

Award No. 16344
Docket No. DC-17216

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Arthur W. Devine, Referee

PARTIES TO DISPUTE:

JOINT COUNCIL DINING CAR EMPLOYEES

**THE DENVER AND RIO GRANDE WESTERN
RAILROAD COMPANY**

STATEMENT OF CLAIM: Claim of Joint Council Dining Car Employees Local 354 on the property of the Denver and Rio Grande Western Railroad Company, for and on behalf of Albert J. Burks that he be restored to service and compensated for net wage loss with seniority and vacation rights unimpaired account of Carrier dismissing claimant from service on March 27, 1967, in violation of the Agreement between the parties and in abuse of its discretion.

OPINION OF BOARD: This is a discipline case involving the dismissal of Claimant for conducting himself in a manner unbecoming a dining car waiter while serving on Train No. 17, departing Denver, Colorado, on March 3, 1967.

The Petitioner has raised two procedural arguments, neither of which the Board finds meritorious. First, the contention is made that Claimant was not apprised of the precise charge as required by Rule 9(a) of the Agreement. The Board has held in numerous awards that the purpose of rules such as 9(a) is not to create technical loopholes to permit an employee to escape discipline, but to enable him to prepare his defense so that he is not misled, deceived or taken by surprise. Awards 11170, 13969, 14272, 15025, 16115. The charge against the Claimant met the requirements.

The Organization also alleges that Claimant did not receive a fair and impartial investigation by reason of alleged failure of the hearing officer to instruct one of Carrier's witnesses to answer questions. The record before the Board does not contain a complete copy of the transcript of the investigation. All that we have are quotations of questions and answers by each party that are favorable to their respective positions. Without a complete copy of the transcript, this Board is not in position to make a determination as to whether a fair and impartial investigation was conducted.

The Organization also alleges that the Carrier abused its discretion in dismissing Claimant, considering the circumstances under which the acts complained of took place. Here again the Organization has failed to furnish the Board with a record sustaining its contentions. In the absence of a positive showing that the action of the Carrier was arbitrary, capricious or in bad faith, we must deny the claim.

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 not violated.

AWARD

Claim denied.

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

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 24th day of May 1968.

DISSENT TO AWARD 16344, DOCKET DC-17216

This Award is in serious error.

The Docket did not contain a complete copy of the transcript of the investigation. Therefore, the Majority erred and clearly recognized this in the following language:

"Without a complete copy of the transcript this Board is not in position to make a determination as to whether a **fair and impartial investigation was conducted.**" (Emphasis mine.)

The fact that the transcript of the complete investigation was not in the Docket was brought to the Board's attention in Panel Discussion by the Members.

The Carrier Members stated in their written brief:

"The record does not contain a complete copy of the transcript of the investigation. All that we have are quotations of questions and answers by each party that are favorable to their respective positions. Without a complete copy of the transcript this Board is not in a position to exercise its proper function of reviewing the transcript and making a determination as to whether or not a fair and impartial investigation was conducted. Likewise, the Board is unable to make a fair determination as to whether or not the discipline assessed was excessive and an abuse of discretion under the circumstances surrounding the altercation."

The Labor Members stated in their written brief:

"A complete transcript of the investigation is not included in the Docket and therefore makes it extremely hard for this Board to review the entire investigation. The parties have picked out what suited their purposes."

Thus, it is a truism. The Members of this Board agreed upon the point now raised in this Dissent.

In our deliberations over the years involving discipline cases, a complete copy of the transcript has been a very essential part. To cite but a few Awards, all of recent dates, including the date Award 16344 was adopted:

AWARD 16340 (Devine)

[Adopted the same date as Award 16344]

"A copy of the transcript of the entire hearing has been made a part of the record. Following the hearing the Claimants were dismissed from service.

As concerns the merits of the case, a review of the transcript of hearing shows that there was substantial probative evidence to support the charges against the Claimants, and the nature of the offenses was such as to fully warrant dismissal from service."

The Board recognizes the need for a copy of the transcript.

AWARD 16343 (Devine)

[Adopted the same date as Award 16344]

"The burden of proving the Claimant was guilty as charged rested with Carrier. To meet the burden the transcript of hearing must contain substantial material and relevant evidence of probative value supporting Carrier's findings. Such evidence is lacking, and we find that Carrier has failed to prove the alleged violation of Rule 7. We have made no assessment of credibility in reaching this conclusion, but have considered Carrier's direct case in the best possible light and have found it wanting." (Emphasis mine.)

AWARD 14339 (Perelson)

"We examine and consider this claim on the merits.

A full and complete transcript of the testimony adduced at the hearing held in this matter is set forth in the Record."

AWARD 15410 (McGovern)

"We, for the purposes of this award, need not decide which operating rules were applicable. A careful review of the record presented and the hearing conducted reveals that Carrier has not presented that requisite body of evidence to enable us to support their position. The burden of proof is on the Carrier in cases of this nature. We accordingly sustain the Claim."

This Docket contained a complete text of the investigation, and as stated, this is where the burden of proof is upon the Carrier.

AWARD 15412 (McGovern)

"... Suffice it to say that the burden of proof in disciplinary cases is on the Carrier. A careful review of this record convinces us that the evidence presented does not warrant a finding in Carrier's favor. We will therefore sustain the Claim."

There was a full text of the investigation in this Docket.

AWARD 12252 (Seff)

"The sole issue in the case is whether there was substantial evidence in the record to support the discipline imposed.

... Mrs. Contee did not appear at the investigation and therefore her credibility could not be tested in the crucible of cross-examination. The Claimant categorically denied the charge. In order to sustain its action the Carrier had the burden of proof which must have been established by a preponderance of the evidence."

The Majority, in this Award 16344, has improperly shifted the burden of proof to the Employee charged when, as the citations above clearly show, the burden is always upon the Carrier to prove by competent evidence that its disciplinary action was justified. Failure of the Carrier to introduce the entire record of the proceedings leading to imposition of discipline left this Board without sufficient evidence to sustain its action.

Under these circumstances the Claim of the Employees should have been sustained; therefore, I dissent.

**George P. Kasamis,
Labor Member
Third Division NRAB**