Award No. 16170
Docket No. DC-16800

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 Phillips, Waiter-in-Charge, 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 the Waiter-in-Charge of Diner No. 769, Train No. 1, departing from Hoboken, New Jersey, February 18, 1966. He was in the employ of the Carrier for approximately 20 years.

Under date of March 14, 1966, a communication was addressed to the Claimant, signed by A. L. Elwyn, Superintendent, Dining Car Department of the Carrier, which reads as follows:

"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 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 1st, 1954, for failure to issue meal check to guest while assigned as Waiter-in-Charge on diner of Train No. 1, Friday, February 18th, 1966 between Hoboken, New Jersey and Scranton, Pennsylvania; and also your failure to remit to the Company monies that dining car guest paid you for food order consisting of bacon-potatoes-eggs, a pot of coffee, and a dish of ice cream.
>
> This investigation will be held in the office of Superintendent, Dining Car Department, Passenger Terminal, Hoboken, New Jersey, on Monday, March 21st, 1966, at 1:30 P. M.

At this investigation you may have present witnesses and/or representative 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 being present together with representatives of his Union. A copy of the transcript of the hearing is attached to and made a part of the record.

Under date of April 7th, 1966, a letter was addressed and sent to the Claimant advising him that he was dismissed from the service of the Carrier.

The main witness giving testimony against the Claimant and perhaps the chief witness, was a Miss Charlotte Dreyer, an Investigator in the employ of the Pinkerton Detective Agency. The record discloses that this agency was employed by the Carrier to investigate the conduct, appearances and services of the Carrier's employes who came in contact with the traveling public using the Carrier's facilities and also to check discrepancies, if any, in the method and procedures of its employes in the dining car service.

After being asked some preliminary questions, Miss Dreyer testified as follows:

"JPS: Did you have occasion to visit the dining car on this trip?

CD: Yes.

JPS: Would you please relate your observations while in the Dining Car?

CD: At 12:20 P. M. I entered the dining car and sat at the second left side window seat. From the menu I selected the Bacon–Potatoes and Eggs which includes a pot of coffee for the amount of $2.40. I gave my order orally to the waiter named R. Phillips. He did not offer me any order check, nor did he write in my presence. The order was brought to me promptly and the service was good. After completing the meal I ordered a dish of ice cream from the same waiter. The order again was taken orally and no order check was given. After the meal was completely finished the waiter came over to my table and quoted the price of the meal to me as $2.89. He showed no order check and accepted the exact change that I had given him for the meal, plus a 40 cent tip. Head count in the dining car was eight persons. No nips were purchased. Dining car was observed to be clean, preparation of the other orders was good. I proceeded back to the coach car and completed the run."

Mr. Elwyn was also called as a witness. He testified as to the procedure of service in a dining car of the Carrier. He also testified that he caused an examination to be made of the records of the trip of February 18, 1966, with reference to dining car service, the trip in question in this dispute. He further

testified that an examination of those records failed to reveal any dining car orders showing that bacon, eggs and potatoes were served at the price claimed to have been paid by Miss Dreyer but that the records did show some bacon and eggs orders but all were at breakfast prices, to wit, $1.95.

At the start of the hearing the Claimant admitted receiving the communications setting forth the charges and further stated that he had sufficient time to prepare for the investigation and that he was ready to proceed with the hearing.

The Claimant, a witness in his own behalf, testified in part, as follows:

"JPS: Mr. Phillips were you the waiter-in-charge on train No. 1 on February 18th, 1966?

RP: Yes I was.

JPS: Did you serve Miss Dreyer as she has stated?

RP: I could not tell you. I don't know Miss Dreyer. I don't know whether there were two men with me or 1 man. If I had two men I didn't serve her. If I have two men I don't serve anyone."

In order to clear up the question as to whether or not two waiters besides the Claimant was in the car, Mr. Elwyn testified as follows:

"ALE: Mr. Sipple I think there is a point that should be cleared about Mr. Phillips. He said two waiters besides himself in the car. The crew that day consisted of R. Phillips, Waiter-in-Charge, M. Williams, Chef Cook and one waiter A. Clayborne that was the crew.

EP: Was that the day we had Parker with us?

ALE: No sir.

