



Award No. 17241

Docket No. DC-18082

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Louis Yagoda, Referee

PARTIES TO DISPUTE:

**UNITED TRANSPORT SERVICE EMPLOYEES
THE CHESAPEAKE AND OHIO RAILWAY COMPANY
THE BALTIMORE AND OHIO RAILROAD COMPANY**

STATEMENT OF CLAIM: That the Chesapeake and Ohio Railway Company, Baltimore and Ohio Railroad Company wrongfully dismissed Chef Cook James Akridge from the service of the carrier on or about February 19, 1968, on a charge not proven beyond a reasonable doubt, by the use of entrapment, and violated Article 13(a) and (b) of the current working agreement.

That James Akridge be restored to service with seniority and vacation rights unimpaired, and be compensated for all monetary loss sustained.

OPINION OF BOARD: At the time of his dismissal Claimant had been employed for 43 years by the Carrier (previously the Baltimore and Ohio Railroad Company) and held the position of Chef Cook.

On January 16, 1968, Claimant was on his regular assignment as Chef Cook on the Capitol Limited, Train No. 5, Car 2025.

By notice dated February 8, 1968, Carrier charged Claimant with violation of Rule 4, contained in Circular No. 388-Rev. 2, dated May 1, 1959 "by delivering food to passengers without receiving copy of check, Train No. 5, Car 2025, dinner, January 16, 1968."

Thereafter, after due notice, Carrier conducted on February 19, 1968, a hearing on these charges and by letter dated February 29, 1968 notified Claimant that the hearing had established the violation charged and that Claimant was consequently dismissed as of that same date.

Rule 4. of Circular No. 388 (Revision No. 2) addressed "to all stewards, waiters-in-charge, cooks and waiters", reads:

"The chef will not deliver any food without receiving his copy of check, except upon order from the office."

In support of its charges, the Carrier alleged the following circumstances:

Two operatives of the E. M. Burch Company, St. Paul, Minnesota, were passengers on Train No. 5 that departed from Washington, D. C. at 4:15 P.M. on January 16 and arrived in Chicago, Illinois at 9:05 A.M. on January 17, 1968, in connection with some work for the Pullman Company.

According to a report made by them to the Carrier under date of January 19, 1968 and later testified to by them at the hearing on February 19, 1968,

they were seated by the Steward in Dining Car 2025 at 5:00 P.M. and menus presented to them by said Steward, but were not furnished with a la carte checks. The two operatives thereupon orally ordered a fried oyster dinner, a steak dinner accompanied by two orders of baked potatoes and salads, an order of Bavarian cream puff, an order of baked apple and served with rolls, butter and coffee for two.

The report and later testimony of the operatives states that the Steward did not give the operatives a la carte checks nor write such checks and thereafter a waiter served the two meals to the operatives.

Further statements and testimony are that at the conclusion of these meals, one operative placed a \$20.00 bill on the table, the Steward had a number of meal checks in his hand and after looking at them, informed the operative that the bill for the two meals amounted to \$9.15, after which the Steward gave said operative \$10.85 in change. The operatives departed at 6:30 P.M., not having received blank or filled checks or having written any orders thereon.

In further support of Carrier's charges, W. H. Bond, System Supervisor, Passenger Services Department, Food Service Section, stated at the investigation hearing that a check of the abstract for January 16th showed 20 steaks on hand at the beginning of the day, none supplied, 14 on hand at the end of day, 6 sold but only 4 shown on a la carte checks. For January 17th, 14 steaks were shown to be carried over, none picked up, 6 on hand at the end of the day, 8 sold and 8 shown on a la carte checks.

The Claimant's Organization takes the position that the charges have not been credibly and convincingly proven. In support of its position, the testimony at the investigation is cited in respect to the fact that neither the operatives nor anyone else testified to having seen or heard the Steward put the order into the kitchen and one of them affirmatively stated in response to a direct question that he had not observed such an exchange between Steward and Claimant.

The Claimant calls attention also to the fact that the waiter who served the allegedly unrecorded meals was not presented as a witness.

The Claimant argues, in sum, that the testimony of the operatives covers the actions of the Steward, not those of the Chef Cook.

The Claimant attacks also the Carrier's reliance on the abstracts as further support of its charges. It is contended that, in the first place, the Claimant cannot be held responsible for the opening abstract of January 16th, because this is made up at the close of business day, January 15th—a day on which the Claimant was off duty on the last day of a 4-day relief. It is posited as a reasonable possibility that the outgoing chef and/or steward could have made an error in listing the number of steaks.

