Award No. 12842
Docket No. TE-11987

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Robert J. Ables, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

ERIE RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Erie Railroad, that:

Glenn P. Reed, who was improperly and unjustly suspended from service May 19 through 23, 1959, be compensated for wages lost by reason of the Carrier's improper act.

OPINION OF BOARD: This is a discipline case. Claimant was suspended 5 days for being discourteous to an intended passenger.

It will probably be said of this case that Reed beat the rap on a technicality, for we are going to find that he was improperly suspended; but for those who know anything about the circumstances, they will probably remain convinced that Reed was discourteous, as charged.

Reed worked as an operator–ticket-clerk from 11:59 P. M. to 7:59 A. M. The ticket office was closed from 8:00 A. M. to 10:30 A. M. A public notice was posted to this effect.

At about 7:55 A. M., the company says — Reed says, at 8:00 A. M. — a lady patron asked if she could buy a ticket. Although still at the ticket window, Reed was ready to leave, having put on his overcoat, closed his cash book and ticket ledger and having removed his personal die (ticket) from the dater. Reed told her the ticket office was closed and that she could purchase a ticket at 10:30 A. M., when the office re-opened.

The facts are in dispute as to the tone of voice and manner used by Reed in his conversation with the patron. Reed says he was courteous and expressed appropriate regret. The lady said he used a surly tone. In any event, Reed did not sell the lady a ticket. In explanation of this he told her that the company had discontinued the trick between 8:00 and 10:30 A. M., that his quitting time was 7:59, and that he would not be reimbursed by the company if he stayed later. When the patron asked another employe, a working man in overalls, to sell her a ticket, Reed "could see that to stand and listen to any more conversation I would be as well off to have sold the ticket, so I picked up my lunch bucket and said to Mr. Ramsey, "Let's go home."

The lady was "so infuriated" she "saw red," her feelings, no doubt, inflamed by the fact she had made a special trip in zero weather over snow-covered roads to buy the tickets.

The Carrier, having the duty to show that an offense had been committed, evidently felt it was important to find that Reed was still on duty at the time of his conversation with the patron, for it painstakingly attempts to show through circumstantial evidence that the conversation must have taken place before 8:00 A. M. — or at "about 7:55 A. M." To this end, Carrier points to the time — consuming duties of an operator-clerk when a train departs his station (one left at 7:52 A. M.), to the conversation with other employes after Reed refused to sell her a ticket, and to the time the lady spent in the parking lot outside the waiting room, all of which occurred before 8:05 A. M. when she entered the chief clerk's office to register her strong complaint about the treatment she had received.

We agree with the Carrier that it is essential to show Reed was on duty at the time of his conversation with the lady, and we think the circumstantial evidence does suggest that this happened before 8:00 A. M., but the Carrier has not quite met the burden it carries to show this.

However long it takes to make the required reports after a train leaves the station, the fact is Reed says he had finished all required business before 8:00 A. M., and there is no evidence to the contrary. Coupled with this is Reed's specific, unqualified statement, supported by the only other direct witness (Mr. Ramsey), that he had closed the ticket office and was ready to go home at 8:00 A. M. when the lady came in. With this evidence, and with the burden on the Carrier to show otherwise, we conclude that the conversation in question took place at 8:00 A. M. — or, at a time when, technically, Reed was no longer on duty.

We do not say that because Reed was not on duty at the time he could not be found to have been discourteous to the patron in violation of the operating rules. On the contrary, we think such offense could be found where the evidence clearly supports such charge — but such evidence is not present here. We do say that because Reed was not on duty at the time he was not under a duty to sell a ticket to the lady, and his refusal to sell such ticket was the heart of the lady's disappointment and, consequently, the cause of her becoming so irate.

Carrier's argument that Reed should have sold the ticket even if he were off duty is weak. The ticket office was closed between 8:00 A. M. and 10:30 A. M. because the Carrier elected to close it for reasons of economy. If Carrier wanted ticket operators to work overtime to take care of available business, it should have made this clear one way or another. It did not do this; therefore, Claimant cannot be faulted for standing on his technical right to quit work as scheduled.

In the long run, situations like this depend on existing employer-employe relations. To the outsider, it is frightening to think that the climate of these relations might be such that each side would rather stand on his technical rights than promote their common — and the public — good. But, this a matter for other forums.

We cannot feel sanguine about Reed literally or figuratively turning his back on the patron or leaving the distinct impression with her that the company was tight-fisted and unfeeling about employe interests, but these are

not elements of discourtesy to the patron — at least of the kind requiring suspension from duty. We decide this case, therefore, on the narrow ground that the ticket office was technically closed at the time of the incident, that Reed was not under a duty to sell the patron a ticket and that the Carrier has not shown the cause of the patron's displeasure to be Reed's discourtesy as distinguished from her inability to purchase a ticket. Reed was, therefore, improperly and unjustly suspended and should be compensated for wages lost by reason of Carrier's action, as claimed.

The Carrier states that discipline is in all cases administered for the education, caution and benefit of the employes rather than as punishment. Perhaps the same ends are served after a proceeding of this kind even though actual suspension is not levied.

In view of the final disposition of this case we have preferred to decide it on its merits rather than on the question whether Claimant received a fair and impartial hearing, which was raised by the employes. Without passing on the question, we note the Claimant stated that he did receive such fair and impartial hearing. This is most persuasive in deciding whether an employe understood the reasons for his being charged with violation of company regulations. At the same time, we note that the company, seemingly in a knowing and wilful — but not malicious — way, refused to make available to the employe or his representative, during the investigation, the patron's letter of complaint. Since the letter was the exclusive basis for the charge of discourtesy, it was highly prejudicial to the employe for the company not to make it available to him.

