Award No. 16168
Docket No. DC-16798

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 Richard Foster, Waiter-in-Charge, that he be returned to service and compensated for net wage loss, with vacation and seniority rights unimpaired since April 7, 1966, acocunt 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 the Waiter-in-Charge of Diner No. 769, Train No. 1 of the Carrier, departing from Hoboken, New Jersey, on February 13, 1966.

A communication, dated March 14, 1966, was addressed to the Claimant, as follows:

"March 14, 1966
File: Personal File

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. Richard Foster
159-38 Harlem River Drive
New York, N. Y.

Dear Sir:

In accordance with Rule 29 — Investigation, Appeal Decisions, of Agreement effective November 15, 1961, between Erie Lackawanna Railroad Company and their employes represented by Joint Council of Dining Car Employees Union, Local 351, you are hereby notified to present yourself for investigation in connection with your alleged violation of Rule 1(a) of General Rules for the Guidance of Dining Car Department employes effective September 1, 1954, for failure to issue meal check to guest while assigned as Waiter-in-Charge on diner Train No. 1. Sunday, February 13, 1966, between Hoboken, New Jersey and Scranton, Pennsylvania; and also failure to remit to the Company monies dining car guests paid you for food order consisting of a cold turkey sandwich and tea.

This investigation will be held in the office of Superintendent, Dining Car Department, Passenger Terminal, Hoboken, New Jersey on Tuesday, March 22, 1966 at 9:30 A. M.

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

Yours very truly,

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

The hearing took place as scheduled with the Claimant present together with representatives of his Union. A copy of the transcript 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.

The chief and main witness testifying against the Claimant was a Miss Edna Blair, a Special Investigator in the employ of the Pinkerton Detective Agency. The agency had been employed by the Carrier to investigate the conduct, appearance and service of the Carrier's employes who came in contact with the traveling public and also to check discrepancies, if any, in the methods and procedures of its employes in the dining car service.

During the course of her interrogation, Miss Blair testified as follows:

"J. Sipple: Miss Blair, were you a passenger on Train No. 1, February 13, 1966 between Hoboken, New Jersey and Scranton, Pennsylvania.

E. Blair: Yes, I was.

J. Sipple: And were you a paying passenger on that train?

E. Blair: Yes Sir.

J. Sipple: Miss Blair, where did you secure your transportation?

E. Blair: At Hoboken, New Jersey.

J. Sipple: While you were on Train No. 1, did you have occasion to visit the Dining Car?

E. Blair: Yes sir, I did.

J. Sipple: Will you please relate your observation?

E. Blair: While in the dining car?

J. Sipple: Yes.

E. Blair: I entered the car at 11:25 A. M., sat at the third table, facing forward, waiter gave me a menu and he did not give me a check. I ordered a cold turkey sandwich and tea. I knew the sandwich was $1.50 and tea $.35, total $1.85 and a $.40 tip made it $2.25. He was not busy when I entered; there was a man drinking coffee and a girl came in after I had ordered and after I had been served, others came in; there was a head count of 6 and a 4-year old child. No nips. Service was prompt. Waiter pleasant. Food OK, the car was clean.

* * * * *

J. Sipple: Miss Blair, do you recall Mr. Foster, sitting here, as the waiter who waited on you that day?

E. Blair: Yes sir.

W. Seltzer: Miss Blair, will you tell us please, just how you were able to determine that the man who seated and placed you was Mr. Foster?

E. Blair: There was no identification, I just recall him.

W. Seltzer: By being told today? He was identified to you by Mr. Sipple here today. Just what mark of identification did you place on Mr. Foster at that time that would cause you to remember that he is the same man that is here today?

