

Award No. 12435
Docket No. DC-13970

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Bernard J. Seff, 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 Employees, Local 385, on the property of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, for and on behalf of Chef E. Bond, that he be returned to service with seniority and vacation rights unimpaired and compensated for net wage loss account of Carrier dismissing Claimant from service in violation of the Agreement.

OPINION OF BOARD: Claimant was charged by the Carrier with molesting a teen-aged white female passenger by placing his hand on her body against her will and making a suggestive remark. The Complainant recited in an unsigned letter that after she had partaken of a soft drink in the dining car she passed the kitchen and expressed an interest in seeing it. Chef Bond allegedly invited her in and in the course of her inspection of the kitchen, the above incidents allegedly took place.

Carrier notified the Claimant that a hearing would be held to determine his responsibility for these charges. The Employees requested and were granted two continuances before the hearing took place. On at least two occasions, requests were made by the Organization, both on the telephone and by wire and letter asking who the Carrier's witnesses would be; the Organization also asked to see the statements of the witness and what her name and address was so that a visit could be made to interview her. The Carrier ignored these requests and finally refused to divulge the Complainant's name and address because the parents of said Complainant refused to allow their names to be revealed and refused the Organization permission to interview the girl.

The Carrier stated on the record at the hearing that:

" * * * the person who has written to us and complained in this case was a guest of the railroad and was a paying passenger. The railroad has no control over the activities of this person and she will not be present at the hearing for questioning. This person and

her family have also specifically requested that their name and address not be disclosed * * *."

The Organization, for its part, stated on the record that:

"* * * We have stated at the outset that we consider these charges serious. Serious not only in that if they were true they would probably merit a discharge of this employe but serious * * * they are the kind of accusation that would place a stigma on this employe * * *."

At the hearing the Carrier introduced into evidence a copy of the Complainant's unsigned letter and the testimony of the Carrier's inspector who testified that the 15 year old girl stated to him, in her Mother's presence, the same charges which are contained in the said unsigned letter. Based on this evidence, the discharge of the Claimant was upheld even though Mr. Bond categorically denied the charge in its entirety.

The question at issue is whether or not the Carrier's action was supported by a preponderance of the credible evidence or whether the discharge was an arbitrary act which in effect constituted an abuse of the Carrier's discretion.

It is to be noted that despite a number of requests, the Claimant was denied the right to see the unsigned letter before the hearing. The Carrier refused to divulge the name and address of the Complainant, thus preventing the Organization from making its own investigation of the facts of the case. This Board understands the Carrier's explanation that it was precluded from making this information available to the Claimant because the information was given to it on the Carrier's express commitment, insisted on by the Complainant, that this information would not be disclosed and that the Complainant would not appear as a witness. Nevertheless, absent proof by competent witnesses, and in the face of the Claimant's denial of the charges it would seem clear that the charges were not proven at the hearing. The following Awards support this conclusion:

AWARD 3288

"* * * The purpose of furnishing this information to the employe is obvious. It enables him to know the contents of the report, gives or should give time to investigate the circumstances related in the reports and time to prepare, to answer, explain or deny. That is a substantive right. The Carrier here denied that right to the employe. It is our view that when a carrier has information in writing, which it expects to use as a basis of sustaining its charges, that it is incumbent upon it to furnish that information to the employes 'prior to the hearing'. If it does not do so the use of that information as evidence at the hearing should not be permitted * * *."

* * * The Carrier at the hearing, however, used the statements in the reports as substantive evidence of their contents, at the same time refusing to divulge the name or names of the inspector. It accordingly denied before the hearing any opportunity to the employe to check the statements and at the hearing denied an opportunity to inquire as to them of the party making them. * * *"
(Emphasis ours.)

AWARD No. 4976 (Robert O. Boyd)

"* * * It is to be noted that the identity of the witnesses and the nature of their statements were made known to the claimant. The denial of this information by the Carrier was the basis for Award 3288, relied on by the claimant." (Emphasis ours.)

AWARD No. 8576 (Sempliner): This case is also one of alleged molestation of woman passenger.

"* * * While the degree of proof required is not as great here, as it would be in a criminal proceeding, fundamental rights cannot be entirely disregarded. The accused has a **fundamental right** as in this case where statements had been taken, to see those statements prior to the hearing, **including the signatures thereon**. This right was denied." (Emphasis ours.)

AWARD No. 4771 (Mortimer Stone)

"* * * The right to require the personal appearance for cross-examination of witnesses is not essential to a fair hearing. In many cases that would be impracticable or impossible. But the right either to have the personal appearance of witnesses or **information as to their identity** and the nature of their statements, with **reasonable opportunity to communicate with the witnesses and inquire into their statements, is essential**." (Emphasis ours.)

Measured against the above standards, it can be readily seen that when the Carrier denied information to the Organization before the hearing and further refused to provide it with the identity of the witness, it abridged the Claimant's substantive rights and abused its discretion.

The Division has consistently held that it will not attempt to pass upon the credibility of witnesses, or to weigh the evidence, but if the evidence is such that, if believed, it supports the findings of the Carrier, the Carrier's action will not be disturbed. (Awards 10791-Ray, 3149-Carter, 2633-Shake, 3127-Youngdahl, 5861-Jasper, 7139, 7140-Cluster, 9046-Weston, and 9322-Johnson.) The difficulty in the instant case is that an unsigned letter is not probative evidence and when juxtaposed over against the flat denial of the Claimant who has an unblemished record of 17 years of service with the Carrier, then not only has the Carrier failed to sustain its burden of proof but it has predicated its discharge on no evidence whatsoever. Under these circumstances, it is clear that Complainant's story cannot be credited and the Carrier's action cannot be sustained.

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 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 discharge is not supported by any evidence, let alone substantial evidence, and therefore constitutes an abuse of discretion.

AWARD

The claim is sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of **THIRD DIVISION**

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 23rd day of April 1964.