Award No. 13306
Docket No. DC-14900

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Daniel Kornblum, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD TRAINMEN

THE PENNSYLVANIA RAILROAD COMPANY

STATEMENT OF CLAIM: Docket No. S-696

Appeal filed for and on behalf of C. E. Brecklew, Steward as a result of fifteen (15) days' suspension he was assessed for the following charge:

"While on duty as Steward on Train No. 130, March 14, 1963, you treated patrons in a discourteous manner."

OPINION OF BOARD: The Claimant was given a suspension of fifteen (15) days because, "While on duty as Steward on Train No. 130, March 14, 1963, (he) treated patrons in a discourteous manner." The Organization challenges the Carrier's decision on the grounds that Claimant was not accorded a "fair and impartial trial" as required by Regulation 6-A-1 of the parties' Agreement and there was not substantial evidence in the record to support the charge of being discourteous.

The entire case against the Claimant rests on three letters of complaint directed to the Carrier by three passengers, all of whom were together involved in the single incident which seemingly provoked their written protests. As the Carrier acknowledges in the Joint Statement submitted while this appeal was being progressed on the property: "The information contained in the letters constitutes the case against (Claimant)."

With some differences in detail, the letters all describe the common occurrence which gave rise to them. Apparently, the three letter writers, together with a fourth passenger, constituted a party of business associates or friends who boarded the train at Baltimore going to New York City. After getting their seats in the coach they went promptly to the Dining Car. All the tables were then occupied and they could not be seated. They then inquired of the Claimant, the Steward, whether they could get a drink while standing and waiting to be seated. They were told by the Claimant under the rules they could not be served with drinks until they were seated at table. Two of the correspondents wrote that this initial rebuff was delivered by the Claimant very "curtly" or "unpleasantly".

In any event, the party then went to the Club Car where they got their drinks and also started a game of bridge. When the train got to Philadelphia they went back to the Dining Car where they were seated and ordered lunch.

As one of the correspondents put it: "While waiting for our lunch to be served we thought we could continue our bridge game until lunch was served. We were in the middle of the hand when (Claimant) came storming up to our table and, in a voice loud enough to hear throughout the car, if not the whole train, announced card playing was forbidden in the Diner. We said we would finish the hand, at which he further raised his voice, if that were possible, to announce we could not play one more second." This is the sum and substance of the episode as variously reported in the letters of the offended passengers. Copies of these letters were furnished the Claimant by the Carrier with the notice of hearing on the charges.

At the ensuing hearing on the property no witnesses in person were called by either side to testify on the merits. Claimant was present with his representative from the Organization but was directed not to take the stand in his own defense because the Carrier had not seen fit to bring in any of the complaining passengers in person or anyone else to attest their complaints in oral examination. However, the Carrier's hearing officer did introduce for the record the Claimant's letter directed to it in the investigatory stages of these charges. This letter gives a version of the episode at striking odds with that of the passengers. We quote it in full:

"March 28, 1963

"Mr. J. T. Blake
Asst. Director of Personnel
P. R. R.
Dining Car Dept.
Sunnyside Yards
L. I. City 1
New York

"Dear Mr. Blake

"On March Four men entered D. C. 4626. I seated them at #2 station and presented them with a check and menus. I then walked to the other end of the diner and seated some other guests. I patrolled the car as in my invariable custom and noticed that the four men I had previously seated had returned the menus to the menu rack as well as the check I had presented them.

"At this time they had some sort of card game going full blast without the slightest sign of any type of food or beverage order. I noticed there was money on the table and assumed they were gambling. I am aware that there is a federal law which prohibits gambling in interstate commerce.

"I very politely asked them to cease playing cards. One man who seemed a little befuddled, to say the least, said in a very belligerent and offensive manner, we are going to finish this hand. I said 'I do not think you will. I was still polite and my voice was quite moderate in tone. This patron whom I assume was in some sort of private world of his own said to me 'DO YOU KNOW WHO I AM'. I said no I do not know and then having picked up their cards I walked away from their table. I did not pick up the cards, the patrons did.

In finishing this statement permit me to state that I had already

stopped another card game at #1 station and the guests were still there eating their lunch. Had I permitted these persons at the other table to continue their game, what kind of an explanation could I have made to them?

"Very truly yours,

"(the Claimant)"

In addition, the Organization representative introduced into the record the statement of one of the waiters who was working in the Dining Car at the time of the alleged incident, as follows:

"4/5/63

"To whom it may concern

"I herewith state on my own volition that on 3/14/63 Train #130 I observed two parties playing cards in the diner in which I was the 5th waiter and (Claimant) the steward.

