

Award No. 5533

Docket No. DC-5403

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Alex Elson, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD TRAINMEN

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY

STATEMENT OF CLAIM: Request of Dining Car Steward P. G. Benton for reinstatement with seniority rights unimpaired and payment of time lost February 20, 1950, and subsequent dates until restored to service.

OPINION OF BOARD: This is a discipline case. Claimant, a Dining Car Steward, was dismissed from the service on March 2, 1950, for violation of rules governing issuance of checks and proper reporting and remitting of funds on February 10, 1950. At the hearing into the charges, testimony in support thereof was received from three witnesses, a special officer of the Carrier, and two operatives of a private agency employed by the Carrier.

The principal facts testified to by them concerned the events involved in the service received by the special officer and a special private investigator in the dining car supervised by Claimant on February 10, 1950. According to them, they were ushered to table by the Steward. A dinner check was handed to them. The special officer wrote in the items of soup, pike and coffee. He did not fill in the number of portions to be served. The menu showed a price of \$1.65 for this meal. The special officer and the operative were each served the items in question. When the meal was concluded the Waiter orally informed them the check was \$3.00. The Steward was nearby, and the special officer handed the Steward a \$10.00 bill and received \$7.00 in change. The check was not run through the cash register prior to the departure from the car of the witness. The special officer did not ask for a receipt, and none was given to him. The testimony in connection with the oral statement of the bill and the payment thereof was substantiated by the testimony of a second investigator stationed at a table about ten feet away.

The check in question was introduced at the hearing. The items ordered were in the handwriting of the special officer. It was totaled in the handwriting of the Steward at \$1.65. The check showed that the Waiter in question served the meal. It also showed a punch under number of persons served as "1" and "2", the figure "2" being circled. The circling of the figure would be a method of using the same check when a mistake was made or a person changed his mind after being served. The Chef's portion of the same check was punched only once, and was punched for two persons.

The Steward and Waiter denied receiving \$3.00 on the check in question, and testified that their practice was to comply with the rules of the Carrier. The Chef testified that he could serve only one meal on the check in evidence and denied knowing anything about the transaction in question. Under the Carrier's theory of the case, the Employees in question had

cheated the Carrier of \$1.65 on the transaction, and had pocketed \$1.35. They did this by the device of serving two meals on a check which apparently called for only one meal. In the process of cheating the Carrier, the rules in question were also violated. Both the Claimant Steward and the Waiter were suspended pending the investigation, and dismissed upon completion of the investigation. The Waiter was returned to the service with all rights restored, effective on or about May 19, 1950. The Chef was not suspended or dismissed, and the record shows no disciplinary action taken against him by the Carrier because of the incident in question.

The Organization advances several contentions. First, it argues that the actions of the operatives in question amounted to an entrapment of the Claimant Steward. We have examined the record and find no evidence of entrapment. The operatives acted no differently than would many patrons of a dining car, except to make a note of what occurred. They did not urge or tempt the Steward to commit a violation of the rules.

Second, the Organization charges that the hearing was not fairly conducted because the Carrier put into the record two letters from patrons calling attention to certain acts of the Claimant, without calling the authors as witnesses. The Carrier explained that the only purpose in introducing the letters was to give an explanation why an investigation was initiated of the Claimant. Any question of fairness of the hearing in this report was eliminated when the Carrier offered to adjourn the hearing to obtain the testimony of the two correspondents.

The third contention also goes to the fairness of the hearing. The Organization contends it should have been given an opportunity to examine other checks for the day in question. Again the Carrier offered to adjourn the hearing to permit such an examination, but the offer was declined.

Fourth, the Organization contends that considering all of the evidence, the charges were not proved. We have carefully considered all of the testimony. There is evidence in the record to support the charges and under the established rules of this Board, we may not therefore disturb the findings of the Carrier based on such evidence.

Finally, the Organization contends that the Carrier imposed its penalties in this case in a discriminatory and arbitrary fashion. We are inclined to agree with this contention. The violations in question could not have occurred unless there was a conspiracy between the three Employees in question—the Claimant, the Waiter and the Chef. If we are to accept the testimony of the Carrier's witnesses, two meals were served instead of one. The Chef testified that he served only one meal on the check in question. The testimony, under the Carrier's theory must fall, and the Chef was equally responsible with the other Employees for imposing upon the Carrier the fraud which is charged. The Carrier justifies its reinstatement of the Waiter on the basis of his youth and apparent domination by the Claimant, and states that it reinstated the Waiter as a matter of leniency. This is an understandable course of action. However, the Carrier is completely silent as to why no discipline of any character was imposed upon the Chef. The only apparent justification for the action taken with reference to the Claimant is his past record, to which the Carrier makes no reference. We have examined this past record. As to the number of the items recorded, no irregularity was shown. As to all of the items recorded, no disciplinary action was taken previously by the Carrier against the Claimant. The suspension in this case is the first time that the Carrier disciplined Claimant.

We agree with the Carrier that the offense in question is a serious offense. Apparently, however, the Carrier does not believe that the offense is so serious as to justify imposing a penalty, however slight, against one of the participants equally guilty with the Claimant. Under these circumstances, we can only conclude that the dismissal of the Claimant is an arbitrary and discriminatory action by the Carrier.

Having come to this conclusion, we must consider what would be an appropriate penalty under all the circumstances. The Claimant has been in the employ of the Carrier since 1936. The Carrier states that he has had a good record up to 1944, but relies on his prior record since that time. The offense which was the subject of the charge, taken together with the past record of the Claimant for the period subsequent to 1944, would justify the imposition of some penalty against the Claimant. The Claimant has been out of the service since March 2, 1950—more than eighteen months. We believe that the loss of employment during this period is a substantial penalty. We believe that this penalty is sufficient to impress upon the Claimant the gravity of the offense and cause him to reform his ways. As we have previously stated, discipline should be imposed in such a way as to turn the employee toward a course of conduct which will make it possible for him to support himself and his family, and to make a contribution to society. See Award 5385. This Board believes that the Claimant can be salvaged as an employee for the Carrier, notwithstanding the various statements made by the Carrier in its presentation. Accordingly, we will reinstate the Employee without compensation for the period during which he has been out of service.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That both parties to his dispute waived hearing thereon;

That the Carrier and the Employee involved in this dispute are respectively Carrier and Employee 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 under the facts and circumstances set forth in the Opinion suspension, and not dismissal, was the proper disciplinary penalty.

AWARD

Claim for monetary compensation denied. Claim for restoration to Carrier's service sustained, as set forth in the Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 29th day of October, 1951.