

Award No. 16166  
Docket No. DC-16793

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

Bernard E. Perelson, Referee

**PARTIES TO DISPUTE:**

**JOINT COUNCIL DINING CAR EMPLOYEES  
(Local 351)**

**ERIE-LACKAWANNA RAILROAD COMPANY**

**STATEMENT OF CLAIM:** Claim of Joint Council Dining Car Employees Local 351 on the property of the Erie-Lackawanna Railroad, for and on behalf of Matthew Stackhouse, Chef Cook, that he be returned to service and compensated for net wage loss, with vacation and seniority rights unimpaired since April 6, 1966, account of Carrier dismissing Claimant from service on that date, in abuse of its discretion and in violation of the Agreement.

**OPINION OF BOARD:** This is a discipline case.

The Claimant was Chef Cook on Diner No. 746 of Train No. 1, of the Carrier, departing from Hoboken, New Jersey, on February 15th, 1966, and was Chef Cook on Diner No. 742 of Train No. 2 enroute from Scranton, Pennsylvania, on February 18th, 1966.

Under date of March 14, 1966, the following communication was addressed to the Claimant:

"Dear Sir:

In accordance with Rule 29—Investigation, Appeal and Decisions of Agreement, effective November 15, 1961, between Erie Lackawanna Railroad Company and their employes represented by Joint Council of Dining Car Employes Union, Local 351, you are hereby notified to present yourself for investigation in connection with alleged violation of Rule 2 of General Rules for the Guidance of Dining Car Department, Passenger Terminal, Hoboken, New Jersey follows:

1. Allowing food order consisting of a hot turkey sandwich and a pot of coffee to leave your kitchen without receiving chef's portion of meal check to cover such food order while covering your assignment as chef on diner of Train No. 1, Tuesday, February 15, 1966, between Hoboken, New Jersey and Scranton, Pennsylvania.

2. Allowing two food orders, one consisting of toast, a pot of coffee and a dish of ice cream and the other consisting of a piece of apple pie, to leave your kitchen without receiving chef's portion of meal check to cover such food orders while covering your assignment as chef on Diner of Train No. 2, Friday, February 18, 1966, between Scranton, Pennsylvania and Hoboken, New Jersey.

This investigation will be held in the office of Superintendent, Dining Car Department, Passesger Terminal, Hoboken, New Jersey on Monday, March 21, 1966, at 9:30 A. M.

At this investigation you may have present witnesses and/or representation of your own choice, without expense to the Company.

If you are unable to attend this investigation you should contact the undersigned at once, giving the reason, as failure to report at the time and place specified herein will be considered as an admission of guilt and grounds for discipline.

/s/ A. L. Elwyn  
Supt. Dining Car Dept."

The hearing took place as scheduled with the Claimant present together with representatives of his Union. The hearing in this dispute was held concurrently and simultaneously with the hearing of the charges against B. A. Thompson, who was the Waiter-in-Charge of the dining cars on the dates in question. The testimony adduced at the hearing is contained in one transcript; a copy of which is attached to and made a part of the record.

Under date of April 7, 1966, Claimant was advised that he was dismissed from the service of the Carrier.

It is the Claimant's contention, before this Board, that

1. He was not accorded a fair and impartial investigation as contemplated by the rules.
2. The evidence adduced at the investigation was insufficient to support the charge.
3. The penalty of dismissal from service was, in any event, excessive.

An examination of the transcript of the investigation discloses that the Claimant did not object to the notice of the hearing received by him; that he had sufficient time to prepare for the investigation; that he was ready to proceed with the investigation. Not having raised nor offered objection to the investigation taking place, such failure, on his part, constitutes a waiver. See Awards 15027; 14573; 14444.

The manner in which the investigation was conducted, with reference to the Claimant herein, by the Hearing Officer, leaves much to be desired. We find that the evidence was offered in such a way as to make this Claimant to appear to be guilty of acts and conduct, as to certain matters, over which he

had no control. The testimony, with reference to the charges against him should have been confined solely and strictly to those charges, i.e. a violation of Rule 2. We do not look with favor nor do we approve of the manner in which the hearing was conducted.

The unorthodox manner in which the hearing was conducted, in and of itself, will not void the hearing, unless it can be shown that the Claimant was prejudiced thereby. We think, however, that the Claimant was prejudiced by the manner in which the investigation was conducted. The transcript of the testimony adduced at the hearing contains over 30 pages; most of which relates to the charges against the Waiter-in-Charge and does not in any way apply to the Claimant herein.

