the proper manner.

OPINION OF BOARD: The Claim involves the identical parties before the Board in Award 11130, and the key holding in this very recent Award is quite applicable to the case at hand.

In Award 11130, we said:

"The burden was on the Carrier to produce evidence directed to the charges contained in the notice. By also including a review of old records we cannot now find that the decision of the Carrier rested solely on the testimony pertinent to the charges. We believe that by including in the hearing a review of the Claimant's past record without any showing that such was solely limited to determining the degree of penalty, if any should be assessed, the Claimant was not accorded a fair and impartial investigation."

We believe that this prior Award is correct.

In the present case the Hearing Officer of the Carrier — overruling objection and without explanation — directed that the transcript of the hearing held in connection with the letter of charges show and include the "Historical Record" of the Grievant, which consisted of numerous exhibits covering a time span of almost two decades. In Award 11130, we expressed misgivings in reference to this procedure; we stated that a review of an employee's past record had no place in the investigation of current charges. But here, as aforesaid, such a review was made a part of the transcript of the hearing.

We cannot be certain that Carrier's making the "Historical Record" of the Grievant part and parcel of the record of the trial did not result in any

prejudice to the rights of the Claimant; for the Record before us indicates that the charges against the Grievant were (in the main) supported by uncorroborated hearsay evidence: the complaint of one passenger (transmitted by letter and subsequently reiterated in a long distance telephone conversation with a Carrier official) — whose allegations pertaining to Grievant's misbehavior were not fortified by the testimony of any other person.

For the reasons shown and indicated above, we are of the opinion that the Grievant did not have a fair and impartial hearing and that therefore the Claim should be sustained.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employees involved in this dispute are respectively Carrier and Employees 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: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 11th day of April 1963.

CARRIER MEMBERS' DISSENT TO AWARD NO. 11308, DOCKET DC-13317

The Award in this case is in error in that it gratuitously assumes the Carrier based its decision of dismissal on the Claimant's past record rather than on the basis of a finding of guilt of the charges preferred. This assumption is not warranted and cannot be properly inferred from the inclusion of his past record in the transcript of the investigation which, as stated by the Carrier, was for the purpose alone of fixing the quantum of discipline should there be a finding of guilt. The Referee cites Award 11130 which erroneously places the burden on the Carrier to prove that it did not use the past record in determining guilt. The Award cited and the Referee here blithely impose a burden without regard to how it might be met. How do you prove or disprove a mental process?

The only proper consideration for this Board is whether the record contains evidence relative to the charges, which if believed, would sustain the Carrier's finding of guilt. This record does contain such evidence, and the

fact that only one passenger complained of Claimant's conduct, does not bar the Carrier from taking appropriate action. The rudeness of the Dining Car Steward, Claimant here, toward his passengers cannot be condoned merely because only one passenger took the trouble to complain to the Carrier.

The Award here is in error and produced an unfair and improper result. We therefore dissent.

D. S. Dugan

P. C. Carter

W. H. Castle

T. F. Strunck

G. C. White