

Award No. 5126  
Docket No. CL-5090

**NATIONAL RAILROAD ADJUSTMENT BOARD**

**THIRD DIVISION**

Edward F. Carter, Referee

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**PARTIES TO DISPUTE:**

**BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS,  
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES**

**THE PENNSYLVANIA RAILROAD COMPANY**

**STATEMENT OF CLAIM:** Claim of the System Committee of the Brotherhood that:

Samuel Landesman, Ticket Clerk, Pennsylvania Station, New York, New York, be returned to service with all rights unimpaired and compensated for all monetary loss sustained dating from May 24, 1949, until adjusted. (Docket N-268.)

**OPINION OF BOARD:** Claimant held the position of Ticket Clerk, Pennsylvania Station, New York, New York, on May 24, 1949. On that date, he was dismissed from the service of the Carrier after investigation and trial. Claimant appeals to this Board requesting reinstatement with seniority rights unimpaired and compensation for monetary loss sustained.

The evidence produced is voluminous and no attempt will be made to reproduce it in detail.

The claimant was charged (1) with accepting \$10.00 in excess of the value of transportation issued, (2) requesting and accepting \$5.00 as a gratuity in excess of the cost of transportation issued, and (3) with selling railroad and Pullman tickets issued and reported by another clerk. The record shows that the Carrier had instructed all employees on November 27, 1948, that tips and gratuities were not to be accepted for service performed in selling tickets and that in every case they must be refused. Also, on January 17, 1948, the Carrier instructed employees that "under no circumstances is any ticket seller to buy tickets for another seller for resale." Claimant admits that he was fully cognizant of these instructions.

On February 21, 1949, claimant sold rail and Pullman tickets to one Stickler pursuant and in accordance with arrangements previously made by telephone. After the transaction was completed and the transportation paid for, claimant was paid a gratuity of \$10.00 which he pocketed. The record shows that the gratuity was paid at the instance of Stickler rather than upon any solicitation on the part of claimant.

On February 28, 1949, claimant sold rail and Pullman tickets to one Winter in accordance with arrangements which had previously been made by telephone. Claimant was paid an additional \$5.00 which he pocketed.

The gratuities mentioned were paid after the sales of transportation had been completed. There is no evidence that they constituted compensation for favoritism or any special privileges.

The claimant complains of the method used by the Carrier in obtaining its evidence. It is asserted that it is the result of an entrapment by detectives from the Burns Detective Agency which had been employed by the Carrier. It is urged that these witnesses, including Stickler and Winter, are lacking in credibility because of claimed variances in their evidence which indicated that the desire for success was superior to the desire for an impartial statement of the facts. Whatever merit there may be in this contention, it lends no aid to the claimant for the simple reason that he admitted the violations of the Carrier's rules in both instances. He not only admitted the acceptance and retention of the two gratuities, but he admitted that he knew they were violations of the Carrier's instructions when he accepted them. The Carrier is not bound to prove that which the claimant admits to be true. The evidence fully supports the findings of the Carrier that claimant violated the Carrier's instructions.

With reference to the charge that claimant sold railroad and Pullman tickets issued and reported by another clerk, the record shows that claimant did procure such a ticket from another clerk and paid for it out of personal funds. The record also shows that this instruction has not been literally enforced. The record shows that clerks are sometimes maintained to prepare tickets for the window clerks who sell them to the public. The record discloses no intent to defraud the Carrier or that the handling was in any manner detrimental to the Carrier. We think that the evidence shows a technical violation of the Carrier's instructions but fails to show any detriment to the Carrier or personal gain for the claimant.

The evidence amply supports the imposition of discipline in the present case. We think there are mitigating circumstances which the Carrier should have taken into consideration. The purpose of the instructions was undoubtedly to eliminate the practice of showing favoritism and granting priorities to persons who were willing to pay for special treatment. It is very detrimental to the Carrier to favor one patron over another for any such reason. But in the case before us, there is no evidence that the person paying the gratuity received any such favoritism. The ticket sales were closed and the gratuities thereafter accepted at the insistence of the patron. While we cannot condone the violation of the Carrier's instructions, we think a dismissal from the service was excessive punishment under the facts here disclosed. The time which the claimant has now been out of service constitutes adequate punishment for the offenses committed.

**FINDINGS:** The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

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 discipline imposed was excessive.

#### AWARD

Claimant restored to service with seniority rights unimpaired without pay for time lost.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

ATTEST: A. I. Tummon  
Acting Secretary

Dated at Chicago, Illinois, this 30th day of November, 1950.

**Dissent to Award 5126, Docket CL-5090**

This award expresses an opinion that there are mitigating circumstances which now is used to substitute the judgment of the Third Division by modification of the discipline assessed by the Carrier, whose findings of the claimant's violation of instructions and whose imposition of discipline were declared by the award to be amply supported by the evidence.

It is submitted that such an award represents arbitrary action beyond the authority of this Board.

/s/ C. C. Cook

/s/ A. H. Jones

/s/ C. P. Dugan

/s/ J. E. Kemp

/s/ R. H. Allison