# Award Number 17311
# Docket Number DC-17811
## NATIONAL RAILROAD ADJUSTMENT BOARD
## THIRD DIVISION

**Robert C. McCandless, Referee**

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## PARTIES TO DISPUTE:

## JOINT COUNCIL DINING CAR EMPLOYEES, LOCAL 351

## THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY (Dining Car Department)

**STATEMENT OF CLAIM:** Claim of the Joint Council Dining Car Employees Local 351 on the property of the Atchison, Topeka and Santa Fe Railway Company, for and on behalf of Barman Andrew Dean that he be restored to service and compensated for net wage loss with seniority and vacation rights unimpaired account of carrier suspending claimant from service on October 30, 1967, and dismissing claimant from service on November 10, 1967, in violation of the Agreement and in abuse of its discretion.

**OPINION OF BOARD:** Claimant, an employee without prior disciplinary charges on his record during his twenty-six (26) years of service to Carrier, was charged, investigated, and dismissed for violation of several of Carrier's rules, i.e. failing to open bottles of liquor or soft drinks in the presence of passengers, not properly presenting a completed bar check to passengers, and for general dishonest conduct in regard to the above matters.

Having carefully examined each issue raised before us, we find that the instant case turns on a single, but vital, procedural issue. Employes requested orally and by letter, prior to the investigation to be allowed to examine Claimant's "locker sales books" for the period covered by Carrier's charges. (These "books", exhibits in the transcript, are logs, inventories, and sales checks). Claimant's representative preserved viable demurrer to this point at the investigation by proceeding under protest due to the lack of a prior examination of the "books" upon which the charges against Claimant were based. He described the conversations he had had with Carrier officials requesting examination of these records. The representative further read into the record of the transcript the letter he had written to Carrier requesting an examination of these "books". And in summation, the representative again protested the fact that he had not been properly able to prepare Claimant's defense against Carrier's charges because of Carrier's refusal to bring these "books" forward until the investigation.

Carrier maintains that the controlling Agreement does not require any such disclosure as Employes here requested. And indeed the Agreement is not explicit as to what a fair and impartial investigation should consist of. ARTICLE VI, DISCIPLINE-HEARINGS-GRIEVANCES, of the Agreement reads, in part, as follows:

> "Section 1. In cases involving discipline or dismissal from the service, an employe, who has 90 days or more service with the Company, including regular lay-over days, will be accorded a fair and impartial

investigation, provided he makes written request therefor upon the Dining Car Superintendent within 15 days after the employe has been notified of the precise nature of the charge against him. When practical, notice to the employe will be in writing. Should the employe fail to make written request for an investigation within the 15 day period, it will be deemed he has accepted the discipline." (Emphasis added).

"Section 4. Investigations will be fairly and impartially conducted by the proper official of the Company, and will be held in not to exceed 10 days following the date within the 15 days an employe has to request an investigation after being advised of the charge against him. Date for investigation may be extended by mutual agreement between the Company and the employe's authorized representative, but in no case will the time limit for the first investigation exceed 20 days after the date the employe requests investigation." (Emphasis added).

"Section 6. The Company and the employe, or the latter's representative, may call witnesses to offer testimony in a hearing. When an employe, not at fault, is required by the Company to be present at a hearing as a witness for the Company, he will be paid for the time lost." (Emphasis added).

Further, Carrier cites several awards which deal with precisely the same point as herein raised—that of pre-hearing disclosure or inspection of documents/records to be used to substantiate the charges against the accused. In Award 14069, Referee Rohman best sums up the position held in the awards relied upon by Carrier. In holding that the contention that Carrier's refusal to produce the report upon which the charges were based lacked merit, Referee Rohman went on to write: "The effective Agreement between the parties does not provide for such pre-hearing inspection, and absent a specific provison to that effect, we will not direct otherwise." Further stating that the Railway Labor Act does not empower this Board to inject new provisions into the existing agreements between the parties, the Referee went on to write: "The Claimant was not prejudiced, inasmuch as the two passengers who submitted adverse reports testified at the hearing, and were cross-examined. This is the ultimate protection that can be afforded a defendant even in a court of law—the right to be confronted by his accusers and to cross-examine them in open hearing."

We must respectfully disagree with the honorable referee in this award, and with Awards 13397 and 13670, as they are applicable to this point.

Without endorsement or comment on Referee Thomas J. Kenan's Award 15676—in which he states that the "due process" clause of the U. S. Constitution does not apply to railroad employees, who must look for their rights to the applicable employment agreement, it would seem that if indeed this were true, Carriers must be extra zealous in guarding against the abridgement of any of the procedural rights as written into their collective bargaining agreements. As we have said before, Carrier has in its hands the basic machinery of the judicial process upon the property. Consequently, Carriers must bend over backwards at every stage to give the accused every opportunity to defend himself against charges which can cost him his job and considerable money.

Sections 1 and 4 of the Agreement call for a fair and impartial investigation. Section 6 goes so far as to say that Employes may call any witnesses

they may desire. It is hard for us to accept the concept that an employee must face a hearing, the outcome of which may cost him his job and other emoluments, without full recourse to all records, books and witnesses which may be used against him. Referee Rohman errs in stating that a defendant's ultimate protection is facing and cross-examining his accusers. To adequately prepare to defend a claimant in a case such as this, claimant's representative must have access to all which will be used against his "client." To do otherwise is to abrogate the provisions in the Agreement calling for a fair and impartial trial.

Since this Board does not weigh the evidence de novo, and since in this case Carrier has advanced substantial evidence as to the charges against Claimant, this Board will not reward dishonesty, and consequently, we deny that part of the claim for back compensation.

However, because of the denial of the reasonable request to examine Claimant's "locker sales books"—a denial which we find substantially vitiating a fair and impartial trial as required by the Agreement, we herewith reinstate the Claimant to service.

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 jurisidiction over the dispute involved herein; and

That the Agreement was violated.

## AWARD

Claim sustained to the extent indicated in the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 24th day of July 1969.

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