

Award No. 14187
Docket No. DC-15513

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Don Harr, Referee

PARTIES TO DISPUTE:

JOINT COUNCIL DINING CAR EMPLOYES, LOCAL 849
CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of Joint Council Dining Car Employees Local 849 on the property of the Chicago, Rock Island and Pacific Railroad Company, for and on behalf of Walter Michael Wilson that he be compensated for net wage loss during ten (10) day suspension arbitrarily imposed by Carrier in violation of the agreement between the parties hereto.

OPINION OF BOARD: On October 7, 1964, Claimant was notified to appear for formal investigation to be held October 15, 1964, on a charge that he:

"* * * August 27, 1964 you directed certain passengers who were partaking of meal service in the dining car to which you were assigned at 10:45 A. M. that they must leave this car, in a most rude manner in violation of Rule N of the General Notice and General Rules, Form G-147 which reads in part as follows: 'Courteous deportment is required of all employees in their dealings with the public, their subordinates and each other. Employees who do not conduct themselves in such a manner and handle their personal obligations in such a way that their railroad will not be subject to criticism or loss of good will, will not be retained in the service,' or the violation of any other rule in connection therewith."

This letter was signed by Mr. M. H. Bonesteel, General Superintendent, Dining and Sleeping Cars, Chicago, Rock Island and Pacific Railroad Company.

On October 9, 1964, the Employees wrote Mr. Bonesteel requesting a copy of the entire report made against the Claimant and the names and addresses of all witnesses. They also requested that all witnesses involved in the incident be present at the hearing. These requests were denied by the Carrier by letter of October 13, 1964. At that time the Employees were advised that all reports and witnesses would be present and available to them at the investigation. They were also told that they would be given the opportunity to question the Carrier's witnesses at that time.

The investigation was postponed and subsequently held on November 16, 1964, at Minneapolis, Minnesota. The transcript of the investigation is reproduced beginning at record page 49, and identified as Carrier's Exhibit "1".

The investigation was conducted by Mr. J. S. Antink, Assistant Superintendent of Dining and Sleeping Car Department, and the Claimant was represented by officers of his Organization.

The Carrier relied on the testimony of two employees of the E. M. Burch Company to support the charge against the Claimant. These two witnesses were: Miss Linda Ouderkirk, operative No. 63 and Mrs. Irene Ouderkirk, operative No. 61. They testified that there was another witness present at the alleged incident; but she was never identified, other than as a college friend of Miss Ouderkirk.

It was brought out at the investigation that E. M. Burch Company is retained by the Carrier to furnish coverage of their passenger service. A written report submitted by Miss Linda Ouderkirk was introduced and is reproduced at record page 62 and marked Exhibit "C" to Investigation. Both of the E. M. Burch Company operatives testified in support of this written report. The Claimant, Dining Car Waiter Fain and Steward Blount also testified at the investigation. The Claimant denied any knowledge of the alleged incident. Fain and Blount also denied any knowledge of the incident and both testified that the Claimant had a naturally "gruff" voice.

As a result of the investigation Claimant was notified on November 25, 1964, that he was suspended from service for 10 days beginning with November 27, 1964 to and including December 6, 1964.

The Employees appealed this decision and the appeal was denied by the Carrier.

In their Ex Parte Submission the Employees state that the decision should be set aside for one or all of the following reasons:

1. The notice of the investigation was defective.
2. Carrier's failure to give the Organization a copy of the report placed in evidence at the investigation and Carrier's failure to inform Employees of the names and witnesses it intended having present at the investigation.
3. The evidence produced at the investigation, did not support the charge.

We shall consider these three reasons separately.

I

Rule 11(d) of the Agreement reads:

"(d) Investigation shall be held within fifteen (15) days from the date the General Superintendent Dining Cars, has knowledge of the offense, * * *"

The operatives report is stamped at the top "M. H. B. Oct. 21, 1964." The Carrier states that this is the date stamp of Mr. M. H. Bonesteel, General Superintendent, Dining and Sleeping Cars. The investigation was set within 15 days of this date and the Carrier contends that this October 2, 1964, date

was the first notice to Mr. Bonesteel. The continuance in this case was by agreement.

The burden of proof must be on the Employees to prove that the notice of investigation was defective. The notice appears to be good upon its face and the Employees have not met the burden of proving it defective.

See Awards 13748 (Mesigh), 13329 (Dorsey), 12708 (Yakoda) and 11887 (Christion).

II

We cannot find that any substantive right of the Employees was violated by the Carrier's refusal to provide a copy of the report and the names and addresses of witnesses prior to the investigation.

The manner for handling Discipline and Grievances is set out in the Agreement. If the Employees desire a discovery procedure they should negotiate this into the Agreement at the bargaining table. We note from the awards submitted by the Employees that rules in some Agreements require disclosure of evidence and naming of witnesses prior to investigation.

Award 13670 (Weston) involves the same parties and Agreement. In this Award the Board states:

"Petitioner insists that the record is materially defective since Carrier rejected Petitioner's request prior to the hearing for the names of the witnesses and an opportunity to examine any written statements that would be used in the case. This argument lacks merit in the present factual situation since there appears to be no rule in the controlling Agreement requiring the production of the requested information (cf. Award 3288 and other awards based thereon) and the authors of the only written statement used in evidence were present at the hearing and subject to cross-examination (cf. Awards 8576 et al)."

III

If there is any conflict in the testimony it is not our prerogative to resolve that conflict. The Carrier conducts the investigation and this Board has consistently held that we cannot pass upon the weight of evidence nor the credibility of witnesses. This right is reserved to the Carrier.

Award 10595 (Hall) states:

" * * * To the Carrier is reserved the right to pass on the credibility of the witnesses and the weight it will attach to testimony. It is for the Carrier to say who it will believe and whom it will disbelieve. It is not within the province of this Board to weigh conflicting testimony."

See also Awards 12074 (Dolnick), 9199 (Weston) and Second Division Award 1831 (Carter).

This Board has upheld the Carrier's right to assess discipline for discourteous conduct toward passengers. See Awards 12074 (Dolnick), 9455 (Grady), 7139 (Cluster) and 8896 (H. A. Johnson).

Based on the record we find that the Carrier has not violated the Agreement and the Claim will be denied.

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 the Agreement was not violated by the Carrier.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 28th Day of February, 1966.