The testimony, in the transcript, that applies to the Claimant, is as follows:

"JPS: Mr. Stackhouse were you the Chef in dining car 746 on Train No. 1 on February 15th, 1966?

MS: I was.

JPS: Did you make up the order that Miss Dreyer states she received on that day?

WSS: I object to this question. I don't see how the chef-cook who is hidden away as far as the passengers are concerned in the kitchen can determine what meal was prepared for what passenger and set out by the Chef cook to give to a particular person. I am certain that the chef cook doesn't know who the passengers are when he prepares an order.

JPS: Your objection is noted Mr. Seltzer.

JPS: Would you please answer the question Mr. Stackhouse?

MS: I have no way of knowing if I prepared her order.

JPS Mr. Stackhouse, Miss Dreyer stated that she ordered and received a hot turkey sandwich and a pot of coffee. Is there any other way she could have received this food other than from your kitchen?

MS: No.

JPS: Mr. Stackhouse did you put out any food on that day without receiving the Chef's portion of the meal order?

MS: No not that day or any other day, that's not my policy.

\* \* \* \* \*

WSS: Mr. Stackhouse you were the chef cook on train No. 1, February 15th, 1966, Hoboken to Scranton is that correct?

MS: Right.

WSS: It is alleged that you prepared an order or a hot turkey sandwich to leave the kitchen to be served to a passenger without a receipt or chef's portion of check is that a true allegation?

MS: Not true I never allow food to leave the kitchen without chef's copy.

WSS: Are you saying now that it is your established policy to at all times on this date, or any other date to secure chef's portion of check for all orders leaving the kitchen?

MS: That is my policy and I don't vary it."

It should be noted at this time that in the course of the investigation, the Carrier withdrew that part of Charge No. 2 which charged the Claimant with allowing a pot of coffee, a dish of ice cream and a piece of apple pie to leave the kitchen without receiving the chef's portion of the meal check. There was some question as to whether or not the toast was usually made by the Chef or by the Waiter who had an order for the toast.

This Board has held, on numerous occasions, that in a discipline case it is not its function to determine the credibility or weigh the evidence nor will it substitute its judgment for that of Management as to the degree of the discipline. We have held, however, that in view of the nature of the proceeding that:

"It was incumbent upon the Carrier to establish the findings on which it assessed discipline by **positive evidence**. Failure to do that, or when the case is brought here for review on charges of impropriety and unfairness, failure to produce a record disclosing testimony of that character, is **fatal and precludes the sustaining of its action**." See Award 2813. (Emphasis ours.)

In Award 13179, we said:

"In discipline cases, the Board sits as an appellate forum. As such, our function is confined to determining whether;

- (1) Claimant was offered a fair and impartial hearing;
- (2) the finding of guilty as charged is supported by **substantial evidence**;
- (3) the discipline imposed is reasonable.

We do not weigh the evidence DE NOVO. If there is **material and relevant evidence**, if believed by the trier of the facts, supports the finding of guilty, we must affirm the finding." (Emphasis ours.)

It may be that the Claimant failed to carry out his duties, under the rule, as the Chef of the dining car in question, but we fail to find any direct, positive, material or relevant testimony in the record to sustain such contention.

What he did or did not do can only be determined from the record before us and then only by conjecture, speculation and inference. That is not enough.

We may not and cannot speculate as to nor may we infer or assume facts not in the record.

The burden was on the Carrier to prove by direct, positive, material and relevant evidence that the Claimant was guilty of the charges preferred against him. We find that this the Carrier has failed to do.

We are not and should not be concerned, in this dispute, with what determination might be made with reference to the charges preferred against the Waiter-in-Charge, which investigation was conducted simultaneously with the charges preferred against the Claimant. Each case must be judged and stand or fall on its own set of facts and circumstances.

We find and hold that the Carrier's action was arbitrary, unjust and without any foundation in law and fact, and that

1. The discipline imposed by the Carrier was arbitrary, unjust and without any foundation in law and fact,
2. That the Claimant be returned to service and compensated for NET wage loss, with vacation and seniority rights unimpaired since April 6, 1966.

**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 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 the Carrier violated the Agreement.

#### AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of THIRD DIVISION

ATTEST: S. H. Schulty  
Executive Secretary

Dated at Chicago, Illinois, this 29th day of March 1968.