Award No. 16171
Docket No. DC-16830

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 B. A. Thompson, 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. 746, Train No. 1, of the Carrier, departing from Hoboken, New Jersey, February 15, 1966. He was also the Waiter-in-Charge of Diner No. 742, Train 2, of the Carrier, enroute from Scranton, Pennsylvania, on February 18, 1966. He was in the employ of the Carrier for approximately 21 years.

A communication, dated March 14, 1966, 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 15th, 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 alleged violation of Rule 1 (a) of General Rules of the Guidance of Dining Car Department employes effective, September 1st, 1954, as follows:

1. Your failure to require dining car guest to write food order and failure to issue meal check to cover food order consisting of hot turkey sandwich and a pot of coffee served to dining car guest during your assignment as waiter-in-charge on diner of Train No. 1, Tuesday, February 15, 1966, between Hoboken, New Jersey and Scranton, Pennsylvania; also your failure to remit to the Company monies guest paid for this food order.

2. Your failure to issue meal checks to two guests during your assignment as waiter-in-charge on diner of Train No. 2, Friday, February 18, 1966, between Scranton, Pennsylvania and Hoboken, New Jersey, and your failure to remit to the Company monies guests paid for these food orders, one order consisting of toast, a pot of coffee and a dish of ice cream and the other order consisting of a piece of apple pie.

This investigation will be held in the office of the Superintendent, Dining Car Department, Passenger Terminal, Hoboken, New Jersey on Monday, March 21st, 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 being 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, a letter was sent to the Claimant advising him that he was dismissed from the services of the Carrier.

The chief and main witness testifying against the Claimant was a Miss Charlotte Dreyer, a Special Investigator in the employ of the Pinkerton Detective Agency. The agency had been employed by the Carrier to investigate the conduct, appearances and service of the Carrier's employes who come 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.

Miss Dreyer testified that at or about the hour of 11:35 A. M. of February 15, 1966, while a passenger on Carrier's Train No. 1, she had occasion to enter Diner No. 746; that she was served by a waiter wearing a name tag reading "B. A. Thompson"; that she sat at a table in the rear right next to a window; that the waiter approached her table, asked to serve her and placed a blank order upside down on the table; that she ignored the blank order ticket and orally ordered from the waiter a hot turkey sandwich, which he delivered to her; that she then ordered, orally, a pot of coffee from the same waiter which he also brought to her; that after she had concluded her meal, the waiter informed her that the charges for what she ordered was the sum of $2.40, which she paid. She also testified that she gave the waiter three one dollar bills; that she received her change and left the waiter a $.40 tip. She also testified that the service was good, the waiter was neat and clean in appearance. She also observed other passengers in the dining car who were also served food and two nips. The dining car was clean and orderly. After making some other observations, she returned to the coach in which she was riding. She also

testified that at no time did she see or observe the waiter who served her write on the order blank or as to whether or not there was any writing or number on the order blank.

Miss Dreyer also testified with reference to the February 18, 1966 charge.

She testified that she was a passenger on Carrier's Train No. 2 on that day; that at or about the hour of 4:45 P. M. she entered the dining car and sat at the second left-side window seat; that waiter named B. Thompson asked to serve her; that she orally ordered some toast and a pot of coffee; that no check or order blank was offered to her; that the order was brought to her and that after she finished the toast and coffee she ordered a dish of ice cream from the same waiter. She was informed that the cost of the food served her was $.95; she asked the waiter for a check but that none was offered; that she gave him a dolar bill plus a quarter towards his tip, that he put the money in his pocket. She also testified that while in the dining car a woman sat at her table who ordered a tuna fish sandwich and a can of beer; that her order was accepted orally by the same waiter who served her and that the waiter gave her a check when she had finished her sandwich and beer, a check which Miss Dreyer testified the waiter had written; she also testified that she could not see the amount of money that was written on the check but that she did see the check number which was G001555. Miss Dreyer also testified that while in the dining car in addition to the woman the waiter served a small boy who ordered apple pie who when he was finished gave the waiter the sum of $.35 for the pie plus a $.05 tip; that the waiter put this money in his pocket. Miss Dreyer offered no testimony as to what happened to the money given to him by the woman if any, who ordered the tuna fish sandwich and the can of beer. She testified that the service was good, the waiters were clean and tidy in appearance as was the dining car. After making these observations she returned to her seat in her coach car.

Mr. Elwyn testified 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 trips of February 15th and 18th, 1966, with reference to dining car service. He further testified that an examination of those records failed to reveal any dining car orders showing that a hot turkey sandwich was served on February 15th, 1966, nor any record of any service of toast and coffee or a plate of ice cream or a piece of apple pie of February 18th, 1966, nor was there any record showing that the sum of $2.40, $.95 or $.35 or $.40 were turned over to the Carrier by the Claimant. He did testify that there was a check bearing number G001555, which check was completed and did show the service of the tuna fish sandwich and the can of beer. There is some testimony in the record to the effect that check number G001555 is not in the handwriting of the Claimant.

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

The Claimant, a witness in his own behalf, in his testimony denies most emphatically the testimony of Miss Dreyer. He stated, among other things, that he had no recollection of having seen or served Miss Dreyer.

We have in numerous awards set forth the functions of this Board 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."

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, in any event, was 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. His only objection, if we can consider it as such, was that the allegations in the notice were erroneous and that the investigation never should have been held in the first place. 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 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 the Claimant was not prejudiced by the manner in which the hearing was conducted.

We find that there were no violations of any of the provisions of the Agreement and the claim that the Claimant did not receive a fair and impartial hearing is rejected.

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

The only direct testimony with reference to the incidents involved in this dispute is that of the Special Investigator of the Detective Agency, Miss Dreyer. Her oral testimony was based on her own notes made by her at the time it is alleged the incidents 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 seen or served Miss Dreyer.

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

In Award 13129 (Kornblum) this Board 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. (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 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 entire record discloses that the Carrier's findings were and are based upon substantial and credible evidence and we find that none of the Claimant's procedural or substantive rights were violated.

Dismissal from the Carrier's service is an extreme and severe penalty. Whether or not such 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 check or order upon being seated in the dining car and that the 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 service for dishonest acts is not an excessive application of discipline or an abuse of discretion.

The record reveals that the Claimant has been in the service of the Carrier for approximately 21 years. Years of service alone does not give an employe a right or a license to violate rules or 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 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 the 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 (Mesign); 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 based on 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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