"I heard (Claimant) speaking to both parties to stop playing cards in a normal tone of voice. I did not hear any loud voices.

"(s) B. A. Hutchins"

On April 26, 1963, Claimant was advised in effect that he was found guilty as charged and was disciplined by suspension of fifteen days. In measuring the quantum of discipline (as distinct from Claimant's guilt of the subject charge) the Carrier took into account, as it had a right to do and as it had earlier notified Claimant it would review, the Claimant's previous personnel record in the service of the Carrier. Since no rationale was given for the Carrier's determination of guilt on the subject charges, it must be assumed that it credited the letters of the three passengers and discredited those of the Claimant and his fellow worker. It remains, however, that sofar as the charged discourtesy is concerned the entire record on both sides simply consists of five pieces of correspondence, none of which was ever verified or attested in person by their respective authors.

While there is abundant and settled precedent that it is not the function of this Board to assess the credibility of witnesses or resolve conflicts in the evidence, it has also been held that the case is somewhat different where no witnesses are called and the only evidence in the record consists of conflicting written statements. As was said in Award 5277 (Wyckoff):

"The reason generally assigned for not disturbing judgments based on conflicting testimony is the Carrier's opportunity to assess the credibility by observation of witnesses. But where, as here, the conflict arises from written reports and letters, without more, the Carrier is not in much better case than we are to determine credibility. (citing) (Awards 2613, 2634, 4684)"

Or as it was most recently put in Award 13240 (Dorsey):

"In this case we have only the statements of the Complainants in absolute conflict with that of Claimant. Which, if either, is worthy of credit could be determined only by an impartial hearing officer who

had the opportunity to observe the personalty and demeanor of the witnesses while testifying. Upon the facts of record, herein, the mind of man has developed no other acceptable manner to resolve credibility. (Emphasis ours.)

It is also clear, and supported by abundant precedent, that in disciplinary cases the burden of proof rests with the Carrier (e.g., Awards 11556, 10405, 8994, 6615, 4262), and that this burden can be satisfied only by the production of substantial evidence of probative value (e.g., Awards 11573, 10790, 5743, 2811). Given these decisional precepts the issue in this case is not whether the Carrier has the right, without more, to introduce written complaints by passengers about employe comportment and not calling the complainants themselves to substantiate them. Indeed, it was readily acknowledged by the Organization that realistically it is not to be expected that the Carrier produce in person the offended patrons, since it has neither the power to compel their attendance nor would it make public relations sense for it to attempt to do so. Moreover, the Board precedents cited by the Carrier in support of its position in this regard are impressive (e.g., Awards 2770, 4976, 6866, 7866, 8503, 8300, 8683, 9624, 11237, 11342).

Rather the issue still is whether, absent any witnesses, the Carrier meets its overall burden of proof by presumably relying, without explanation, on the passengers' complaints and discrediting the statements offered on behalf of the Claimant. On this score we turn again to Award 13240 (Dorsey) supra, where it was stated and held:

> "The Carrier argued that in those cases in which a complainant will not voluntarily testify it would be deprived of administering discipline. There is no requirement that Carrier must produce a complainant at a hearing. The requirements are that the Carrier has the burden of proof and to prevail must adduce substantial evidence which proves the charge. We are not unmindful that in some cases the Carrier might be unable to prove the charge absent testimony of the complainant. This is a potential juridical liability which attaches to all litigants. It is no defense for failure to afford an employe his contractual right to 'a fair and impartial hearing;' nor, does it mitigate Carrier's burden of proof."

It is interesting to observe that in its ex parte submission herein the Carrier emphasizes that, for its part, it "demands strict proof by competent evidence of all facts relied upon by Claimants, with the right to test the same by cross-examination, the right to produce competent evidence in its own behalf at a proper trial of this matter and the establishment of a proper record of all of the same." This demand may well be a routine one inserted in all the Carrier's numerous submissions to this Board, but on the state of this record it seems to suggest a dual standard of due process for the Carrier on the one hand and the Claimant on the other. Whether or not this is further revealing of the inherent infirmities of the proof in this case, in balance and limited only to the entirely hearsay character of the record in this case, we hold that the Carrier did not sustain the charge by substantial evidence.

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 re-

spectively 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 Carrier suspended Claimant without a fair and impartial trial within the contemplation of Rule 6-A-1 of the Agreement.

That Carrier's decision that Claimant was guilty as charged is not supported by substantial evidence.

AWARD

Claim sustained.

By Order of THIRD DIVISION
NATIONAL RAILROAD ADJUSTMENT BOARD

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 17th day of February, 1965.