

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Carroll R. Daugherty, Referee

PARTIES TO DISPUTE:

JOINT COUNCIL DINING CAR EMPLOYEES, LOCAL 849

**CHICAGO, ROCK ISLAND AND PACIFIC
RAILROAD COMPANY**

STATEMENT OF CLAIM: Claim of Dining Car Employees' Union, Local 849 on the property of Chicago, Rock Island and Pacific Railroad Company for and on behalf of Michael Weaver, waiter-in-charge and Dave C. Lacy, waiter, that they be reinstated in the service of the Carrier with compensation for net wages lost since September 20, 1957, and with seniority and vacation rights unimpaired, account Carrier's terminating claimants' services in violation of the agreement.

OPINION OF BOARD: Claimant Weaver, with 19 years of service, and Claimant Lacy, with 17 years of service, were Waiter-in-Charge and Porter-Waiter, respectively, on Carrier's Hamburger Grill Dining Car No. 410 on Train No. 4 from Los Angeles, July 30, 1957. On that date on said car there was also a third employe, Chef Vanlayer; he is not a claimant, and beyond the fact of his presence on said car his only connection with the instant case was his testimony as a witness during Carrier's investigation of charges against the two Claimants.

Also on said car on said date were two inspectors of the Southern Pacific Railroad, who observed Claimants' activities and made a report to Carrier. On the basis of this report Carrier's General Superintendent of Dining Cars Dolan, under date of August 9, 1957, wrote Claimants that an investigation would be held "to develop the facts and determine your responsibility, if any, for irregularities in handling of meal checks and handling collections from passengers" on said Diner and Train. The investigation, at first scheduled for August 20, 1957 was by mutual agreement postponed until September 11-13, 1957. On September 25, 1957, said Superintendent wrote Claimants notifications of dismissal. On appeal, Carrier's highest official designated to handle such matters affirmed the discharges in letter dated October 29, 1957. The Employees' notification of intention to file an ex parte submission with this Division was received on February 24, 1958.

The Employees contend that Carrier's investigation was not fair, as required by Rule 11 of the Agreement, and Carrier's decision was arbitrary and constituted an abuse of discretion. Among the allegations of unfairness

and arbitrariness are the following: (1) Hearing officer Dolan not only led his own witnesses but also in fact acted as a witness and gave testimony. (2) One of the inspectors at the hearing was unable to identify one of the accused waiters. (3) The inspectors failed to take into account the irregular nature of the operations of such a dining car—necessarily irregular because of the kind and number of patrons served and the lack of sufficient staff. (4) The inspectors' testimony was full of contradictions and presented unwarranted assumptions and inferences instead of accurately observed facts. Said testimony afforded no proper basis for Carrier's decision.

Carrier defends by asserting that (1) Carrier complied with every provision of Rule 11; (a) the evidence adduced at the hearing on the whole supported the charges against the accused; (3) the hearing officer's conduct of the investigation was not prejudicial to the rights of the accused; and (4) the decision to dismiss them was not too severe in view of (a) their proven guilt on the instant charges involving dishonesty and (b) their records of previous discipline received for similar offenses.

