

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Norris C. Bakke, Referee

PARTIES TO DISPUTE:

JOINT COUNCIL DINING CAR EMPLOYEES, LOCAL 354

MISSOURI PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of Joint Council Dining Car Employees' Union, Local 354 on the property of Missouri Pacific Railroad Company for and on behalf of Sam Wright and R. H. Merritt, Waiters, that they be reinstated in Carrier's employ with seniority and vacation rights unimpaired and compensation for net wage loss suffered from September 24, 1957, account Carrier's dismissal of claimants in violation of agreement; and claim for and on behalf of Bennett Reeves, Chef Cook, that he be compensated for net wage loss suffered account 90 days suspension imposed by Carrier on September 24, 1957; all discipline being assessed by Carrier in violation of agreement and being arbitrary and discriminatory action by Carrier.

OPINION OF BOARD: Under date of September 10, 1957, the Superintendent of Carrier's Dining and Parlor Car Service notified Claimants, Steward C. R. Parker, Waiter D. Matthews and Second Cook L. Bowden, all members of the crew on dining car 846 on August 19, and 20, 1957, the dates when Claimants Wright and Merritt were alleged to have served and collected money for meals without giving to or receiving from the customer the necessary meal checks, in writing, as follows:

"You are hereby notified to report at my office at 6:05 South Ranken Avenue, St. Louis, Missouri, at 9:00 A. M. (Daylight Saving Time) September 18th, 1957, to determine the facts in connection with a report we have received that meals were served on diner 846, Train 12, August 19th and 20th, 1957, without Com-2 meal checks having been issued in accordance with Bulletin No. 13, reissued July 16th, 1954 and Supplement No. 1, issued February 25th, 1953, and Rules 27 and 68 of Missouri Pacific Railroad General Rules Book of the Dining Car Department, indicating misappropriation of company funds.

"Have a representative of your choice present, if you so desire."

Notice was sent by registered mail. Return receipt requested. Receipt of notice is admitted.

Investigation was subsequently held on September 18, as a result of which Claimants Wright and Merritt and Second Cook Bowden were dismissed from service. Reeves was found guilty of aiding and abetting violation of Carrier's rules and given a 90 day suspension, and as noted his claim is for wage loss during that period, and Bowden's discipline was reduced by agreement to a 90 day suspension after Employees agreed to withdraw his pay for time lost.

We dispose of the Reeves claim by saying his appeal was not taken within the 30 day limit allowed by Rule 17 (i). Award 8297.

Steward Parker's case is being handled by another Board and we are not advised as to its status.

This presents an awkward situation to this Board, because it appears there was a conspiracy here because the Claimants, if guilty of accepting money for meals without giving meal checks therefor, had to have help from other members of the crew, but since both parties agree that our task is only to review the record to determine whether the finding of guilt as to Wright and Merritt was justified, we proceed accordingly.

The record contains the following statement:

"Little Rock, Ark., Aug. 28th, 1957

"Mr. A. C. Drui,
Supt. of Dining Cars,
Missouri Pacific RR Co.,
St. Louis Missouri.

Dear Sir:

On August 19th, I left Denver, Colo., on Missouri Pacific train No. 12, enroute to St. Louis, Mo., and had the following experience.

My son, age 13, and I were riding in the Pullman car and we went to the Diner soon after the first call was made, around 5:30 P. M.

As we entered the Diner we did not see a steward, one of the waiters seated us at the second table on the left from the lounge end. There was no one at the table at the time and no one else was seated there while we ate.

The waiter took our order: 'two Specials, potted lamb,' verbally. There was a check on the table, but the waiter offered to take the order. We did not write one."

The meal was very good and when we had finished, the waiter told us our bill was \$5.10, but did not present a check. I gave him \$6.00 and as he took the money towards the kitchen end of the car, we left the diner. I did not see what he did with the money.

I saw the Steward around the buffet, but he did not come to our table at any time during the meal.

For breakfast, next morning, we came into the diner when the last call was made at about 10:00 A. M.

The Steward was having coffee when we came into the car, at the last table towards the kitchen on the left hand side.

We seated ourselves at the third table from the lounge end on the left side of the car. There was no one else at this table.

The waiter gave us menus and took our orders verbally. We did not write a check. I ordered, 'orange juice, muffins and coffee and my son ordered orange juice, wheat cakes and bacon and milk.'

When we had finished, the waiter told us we owed \$2.96. I gave him even money plus the tip and as he started to the rear of the car, we left. I did not see what he did with the money. During breakfast the steward did not come to the table at any time.

I did not notice any name cards on the tables, giving the names of the Steward and waiters.

From pictures shown me, I can identify the waiter who served us dinner as S. Wright and the one who served us breakfast as R. Merritt.

I have looked at the checks turned in by the Steward for both the dinner and the breakfast meal and do not find any that correspond to the meals we had.

I thought at the time that certainly the Steward was very lax in the manner in which the car was run. He did not greet us, he did not seat us or come to the table at any time during either meal.