E. Blair: His weight, height, his head (thin receding hair).

W. Seltzer: Are you positive that he is the man that served and sat you?

E. Blair: Yes, he did.

W. Seltzer: Did he proffer you a check?

E. Blair: He did not.

* * * * *

I. Buford: Was there any other waiter on the train on that day, wearing a jacket and apron?

E. Blair: Yes.

I. Buford: Would you know him if you saw him again?

E. Blair: Yes sir.

I. Buford: How could you identify him?

E. Blair: Slight man, short, built about 5 feet, 7 inches, curly hair, close cut, weight about 170 lbs.

I. Buford: Who was this waiter?

R. Foster: Joe Legree"

Mr. Elwyn testified, in substance, as to the procedure of service in a dining car of the Carrier. He also testified that after the receipt by him of the report

from the Detective Agency, he caused an examination to be made of the records of the trip of February 13, 1966, with reference to dining car service. He further testified that the examination of those records failed to reveal any dining car order or orders showing that a cold turkey sandwich and tea was served on February 13, 1966, nor was there any record that the sum of $1.85, the cost of the sandwich and tea was turned over to the Carrier by the Claimant.

At the start of the hearing the Claimant admitted receiving the communication setting forth the charges and further stated that he knew of no reason why the hearing should not proceed, and that he had sufficient time to prepare for the investigation.

The Claimant, called as a witness in his own behalf, in his testimony denies most emphatically the testimony of Miss Blair. He stated that he had no recollection of having seen or served Miss Blair and that at no time did he ever serve a patron without first receiving a written order.

This Board in numerous awards has set forth its functions in a discipline case. In Award 5032 (Parker) we said:

> "Our function in discipline cases is not to substitute our judgment for the company or decide the matter in accord with what we might or might not have done had it been ours to determine but to pass upon the question, whether, without weighing it, there is some substantial evidence to sustain a finding of guilty. Once that question is decided in the affirmative the penalty imposed for the violation is a matter which rests in the sound discretion of the Company and we are not warranted in disturbing it unless we can say it clearly appears from the record that its action with respect thereto was so unjust, unreasonable or arbitrary as to constitute an abuse of that discretion."

In Award 13179 (Dorsey) 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, which if believed by the trier of the facts, supports the finding of guilty, we must affirm the finding."

It is 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. Having failed to raise or offer any relevant 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 by the Hearing Officer, leaves much to be desired. There was no continuity of the examination of the various witnesses. We find that during the course of the examination of a witness and before the direct examination was completed and cross-examination took place, that the examination was interrupted and questions put to other persons in the hearing room. 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 affirmatively shown that the Claimant was prejudiced thereby. We find that the Claimant was not prejudiced by the manner in which the hearing was conducted. The Carrier produced its witnesses at the hearing and these witnesses were cross-examined by the Claimant's representative. This is the ultimate protection one can receive in a dispute, such as the one before us — the right to be confronted by one's accusers and to cross-examine them in an open hearing, together with the right to produce and present any and all witnesses he desires in his own behalf.

We find that there was no violation of any of the provisions of the Agreement and reject the claim of the Claimant that he did not receive a fair and impartial hearing.

Was the evidence adduced at the hearing sufficient to support the charges against the Claimant?

The only direct testimony with reference to the incident involved in this dispute is that of Miss Blair, the Special Investigator of the Detective Agency. Her oral testimony was based on her own notes made by her at the time the incident took place. Her testimony, which was not discredited by a vigorous cross-examination, together with the testimony of Elwyn plus the records from the Waiter-in-Charge Trip Books and the meal checks constitutes substantial evidence to sustain the finding of guilty. This is especially so when the only evidence submitted by the Claimant is his denial of having any recollection of having served Miss Blair.

The testimony of one witness, if believed by the trier of the facts, is sufficient.

In Award 13129 (Kornblum) we said:

"For the part of the Claimant and his witnesses there was complete denial that the food in question had ever been ordered or served

by him. Obviously if we accept this denial we have to discredit the entire testimony of the Carrier's witnesses. But the Board has consistently refused to determine the credibility of witnesses. (Citing several awards.) So, too, the Board has left to the trier of the facts the matter of weighing or resolving conflicts in the evidence. (Citing several awards.) And in the light of the testimony of the Sleeping Car Porter, a witness who surely had nothing to gain or lose by this proceeding, it is difficult to find that there was not substantial corroborative evidence to support the operatives' reports * * * "

There is no rule which states that the Hearing Officer is under an obligation to believe the Claimant's testimony and to completely reject that of those witnesses who testify against him. If, as in this dispute, there be a conflict in the testimony adduced, it is the function of the trier of the facts and not the function of this Board to resolve such conflict. See Award 9046 (Weston); Award 9175 (Begley); Award 9326 (Rose); Award 12074 (Dolnick); Award 13475 (McGovern).

