

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Fred W. Messmore, Referee

PARTIES TO DISPUTE:

JOINT COUNCIL DINING CAR EMPLOYES, LOCAL 465

UNION PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the Joint Council Dining Car Employees, Local 465, on the property of the Union Pacific Railroad Company, for and on behalf of Mr. Napoleon Clytus, waiter, that he be reinstated to his former position, with pass privileges, vacation, seniority rights and progressive rates of pay unimpaired and compensated for all time lost.

OPINION OF BOARD: This is a discipline case. The Claimant, Napoleon Clytus, a waiter in the employment of the Carrier since September, 1943, on January 25, 1951, was assigned as a waiter on Carrier's Diner 3634 on Train 18, to tables numbered 1 and 2 thereon. He was charged as follows: Mishandling of Company meal checks; taking verbal orders from passengers and serving them without a meal check during dinner service January 25, 1951.

There is in effect an Agreement between the Organization and Carrier effective September 1, 1949.

The Claimant was taken out of service January 31, 1951, as provided for by Rule 17. After the hearing he was dismissed from service February 22, 1951. This was the discipline assessed against him.

The Employees contend that the Claimant did not have a fair and impartial trial. Primarily the reasons may be stated as follows: (1) The officer conducting the hearing was thoroughly conversant with the alleged facts. He conducted the hearing in a prejudicial manner to the extent the Claimant was precluded from having a fair trial. (2) The Carrier failed to prove the charges brought against Claimant by sufficient competent evidence. (3) The hearing held on February 14, 1951, was not a hearing within the contemplation of Rule 17. (4) The Claimant was denied the benefit of certain evidence to enable him to properly prepare his defense and protect his rights.

Several contentions were interposed by the Employees having to do with questioning Claimant about the occurrence prior to the bringing of the charges by the Carrier's Dining Car Inspector, one of its Special Agents, and subsequently by its Superintendent of the Dining Car and Hotel Department, and the circumstances by which the inquiries were made. We deem such contentions unnecessary to discuss. The Claimant requested a formal hearing. We confine ourselves to the facts as disclosed therein.

The position of the Carrier is that the procedure was proper, and that the disciplinary action taken was proper and sustained by the evidence.

The case is properly before this Board under Rule 17, cited by the Carrier.

We summarize the facts deemed pertinent to a decision in this case.

The Dining Car inspector testified that during the evening of January 25, 1951, he boarded Train 18 just prior to departure from Pocatello. He went through the dining car to the rear of the train and returned to the dining car in a few minutes. At that time he met the Steward in the hallway of the pantry entrance and introduced himself to the Steward. He informed the Steward he was making a spot check. He then proceeded to various tables to see if the orders of food served to the guests were covered with proper meal checks. When he arrived at table No. 1, served by the Claimant, there were two lady passengers seated at the table. One lady was eating cobbler and milk. The other lady opposite her was eating chicken pot pie. She had practically finished her meal. There was no check at this table. Turning to table No. 2, opposite table No. 1, he found check No. 83355 listing cobbler and milk. He identified the check, which was correct. There was no check on either table covering the order for chicken pie. He inquired about this check. The lady said the Steward had laid a check down for her without a pencil and while reading the menu she reached over for a pencil, found none nor her check, at which point she looked up and the Claimant informed her, "I have your check, Madam." He called the Steward's attention to this fact, and he wrote two chicken pies in error on the check for the cobbler and milk check No. 83355. At table No. 2 there was a man and wife and two children who were eating two orders of veal cutlets and two extra milk. At this table there was a luncheon check. He believed the number of this check was 83345. It listed two chicken salad and black tea. The Steward's attention was called to this matter. These people were at that time starting their dessert. This party finished their meal and check 83345 bearing two chicken salad and two black tea, total \$2.50 was presented. The guest refused to pay, stating it was not his check, to cut him another one because the order was taken orally by the Claimant, which the Steward did and issued check 83371. The Steward also cut a proper check for the lady at Table No. 1, check 83359 for the chicken pie. It appears that the error made by the Steward when he wrote two chicken pies on the one check was because the two ladies were sharing the same chicken pie.

With reference to the check for the two chicken salads on the luncheon check, he endeavored to find out from Claimant who told him the Steward had placed it there, and he was asked if he checked for a duplicate. He said not, the Steward wrote it. Sometimes this witness looks for duplicates, in this instance he did not. He did not know who scratched check 83355, or when. It is true that if there was chicken pie served on that check after the cobbler had been served, then the check would have been used the second time. Until the time he left this station, this check had not been scratched. He did not take anything with him and it would have been possible for the Steward to scratch the check when he was not present. The check read, "Scratched by guest, collected 55c." Also Steward's initials. He did not authorize the Steward to scratch the check. There were eleven passengers in the car. There were checks on all the tables until one and two were reached. The last check which was issued while he was in the diner was check 83371 that contained veal cutlets issued by the Steward.