/s/ (Mrs.) Elizabeth W. Witsell
5119 Hawthorne Ave., Little Rock, Ark."

Mrs. Witsell, the author of the above statement, was not present at the hearing and Claimants' representative objected whereupon the officer conducting the investigation offered "to postpone the investigation to allow anyone time to contact the witness if they so desire".

No one requested that the hearing be postponed.

All of the members of the crew were present and testified, but it is perfectly apparent that there was an understanding among them as to what their testimony was going to be with the result that proof that Claimants actually served Mrs. Witsell is not established aside from her statement except by inference.

Employees are contending that the Carrier violated Rule 17, Sections (a) and (b) which read respectively as follows:

"Rule 17. (Effective 6-1-48.) (a) An employe who has acquired seniority and an employe relationship under Rule 12(a) shall not be disciplined or discharged without an investigation, at which investigation he may be assisted by a representative of his own choice (an employe) who may examine witnesses giving testimony in the case. He may, however, be held out of service pending investigation.

(b) At a reasonable time prior to the investigation the employee shall be advised in writing of the charge or nature of the complaint and shall have reasonable opportunity to secure the presence of necessary witnesses and representative."

In support of this contention they state:

"1. It disciplined claimants despite the fact that no evidence in the record supports the charges against them.

2. It filed (failed) to comply with the requirements of Rule 17(b).

3. Dismissal of claimants Merritt and Wright and suspension of claimant Reeves was arbitrary and discriminatory action on the part of Carrier."

We will consider each of these points briefly.

As to the evidence we say that Mrs. Witsell's statement was admissible. See Awards 2770, 2793, 2978, 3125, 4865, 4976, 6067, 6185 and 8300. That statement in itself, if believed, is sufficient to justify the finding of guilt. The fact that Mrs. Witsell was not present at the hearing was not prejudicial. Employees had her name and address, and the officer in charge of the hearing offered to adjourn the meeting long enough for employees to get in touch with her if they so desired, and there is nothing in the record to indicate (aside from Claimant's denial of course) that her statement was unworthy of belief except the suggested inference from the fact that she was riding on a pass, i. e., that she was under possible influence of the Carrier.

The record shows she occupied Pullman space on the train on the dates in question. While this does not prove she ate in the diner it would be a reasonable deduction that she did. Both Claimants admit assignment as waiters on the dining car on the dates in question, but do not remember Mrs. Witsell and her son. Claimant Wright was assigned to the table where Mrs. Witsell said she sat.

The record also shows that the food costs in connection with the cash receipts on this diner on this run were unusually high, as compared with other dining cars on the same run during the period embracing August 19 and 20.

Further analysis of corroborative evidence is not necessary. We have given enough to give credence to Mrs. Witsell's statement.

Next,

"Carrier violated Rule 17(b) of the agreement because it failed to advise claimants of any charges against them and of the nature of the complaint prior to the investigation."

We fail to see how the charge, quoted above, could be any more specific. It gives the number of the train, the number of the dining car, the dates, failure to give Com-2 meal checks, and designating the instructions violated.

Employees state:

"When Carrier failed to advise claimants that the nature of the complaint against them was a letter which it received from Mrs.

Witsell on August 29, 1957, it prevented claimants from securing the presence of Mrs. Witsell."

We have already indicated that they were given the opportunity to go and see her, before proceeding with the investigation, and their not accepting the offer constituted a waiver of their right to cross-examine her on her statement. (Assuming it to be a contractual right, which we do not concede.)

Finally, as to the alleged discrimination in discipline. As already noted, the Steward's case is not before us, so we can make no comparative quantitative evaluation of his responsibility or discipline.

Assuming, as the parties do, that the rest of the crew was involved in this conspiracy, there is enough in the record to indicate a basis for lighter discipline as to Bowden and Reeves, than was accorded to Merritt and Wright. As to them, we cannot say, in view of their past records, that the Carrier acted arbitrarily or capriciously, nor that the discipline imposed was excessive.

Cited on behalf of the Employees was Award 8713. We have examined both the docket and the Award with great care and while this referee feels the correction of the discipline in that case was justified, he feels the failure to have the complaining witnesses present under the circumstances therein disclosed should not have been seized upon by the referee in that award as the major premise for his action.

Employees here were charged with violation of the Carrier's instructions, with which employees are bound with notice, because they must acknowledge receipt of the same by signing therefor when first employed by the Carrier. Said instructions include the advice that punishment for the violation thereof will be drastic.

Employees well know that the Carrier cannot take these discipline cases resulting in dismissal lightly because if any employee can prove he was wrongfully dismissed, the Carrier subjects itself to a possible action for damages, such as the one that happened to an Eastern Carrier a few years ago when the employee of a dining car recovered judgment for about \$125,000.00 against it. While this is not a matter of record in the instant case it was a matter of common knowledge nationally, through the press, at the time it happened.

We conclude that the finding of guilt in this case is supported by competent evidence and that the discipline was justified.

The Carrier did not violate the Agreement and the claim is denied.

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 Carrier did not violate 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 15th day of May, 1959.