In reviewing the entire record, in this dispute, we cannot say that the trier of the facts had no substantial evidence before him upon which to credit the testimony of the Carrier's witnesses and to discredit the testimony of the Claimant, which was in effect a general denial.

The record reveals that the Carrier's findings are based upon substantial and credible evidence and we cannot find that any of the procedural or substantive rights of the Claimant were violated.

Dismissal from the service of the Carrier is an extreme and severe penalty. Whether or not such a penalty is justified depends upon many factors and the circumstances in each case. In order for us to overrule, reverse and/or set aside the penalty, it is incumbent upon the Claimant, to show by some affirmative proof, that the Carrier in assessing the penalty was vindictive, arbitrary or malicious. This he has failed to do.

The Claimant was found guilty of failing to comply with the Rules and Regulations and instructions of the Carrier which required that patrons be furnished with a dining car order blank upon being seated in the dining car and that orders must be in writing and written by the patron and that the amount received for the food ordered be turned over to the Carrier.

In Award 13250 (Hamilton) we said:

"* * * Even though we are able to find, as a question of fact, that there has been no proof whatsoever of fraud or dishonesty in this case, we must recognize that Claimant was exceedingly careless in his conduct when he knew that a deviation from the rules could cause him to be dismissed. It must also be noted that proof of fraud or dishonesty is not a condition precedent to the imposition of the penalties involved in cases of this nature. We are of the opinion that the intent of the party violating these rules is not a proper part of the offense, and that dismissal is a prescribed penalty, at the Carrier's discretion, whether or not the element of dishonesty is present in the case."

Dishonesty, in any form, is a matter of serious concern and dishonesty usually and frequently results in dismissal from the service of a Carrier.

This Board has held on numerous occasions that dismissal from the service for a dishonest act is not an excessive application of discipline or an abuse of discretion.

The record discloses that the Claimant has been in the service of the Carrier for approximately 12 years. Years of service alone does not give an employe a right or a license to violate rules or to commit dishonest acts. If he does, he does so at his peril.

In Award 11769 (Engelstein) we said:

> "* * * He says he does not remember the orders for the food and coffee served, that he did not deliberately attempt to defraud Carrier, and that his long years of service with a clean record indicate his integrity. These are not defenses, but are proffered in mitigation. We are not unmindful of the long previous record of service of Petitioner and the serious nature of disciplinary punishment. We find from the record that he had a fair hearing in which the charges were sustained. In the absence of substantial error or abuse of discretion on the part of the Carrier, we refrain from setting aside or modifying Carrier's considered judgment."

In Award 10930 (Dolnick) we said:

> "* * * The mere fact that he had sixteen years of service is, in itself, not sufficient grounds to ignore his serious offense and to entitle him to reinstatement. * * * The Board cannot permit its emotional desires to substitute for the judgment of the Carrier." See Award 13704 (Mesigh); 14358 (Ives).

The penalty assessed, in this case, was solely within the discretion of the Carrier and we will not seek to substitute our judgment for that of the Carrier since we do not find or consider it arbitrary or capricious.

It was argued that the manner in which the evidence against the Claimant was obtained amounted to entrapment. We do not agree with such contention and/or argument.

The fact that the Carrier used the services of a Special Investigator employed by a Detective Agency to ascertain as to whether or not the Claimant was following and obeying its instructions, rules and regulations is not necessarily entrapment. The information reported was obtained through the voluntary acts of the Claimant, for which no legitimate excuse was offered. The use of detective methods is, generally speaking, perhaps the only way that the Carrier can ascertain as to whether or not its instructions, rules and regulations are being obeyed. The Carrier was well within its rights in employing this method, both for its own benefit and that of the public.

We will deny the claim.

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

The claim is denied.

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.

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