

Award 20335

Docket 34837

NATIONAL RAILROAD ADJUSTMENT BOARD

FIRST DIVISION

39 South La Salle Street, Chicago 3, Illinois

With Referee Harold W. Davey

PARTIES TO DISPUTE:

ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN

UNION PACIFIC RAILROAD COMPANY

(South Central District)

STATEMENT OF CLAIM: "Claim of conductor C. M. Atherton for payment, in full, of all earnings made by his regular passenger assignment, from May 22nd to December 2, 1956, due to being improperly dismissed and withheld from service on the assignment during that period of time."

FINDINGS: The First Division of the National Railroad Adjustment Board, upon the whole record and all the evidence, finds that the parties herein are carrier and employe within the meaning of the Railway Labor Act, as amended, and that this Division has jurisdiction.

Hearing was waived.

Claimant Conductor Atherton was discharged by the carrier on May 23, 1956 on the grounds that he "entered into an altercation with passenger and accorded discourteous treatment to passenger" on a run between Las Vegas, Nevada and Los Angeles, California on April 20, 1956. Authorization of Atherton's return to service without prejudice to the instant claim for pay for time lost was made by the carrier on November 22, 1956.

The issue for decision here is whether claimant was accorded a "fair and impartial" hearing as required by Article 33 (a) of the agreement. The only evidence introduced by carrier at Atherton's formal hearing, held on May 22, 1956, was what was described by the carrier as a true copy of a letter dated May 1, 1956 from a complaining revenue passenger, Mrs. A. H. Garrigues of Salt Lake City, addressed to the president of the carrier.

Petitioner contends, *inter alia*, as follows:

(1) The concept of a "fair and impartial" hearing requires the opportunity for confrontation and cross examination of complaining witnesses. No such opportunity was afforded claimant in the instant case. Thus, there is a flat violation of Article 33 (b).

(2) Since no evidence other than the unsigned, unsworn letter of complaint was offered by the carrier, it is clear that the carrier

had "pre-judged" the guilt of Atherton. Claimant's testimony shows sensible handling of the seat mix-up situation, but was clearly not even considered by the carrier.

(3) Complainant's letter contains internal evidence tending to show that she is an emotional and prejudiced individual and thus not worthy of belief.

(4) Carrier's conduct of this investigation and the discipline to Atherton, if allowed to stand, would make a mockery of the procedural rights guaranteed to conductors in Article 33 of the agreement and would also be contrary to many cited awards of this Division.

(5) Although he recalls the incident with the complaining passenger and confirms portions of her account as to what took place, Atherton repeatedly denied that he had been discourteous to her or that he had engaged in an altercation with her. Thus, the instant case falls squarely under this Board's policy, as enunciated by Referee Carroll R. Daugherty in Award 19525, that "One letter of complaint from a revenue passenger, unsworn to, is not enough to establish guilt unless the accused admits at the hearing what the letter alleges." The carrier here has completely failed to maintain the required burden of proof, in the view of petitioner.

Respondent carrier contends, *inter alia*, as follows:

(1) Petitioner's contentions as to denial of a fair and impartial hearing are without merit and the claim should be denied. It is well settled under many decisions of this Division that written statements are admissible as evidence.

(2) Article 33 (b) does not, as petitioner seeks to maintain, require the carrier to produce all witnesses but, as noted by this Board in a recent decision, "only those witnesses under the control and direction of the carrier." (Citing Award 20063, with Referee Jacob Seidenberg.) (Emphasis ours.)

(3) This Board is without authority to reverse the carrier in cases of this kind unless it can be shown that the carrier's decision to credit the complaining passenger's statement and not to credit the self-serving testimony of claimant was arbitrary to the point of caprice or whimsy. Clearly, the record here affords no support for such a conclusion. On the contrary, the testimony of Atherton himself confirms many of the pertinent facts in Mrs. Garrigues' letter. If substantial portions of what she related were admittedly true, there is no basis for the carrier to disbelieve that portion of her statement relating to Atherton's discourteous conduct.

For these reasons, the carrier maintains that the record contains "substantial evidence" to support the discipline accorded to Atherton and refutes the contention that he was not given a "fair and impartial" hearing.

We have reviewed the entire record here with great care in the light of pertinent procedural precedents cited by both parties. In our judgment, this record compels the conclusion that Atherton was not afforded a "fair and impartial" hearing within a proper construction of Article 33 of the agreement.

We do not question the carrier's good faith in deciding to credit the passenger's testimony rather than claimant's denial of misconduct. Nor are we substituting this Board's judgment for that of management as to the guilt or innocence of Atherton or as to the propriety of the penalty.

What we do find, however, is that the procedure in this case was fatally defective. Therefore, the claim must be held to be a valid one. It is our firm belief that Atherton's rights under Article 33 were violated in this case by the failure to produce any witnesses against him. The record also indicates that the hearing officer on the property, although conducting the proceedings in a courteous fashion, had pre-judged the matter, thus precluding a fair and impartial hearing. On this point, we duly note the following interrogation of Atherton by Hearing Officer W. J. Fox early in the hearing (Docket, p. 18):

"Q. Were there any vacant seats on the train at this time?

"A. I didn't know at that time whether there was or not.

"Q. Did you make any attempt to find out before entering into this altercation with this passenger.

"A. I didn't enter into any altercation." (Emphasis ours.)

The emphasized words in the foregoing interrogation require the conclusion that Fox had already made up his mind before the hearing was even well under way.

We regard it as procedurally significant in terms of a proper construction of Article 33 that the carrier made no apparent effort to try to improve the quality and probity of the one bit of evidence it offered against Atherton. We are, of course, aware that carrier does not have the power to subpoena witnesses. It does, however, have the discretion to request complaining witnesses to appear. The record does not indicate that carrier did so in this instance. Nor does it indicate that Mrs. Garrigues was asked to swear out an affidavit as to the truthfulness of the statements in her letter of May 1, 1956 if she had been unwilling to appear personally against Atherton. Finally, the carrier in this case did not even go to the trouble of introducing the signed original of the complainant's letter.

In the light of such considerations, we agree with petitioner that the instant case properly falls within the purview of this Board's principle enunciated recently in Award 19525 and quoted above in our summary of petitioner's contentions.

The procedure in this case having been found to be considerably short of the minimal requirements of Article 33, we find that the claim should be sustained.

Compensation should be for all time lost. Here "all time lost" should be determined by reconstructing and then computing the assignments Atherton would have received during the time he was withheld from service had he in fact worked for the carrier during such period. Our award incorporates this finding, which we deem essential to making the claimant whole for improperly assessed discipline derived from procedures that did not meet the requirements of Article 33.

AWARD: Claim sustained for all time lost on the basis indicated in our Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of FIRST DIVISION

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 8th day of August 1963.