One other procedural point bears comment. Carrier earnestly petitions the referee not to weigh the evidence, but to accept Carrier's finding in this discipline case unless it is found to have acted arbitrarily or capriciously. It cites **Award 2769** (Parker) as basic precedent for the Board's authority in considering discipline cases. Carrier also cites **Award 10049** (Dugan) and this referee's **Awards 11014 and 10727** as recent examples supporting the stated principle.

Carrier's right to discipline its employes is unquestioned. Its right to issue operating rules in addition to negotiated Agreement rules is also unquestioned. But, to say that this Board is limited to consideration of arbitrariness, capriciousness or prejudice goes much too far. To "adjust" disputes, as the Congress has charged this Board to do, it must look at a dispute (be it discipline or otherwise) in its total environment, determine if it has authority to settle the dispute and, if it has, issue an award which will right the wrong, make fair what has been found to be unfair — or, more simply, adjust the dispute. Within the bounds of its jurisdiction, therefore, the Board must have wide discretion to consider and settle cases coming to it, **under the circumstances in which the dispute arose.**

Certainly, in discipline cases, the Board should not attempt to second guess the triers of the facts **where there is contradictory evidence.** This is the essence of the Dugan award (**Award 10049**). And, certainly, the Board should not upset Carrier's award of discipline "where there is positive evidence of probative force" or "where there is real substantial evidence to sustain charges." This is the essence of the Parker award (**Award 2769**). But, how do you make this judgment unless you look at the evidence?

This referee's opinions have been cited by Carrier in this case as support for its view that the Board's function in discipline cases does not include review of the evidence. This view may have been gained because of the

force and brevity of the opinions — particularly, Award 10727. It must be understood, however, that before the judgment was made on the probity and substantiality of the evidence supporting Carrier's assessment of discipline, all the evidence had to be, and was, reviewed. When such substantial and probative evidence was found, there was no need to discuss it, in line with the principles cited by Carrier.

For the reasons described in this opinion, however, we find that there were not such probative and substantial grounds to support Carrier's award of discipline as to preclude their examination in this case.

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 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 Glen P. Reed was improperly and unjustly suspended from service from May 19 through May 23, 1959.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 9th day of September 1964.

CARRIER MEMBERS' DISSENT TO AWARD 12842, DOCKET TE-11987 (Referee Ables)

This decision is palpably in error. The Majority is correct when it says "for those who know anything about the circumstances, they will probably remain convinced that Reed was discourteous, as charged." We know something of the circumstances, and we remain convinced. We hope the Majority — after studying the file and rendering the decision — will admit to knowing something about the circumstances of the case. If so, then they, too, are convinced of Reed's discourtesy.

We fail to understand how the Majority, admittedly knowing the circumstances — and being convinced that Reed was discourteous as charged — could sustain the claim. Convinced of his discourtesy, the Majority volunteered the statement that:

> "We do not say that because Reed was not on duty at the time he could not be found to have been discourteous to the patron in violation of the operating rules. * * *"

Thus, whether the discourtesy took place at 7:59 or 8:00 A. M., according to the Majority's reasoning, the Claimant could have been found guilty of discourtesy. In short, the time element was not vital to the decision.

The Majority says the case is decided "on the narrow ground that the ticket office was technically closed at the time of the incident, that Reed was not under a duty to sell the patron a ticket, and that **the Carrier has not shown the cause of the patron's displeasure to be Reed's discourtesy as distinguished from her inability to purchase a ticket.**" (Emphasis ours.)

Again, the Majority is in error. It was already admitted that the patron accused Claimant of using a surly tone. The patron also visited the **Chief Clerk** and asked to buy two tickets and was refused — however, she did not reproach him for refusing to sell her the tickets. On the contrary, she commended him for the courtesy he showed her. She said in her letter:

> "I am writing this not so much in condemnation of the man at the ticket window (I was so infuriated that I 'saw red'), as in praise of Mr. Dohme, who did a good job of public relations."

If the cause of the patron's displeasure was failure to obtain the tickets rather than Claimant's behavior — logic persuades us she would have been equally provoked at the Chief Clerk, who also refused to sell her the tickets. Instead, she gave him a commendation. The Majority's rationale escapes us.

While there are a number of other points we can challenge in this Opinion, we feel one final glaring error should convince the reader this award is without substance. The Majority says:

> "* * * At the same time, we note that the company, seemingly in a knowing and wilful — but not malicious — way, refused to make available to the employe or his representative, during the investigation, the patron's letter of complaint. Since the letter was the exclusive basis for the charge of discourtesy, it was highly prejudicial to the employe for the company not to make it available to him."

This statement cannot be supported. The investigation was held on March 18, 1959. There was **no request** by the Claimant or his representative for a copy of the patron's letter at the investigation or prior thereto. Furthermore, there was absolutely no dispute about its contents. The first request made by the Petitioner for a copy of the letter was on August 20, 1959 — five months **after** the investigation was completed. Furthermore, there could have been no prejudice because the Local Chairman admitted Claimant was informed of the letter and its contents on March 13th — five days **before** the investigation. If there had been anything "highly prejudicial" in this case — it is the impossible position the Majority places the Carrier in when it seeks to operate its business in a business-like manner.

For the reasons stated above, we dissent.

W. F. Euker
R. A. DeRossett
C. H. Manoogian
G. L. Naylor
W. M. Roberts