A determination of the issues here raised will be made by applying to the facts of record the principles set forth in this Division's Awards 8431 and 8503. (1) Carrier's rules (as shown in its Special Instruction Book, its Meal Check Form DC-23, and its printed Menus) required that (a) meal checks be used for serving of food, milk, and coffee; (b) checks be issued promptly to patrons after their being seated; (c) checks be issued in numerical order; (d) orders for the above-mentioned food items to be written on the checks, by the patrons if possible, otherwise by the waiters; (e) if more than one patron's order is written on a given check, the number of patrons be clearly noted on check; and (f) checks be left on patrons' tables, the kitchen copies to be taken by waiters to the chef and the latter to issue food (fill orders) only if said copies are in his possession. The Board finds that these rules were and are reasonably related to the orderly and efficient operation of Carrier's business and to the proper objective of preventing possible dishonesty among dining car employees. (2) The record establishes that said rules, plus possible penalties for disregard of same, were made known to the Claimants, and they were aware of same. (3) The record establishes that the charges made by Carrier, i.e., the questions raised in re dishonesty, were stated with sufficient precision and specificity. (4) The time limit provisions of Rule 11 were properly observed. (5) The accused were given the opportunity to bring witnesses to and have representation at the investigation. They did have representation. (6) The record of Carrier's hearing on the charges raises some doubt as to whether the investigation was conducted in a reasonably fair and impartial manner. Under this Board's principles the hearing officer who conducts the investigation is permitted to be both prosecutor and judge. But as prosecutor he must discipline himself so as to ask fair questions and permit the defendants' representatives to do the same. And he may not ask his own witnesses leading questions, nor may he himself testify, i.e., acts as a witness on points relevant to a fair determination of the charges. Nor may he, as judge, base his decision on any facts that he himself may have introduced as a witness (such facts, if relevant, should be presented by a proper Carrier witness). A study of the record of the investigation discloses at least eight instances in which hearing officer Dolan either led his witnesses or himself introduced testimony or both. Said study discloses also, however, that only one of these instances—the one when Dolan stated that Claimant Weaver's food cost percentage on the trip here at issue was 56 percent rather than the normal 36 percent—can properly be said to have been directly related to the charges as made. And even this instance cannot reasonably be said to have prejudiced the rights of Claimants because Dolan's decision, as indeed

this Board's (see below), rested mainly on other substantial evidence. On the side of impartiality, the record of the investigation discloses that the hearing officer permitted full cross-examination of Carrier's witnesses and during the hearing himself dismissed several of the counts against Claimants when reasonable doubt was raised thereon.

The Board concludes and finds that on balance the hearing was conducted in a reasonably fair manner and was not prejudicial to the rights of Claimants. (7) Study of the record of the investigation compels on balance the conclusion that, by the evidence adduced at the hearing, Carrier supported its burden of proof on the points of honesty raised by its notice of hearing. It is true that the evidence is somewhat mixed and confused. On the one hand, the report of the two inspectors listed 19 incidents at or about 15 times during the day here involved (July 30, 1957). In the Board's judgment one of the 19 incidents (the buying of food at Yuma by Claimants) is not sufficiently relevant to the charges as made. As to the remaining eighteen incidents, the Board finds that so far as the testimony directly bearing thereon is concerned, Claimants' guilt was substantially proved (by the inspector-witnesses) in ten, and either quashed by Dolan, or not proved in eight. But on the other hand, the testimony of Chef Vanlayer, the only cook on the car here involved, must be considered. Said testimony came out of a discussion of the food-buying incident at Yuma. The portion relevant here was related to "general practices" in "handling his kitchen" rather than to specific occurrences on July 30, 1957. Vanlayer stated that he got "a copy of any order leaving my kitchen", and waiters on his car "cannot receive an order until they turn in an inside copy." This testimony, which was not contradicted by any witness for Carrier, raises a question as to how Claimants could have filled food orders with blank checks, then pocket the money for same instead of turning the money in to Carrier. It would appear that such dishonesty would be improbable without the collusion or connivance of the chef. Yet no question was raised by Carrier or anyone in the record about the possibility of such collusion. Thus the evidence is somewhat conflicting as to the guilt of the accused employees. In such a case the rule of the Board is that the Board will not attempt to determine the credibility of witnesses or to reconcile contradictory testimony; it is sufficient if substantial evidence supports the charges as made. Accordingly the Board finds that, by the testimony of the two inspector-witnesses, Claimants were substantially shown to have been guilty of the offenses in question. (8) The Board finds that the discipline administered in this case (dismissal of Claimants) was reasonably related to the seriousness of the instant proven offenses and to the past records of Claimants.

These last two findings, plus the finding that the investigation was not so biased as to have prejudiced the rights of Claimants, demand a ruling that the claims cannot be sustained. Carrier did not violate the provisions of Rule 11, nor was its decision so arbitrary and unreasonable as to have constituted an abuse of managerial discretion.

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 Carrier's decision was not arbitrary or in violation of the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 5th day of February, 1959.