Further testimony of this witness is to the effect that he believed the Claimant could straighten out the matter and tell what took place. Claimant was requested to follow the Inspector and the Special Agent to the Pullman sleeper behind the lounge where he was interrupted for twenty minutes by both of them.

The Special Agent's testimony was substantially to the same effect as that of the inspector, and that he was with him at all times. The purpose in having the Claimant accompany them to another portion of the train was

due to the irregularity in handling of checks at tables Nos. 1 and 2. He further testified, "We asked Claimant to step out of the car next to the buffet. Guests were coming in and going out of the diner, so we asked him to come to the Steward's end of the car (i.e., the opposite end of the car). We were also in the way of guests at that place so we stepped into the next car and before we could talk to him in the aisle we noticed a Pullman Porter sitting in a drawing room just opposite and asked him if we could use the room for a few minutes. He said certainly, so we stepped in the drawing room." They were in the room 15 to 25 minutes. No other persons were present, just the Inspector, the Claimant, and the Special Officer.

On February 5, 1951, the Pullman Conductor on Train 18 made a statement that shortly after the train left Pocatello he was approached by the Inspector and the Special Agent for the Carrier for the use of a room on the train. He assigned them to bedroom "A", car 184, American Heights. Shortly thereafter it was noticed that members of the dining crew were brought in one by one for what purpose he did not know, but the car was in use for more than three (3) hours during and after the meal.

The Claimant's statement is to the effect that when the train left Pocatello, the Steward left the dining room. Immediately thereafter a man, his wife, and two children came in. Claimant seated them at his station. The baby was crying. They were served water and butter. The man had a can of baby food which he wanted open. The babies had been car sick and were not eating well. The Claimant took the baby food to the pantry, opened it and returned it to the man. The mother began to feed the baby. The larger child was still crying. The man wanted food as soon as possible. He was handed a menu, and it was suggested inasmuch as he was in a hurry, if he would make a selection it would save time; then when the Steward returned he would have a check and they could be served. In five or ten minutes the Steward returned. Claimant motioned to him. These people had been waiting quite a while. The Steward came down and Claimant explained the circumstances to him, to make out a check for two veal cutlets and two extra milk for the babies. It was assumed the Steward was writing the check. Claimant went to the kitchen and ordered this food out in a hurry. Upon his return the Steward handed him the check. He took the inside check and deposited it in the hole. At that time Third Cook Steger was putting orders in the hold. He gave the parties a check and served them. He then started waiting on people at his deuce. The lady with the apple cobbler and milk did not have her check made out. Claimant made it out for her. The lady opposite her had not made up her mind what to eat, and asked for a suggestion. Chicken pie was recommended. She ordered it. The Steward was present giving her a check made out for the order. Claimant took this check to the kitchen and served the chicken pie. She began to eat it and suggested to the other lady that she share it, which was done. The Claimant went back to the pantry a few minutes. Upon his return Mr. Falsetti (Dining Car Inspector) and Mr. Fimmel (Special Agent) were at his deuce. Wondering what it was about, he heard Falsetti say: "Didn't this waiter tell you that he has your check?" The Claimant said there was no such conversation. The Special Agent told him to go away from the table. The Inspector and Special Agent then talked to the man and wife with the babies. The Claimant did not hear the conversation. He had his tray loaded with dishes, and when they had finished was ordered to take off his apron, set down his tray, and follow them, which he did. All of them went to drawing room "A" in the sleeper behind the club lounge. He was questioned by both the Inspector and Special Officer to elicit from him what he knew about the Steward's methods; that something was wrong and he knew what it was; that he should not stand up for the Steward who was rotten, and let his family down; that others were making statements and he should. The Claimant stated that he was not standing up for anybody; he did not know what was wanted of him; he knew nothing about it. They wanted a statement from him. If such a statement was forthcoming it was indicated they could save his job and get him off with a lighter discipline. He was permitted to return to work. The balance of the statement deals with matters that have little relevancy to the charges. The same have been examined and need not be set out.

The next morning when the train arrived at Denver, Claimant and other members of the crew were questioned by the Superintendent of Dining Cars and Hotels in his office. We find this to be nothing more nor less than an inquiry to get at the seat of the trouble. What occurred there was nothing of a prejudicial nature.

Steger, the Third Cook, testified that he was assigned to Diner 3634 at the time of the occurrence. The principal part of his evidence is contained in a statement as follows: "I remember two occasions during dinner meal January 25, 1951, that I did not receive cook's check covering these meals. One was for two orders of veal cutlets and one covering chicken pie. I asked Waiter No. 1, Napoleon Clytus, (Claimant) for the cook's check and he said the Steward was not back yet and no cook's check was received for these three orders. In the past it has been my experience when running with the same crew that it has always been hard to secure cook's checks from the waiters and this was called to their attention several times. He did not count the number of checks given by the waiters that evening. Usually this is the duty of the third cook. He couldn't tell now who served the chicken pie. The Claimant was the only person he had trouble with in securing checks from waiters. He asked Claimant for the check. The Fourth Cook said he got the check for the veal cutlets and chicken pie. He testified the Claimant did bring baby food in the kitchen, which Claimant had on a tray. There were no other orders on the tray.

