Award No. 11443
Docket No. DC-11040

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

David Dolnick, Referee

PARTIES TO DISPUTE:

JOINT COUNCIL DINING CAR EMPLOYEES UNION, LOCAL 370

THE NEW YORK CENTRAL RAILROAD

STATEMENT OF CLAIM: Claim of Joint Council Dining Car Employees Local 370 on the property of the New York Central Railroad (Lines East) for and on behalf of Waiter Claude Thomas that he be compensated for net wage loss account Carrier's imposition of discipline of 15 days suspension in violation of effective agreement and that said discipline was arbitrarily and capriciously imposed.

OPINION OF BOARD: On March 3, 1958 Carrier's Superintendent of Dining Service notified Claimant to report for a hearing on the following charge:

> "Insubordination to Waiter-in-charge Stevenson, train 41, January 29, 1958."

A hearing in accordance with the provisions of the Agreement was held on March 12, 1958. On March 14, 1958, Claimant was notified that the evidence produced at the hearing conclusively established his guilt as charged, and that he was suspended for a period of fifteen (15) days.

Petitioner first contends that Claimant was not afforded a fair and impartial hearing because (1) it was not held in Claimant's home terminal, (2) that Claimant was not given a food allowance, (3) that Carrier cited no violation of any Rules in the charge, and (4) that the Hearing Officer prejudged the evidence before it was presented.

Claimant's home terminal was New York and the hearing was held in Boston where most of the witnesses were more readily available. There is nothing in the Agreement which makes it mandatory that the hearing be held at the Claimant's home terminal. On the contrary, the record clearly establishes the fact that twelve such hearings, involving employes represented by the Organization and the same Carrier, were held in cities other than the employes' home terminal. These hearings were held from 1949 to 1958. Claimant was furnished with transportation.

There is no provision in the Agreement which requires Carrier to give Claimant a food allowance. He was treated no differently than other witnesses

who attended and participated in the hearing. Again, the record clearly establishes the fact that Carrier never gave food allowances to employes who were witnesses at a hearing. There was no discrimination against Claimant. Stevenson, the Waiter-in-charge, and Dunbar, the pantryman, who testified at the hearing, were given no food allowance.

The charge does not need to contain the Rules which Claimant allegedly violated. Awards 7139 (Cluster) and 6171 (Wenke). Claimant knew the nature of the charge. He was not misled, nor was he deceived. Awards 5933 (Parker) and 5370 (Elson).

The record is replete with interruptions, irrelevancies and unfounded accusations. It is desirable that Petitioner conscientiously represent the Claimant at a disciplinary hearing. It is even the duty of Claimant's representatives to insist on a fair and impartial hearing and to present all relevant evidence on behalf of the Claimant. Neither party, however, should clutter the record with so much irrelevancies to obscure the real issue. We have carefully read and examined the record and we find that Claimant was given a fair and impartial hearing. The record does not support the charge that the Hearing officer was prejudiced and that he prejudged the evidence.

Second, Petitioner contends that the Carrier was arbitrary and capricious in imposing a fifteen (15) day suspension. The testimony of the witnesses is conflicting. Yet, there is sufficient evidence in the record upon which a determination can be made.

The Waiter-in-charge directed Claimant to wash the silverware. This was done at the conclusion of the meal after the pantryman had first asked Claimant to do so. Claimant admitted that he received such instructions from the Waiter-in-charge. There is no dispute that the task had to be done that night.

The preponderance of evidence in the record establishes the fact that the pantryman first asked Claimant to wash the silverware and that Claimant told him to mind his own business. Thereafter, the Waiter-in-charge directed Claimant to perform this task that night. At that point the Waiter-in-charge testified that Claimant became profane. Claimant, testified that he was not profane, but said: "I did not know I had to do the silverware tonight."

Whether or not Claimant used profane language is only incidental to the real issue. The Waiter-in-charge was Claimant's supervisor. He had a right to direct Claimant to wash the silverware that night. Claimant testified that he washed the silverware as directed. But the record does not support Claimant. Both the Waiter-in-charge and the pantryman testified that the silverware was not washed and that they washed it the following morning. The pantryman stated that Claimant did not wash the silverware but only spotted. When asked what he meant by "spotted", he answered:

> "Well, it is a term used. When the waiter don't want to wash the silver, he picks up this and that and that and that and he washes those, but he puts the rest away. That is what you call a 'spot'."

He confirmed the fact that he washed the silverware the next morning.

There is nothing in the record to show that the Waiter-in-charge and the pantryman wilfully, maliciously and wickedly contrived a false story to deliberately injure Claimant. There is no reason for disbelieving them. Award 1987 (Shaw).

Even though the evidence is controverted, there is substantial, credible and competent evidence in the record to support the disciplinary action. We cannot "resolve questions as to the creditibility of witnesses or the weight given to their testimony" (Award 4479 — Carter). See also Award 9199 (Weston). We have no opportunity to observe the witnesses, their demeanor and their conduct. This alone, when there is a variance of testimony, is the criteria which determines who is telling the truth. The Hearing Officer had this opportunity. In the absence of apparent and deliberate abuse of discretion, we cannot say that the Hearing Officer abused his power in assessing the penalty. There is enough evidence in the record to justify his conclusion. From all of the evidence, we are convinced that the Carrier was not arbitrary nor capricious.

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

That the parties waived oral hearing;

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes 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 is denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 27th day of May 1963.