WSS: He did have a waiter with him on the car that day?

ALE: B. Frouner was another waiter.

WSS: It is established he had two waiters?

ALE: That's right.

WSS: How many cooks?

ALE: Two M. Williams and J. Flamer."

It is evident from the foregoing testimony that there were two waiters in the car in addition to the Claimant. In view of the testimony of the Claimant as to what services he performs when there are two waiters in the car with him the question of the identity of the waiter who served Miss Dreyer is important.

Miss Dreyer's testimony identifying the Claimant as the waiter who waited on her is as follows:

"JPS: Miss Dreyer do you recognize Mr. Phillips who is sitting here as the gentleman who waited on you in the diner on February 18, 1966?

CD: Yes.

* * * * *

JPS: Miss Dreyer could there be any possibility of your mistaking the identity of Mr. Phillips?

CD: No I do remember him as the waiter.

* * * * *

RP: I would like to ask Miss Dreyer did other people around you have a check?

CD: I don't know.

RP: But you can recall me waiting on you?

CD: I can definitely.

RP: Outside of three men working I waited on you and you remember me?

CD: Yes I identified you by ID you were wearing bearing your name."

This Board in numerous awards have set forth our 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 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 findings."

Claimant contends before this Board, as follows:

1. That he was not accorded a fair and impartial investigation, as contemplated by the rules.

2. The evidence produced at the investigation was insufficient to support the charge.

3. The penalty of dismissal from service was excessive.

An examination of the record discloses that the Claimant did not object to the notice of the hearing received by him; that he stated that he had sufficient time to prepare for the investigation; that he was ready to proceed with the investigation. Having failed to raise 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 asked of 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. The Carrier produced its witnesses at the hearing and these witnesses were cross-examined by the Claimant's representative. This is, perhaps, 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 plus the right to produce and present any and all witnesses he desires in his own behalf.

We find that the Claimant was not prejudiced by the manner in which the hearing was conducted, and his claim that he did not receive a fair and impartial hearing under the provisions of the agreement is rejected.

The testimony of one witness, if believed by the trier of the facts, is sufficient. There is no rule which holds that the Hearing Officer or a trier of the facts is under an obligation to believe the Claimant's testimony and completely reject that of those witnesses who testify against him. If, as in the dispute before us, 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. In Award 13129 (Kornblum) we said as follows:

"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. * * * So, too, the Board has left to the trier of the facts the matter of weighing or resolving conflicts in the evidence. 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 * * *."

See Awards 9046, 9175, 9326, 12074, 13475.

In reviewing and reading the entire record in this dispute, we cannot say that the Hearing Officer's finding was not based on substantial and credible evidence. We find that none of the Claimant's procedural or substantive rights were violated.

Dismissal from service is an extreme and severe penalty. Whether or not such penalty is justified depends in a large measure upon the many factors and circumstances in each case. In order for the Board to overrule, reverse and/or set aside the penalty, it is incumbent upon the Claimant, to show by affirmative proof, that the Carrier in assessing the penalty was vindictive, arbitrary or malicious. This the Claimant 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 check or order blank upon being seated in the dining car; that all orders must be in writing and be written by the patron; that all monies received for the food ordered be turned over to the Carrier.

Dishonesty, in any form, is a matter of serious concern and usually and most frequently results in dismissal from the service of a Carrier. This Board has held on numerous occasions that dismissal from the service for dishonest acts is not an excessive application of discipline or an abuse of discretion.

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 penalty 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."

The record reveals that the Claimant has been in the service of the Carrier for a long period of time, but we must point out that years of service alone does not give an employe the right or a license to violate rules or commit dishonest acts. If he does, he does so at his peril and must suffer the consequences for his act or acts.

In Award 11769 (Engelstein) we said:

"* * * He says he does not remember the order 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 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 Awards 13704 and 14358.

The penalty assessed, in this dispute, while severe, was solely within the discretion of the Carrier and we will not substitute our judgment for that of the Carrier since we do not find or consider it to be 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 mere 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 rules, regulations and instructions is not necessarily entrapment, especially when we find that the information reported was based on the voluntary acts of the Claimant, for which no 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 rules, regulations and instructions are being obeyed by its employes. 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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