A statement appears in the record from Raymond Boyd, chef, that at different times during the meal period he requested waiters to bring in cook's check, and in some cases cook's check was not turned in to kitchen at that time. During the trip January 23 to 26, he requested that cook's check be brought to kitchen and was advised by waiters that the Steward was out of the car, also that the Steward had not written out the check yet, and that cook's check would be brought to the kitchen as soon as he returned, and in some cases to his knowledge cook's check was not brought to the kitchen. During the dinner meal January 25, 1951, there were occasions when he called for the cook's check which had not been brought to the kitchen when order was placed, and it was assumed that cook's check was turned in later. This happened on Diner 3634 on Train 18, January 25, 1951. Steward R. S. Moore.

There are other facts which have been examined and taken into consideration in determining this dispute, however, the above constitute the cardinal facts.

The conduct of a hearing is a disciplinary proceeding and does not require adherence to all the attributes of a trial in a criminal proceeding. The Carrier's trial officer represents it in making a decision. It is not a case of the trial officer being both a prosecutor and a judge. It is a matter of contract compliance in which the trial officer interprets the Agreements in the light of the evidence in the first instance. As some of our awards point out—disciplinary action is not criminal action, not covered by the same rules. See Awards 4840, 5701.

There is nothing in the record to show but that the Claimant was afforded every opportunity to cross-examine the Carrier's witnesses, nor was he denied the privilege of putting in testimony in his defense.

As to procuring witnesses, he had an opportunity under the rules of the Agreement to do so if he desired. In fact the testimony was of such a nature that we believe other witnesses were unnecessary.

The record discloses no violation of the requirements of the Agreement bearing upon discipline. The employe was not disciplined without a hearing, and he was notified in writing of the time and place of the hearing and of the specific charges preferred against him. At the hearing both the employe and his representative were given ample opportunity to present any facts or arguments pertinent to the charges. There are no rules specifying the types

of evidence that must be submitted at the hearing, and the evidence adduced by the Carrier under the circumstances of this case was not such as to detract from the fairness or impartiality of the hearing. See Awards 1062, 1144, 1086, of this Division.

The proof of the charge is purely a fact question. The same rules of evidence do not obtain as in a criminal proceeding. The Agreement does not spell out the kind or nature of the evidence that may be introduced at a hearing, or any rules governing the same. The parties therefore should be guided by a practical and sensible approach to introducing evidence. We discern nothing prejudicial in the manner in which the evidence was introduced in this case.

We recognize the rule that it is not our function to weigh the evidence or to decide the credibility of the witnesses, and when the evidence is sufficiently substantial and supports the charge, the findings based thereon will not be disturbed. See Awards 2621, 5941, and there are other awards too numerous to cite.

We also recognize the rule that while we have the power to order reinstatement of an employe we should be cautious in the exercise of that power. However, there are exceptions to the foregoing rules which warrant intervening on our part, that is when the Carrier, in assessing discipline, acted in an arbitrary or unreasonable manner, or abused its discretion.

In the record before us there is no evidence of a conspiracy between the Steward and the Claimant, in fact, the Carrier makes no such charge. There is no charge against the Claimant that he defrauded the Carrier or intended to do so, nor would the evidence sustain such charge if made. There were extenuating circumstances which we believe the Carrier failed to take into consideration. The Claimant was endeavoring to perform a service for the patrons at his table in the absence of the Steward who was not on the job. The Claimant did wrong, but such wrong was not of a severe or serious nature as to warrant dismissal from service. The record of the Claimant for nearly seven years was satisfactory to the Carrier. He had not been reprimanded or disciplined previously, so far as the record shows. The Carrier exacted the most severe penalty it could exercise. We believe, from a consideration of the whole record, that the penalty was excessive, unreasonable, and an abuse of discretion on the part of the Carrier.

That this Board may reduce the discipline in the event the discipline assessed is unreasonable, arbitrary, or an abuse of discretion has been held on numerous occasions. See Awards 4942, 5849, 4829, 4622, 5645, 5752, 6074, this Division.

We think the very maximum penalty which the evidence will sustain is a suspension of six months.

We conclude the Claimant should be reinstated to service as of August 22, 1951, with all wages lost, if any.

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 Employe involved in this dispute are respectively Carrier and Employe 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 claim is sustained as per opinion.

AWARD

Claim sustained as per opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 26th day of February, 1958.