The Claimant further contends that by their continued passive acceptance of the allegedly wrongful procedure, the operatives were parties to "entrapment" of the accused.

It is alleged also that the use of a joint hearing, trying both Claimant and Steward, the latter represented by a different labor organization, constituted denial of fair hearing to the subject Claimant.

Finally the Claimant contends that the Carrier violated Article 13(a) and (b) of the Agreement between the parties by first taking "undue time" in notifying the accused that he was to be investigated (22 days having elapsed between the date of the incident and notification) and then permitting the elapse of 11 more days before the investigation was held.

Said Article 13(a) and (b) read as follows:

"(a) No employee who has been in the service more than ninety (90) days shall be disciplined or dismissed without an investigation. At a reasonable time prior to the investigation such employee shall be apprised in writing of the precise charge against him, and he shall have reasonable opportunity to secure the presence of necessary witnesses, and shall have the right to be represented by his duly accredited representative. "Accredited representative" shall be construed as meaning his representative as defined in the Railway Labor Act, as amended. He may, however, be held out of service pending such investigation.

"(b) The investigation shall be held by proper officers within ten (10) days from the date the employee is so charged with the offense or within ten (10) days after held from service. A decision shall be rendered within twenty (20) days after completion of investigation. When stenographic notes are taken of investigations, the employee involved or his representative, shall be furnished with a transcribed copy upon request; provided, however, that in the case of statements taken from employees involving personal injuries, transcript or copies of the statements will not be furnished, except to the General Chairman in the event the case is handled as a grievance under this Article."

Additionally, Claimant contends that even if he is found guilty, dismissal is a harsh and excessive penalty therefor.

Addressing ourselves first to the claimed deficiencies of due process and procedure, the record is in agreement with Carrier's contention that the allegations concerning improper lapses of time in violation of Article 13(a) and (b) were not raised during the investigation on the property or in any of the ensuing interchanges between the parties on the property on the subject of this dismissal. Pursuant to well-settled attitude of this Board, we hold that failure to raise such objections at the time of investigation constitutes a waiver. (Awards 13040, 14444, 14573, 15027, 16074 and others.)

We find also, no violation of Claimant's right to a fair and full hearing in the fact that the charges against him were heard at the investigation together with those against the Steward involved in the same incident. There is no provision in applicable Agreement or otherwise that prohibited the Carrier from handling Claimant's case in such manner and there is no evidence that in doing so Claimant was denied entitled rights.

There is also no evidence that "entrapment" was utilized either in the means of holding the investigation or in the evidence adduced thereat. That is, there is no showing that anything was done by officers or agents of the Carrier "in inducing a person to commit a crime not contemplated by him for the purpose of instituting a criminal prosecution against him" (Black's Law Dictionary, Fourth Edition).

Turning to whether the record supports Carrier's charges and the discipline imposed therefor, we find that Carrier's case is not supported by direct, first-hand witnessing of the alleged impropriety, but relies on circumstantial evidence of two separate groups of proofs.

The first of these circumstances is the set of facts established by the evidence that the two operatives were not tendered checks to fill out and the meals were nevertheless served by the waiter, coupled with the fact that the Claimant was concededly on duty as Chef Cook at the time of this episode. The Carrier infers from this that the meals were issued by the Claimant without his having received a copy of the check as uniformly required by rules and practice.

The second significant set of surrounding circumstances put forward by Carrier is that the inventory of steaks shown on the abstract for the day in question was that six had been sold, but only four were shown on the ala carte checks. Two steaks were unaccounted for. This is regarded by Carrier as strong presumptive proof of the commission of the act charged.

Circumstantial evidence may be found sufficient to support a finding of guilt where it is so strong as to reasonably eliminate more innocent possibilities, but under existing standards for convincing and credible proof, care must be exercised to avoid making hasty or false inferences from mere surrounding appearances.

We find the record persuasive in showing strong support for the Carrier's charges in respect to the Claimant's having defaulted in observance of the rule in question. The nature of the evidence is such, however, that it may not be said with equal strength that the failure was either an intended or actual act of dishonesty. From the chain of actions revealed, the thrust of the entire pattern is more in the direction of other guilty person or persons.

The evidence, being secondary as it is, leaves present the reasonable possibility of this mis-act by the Claimant, having been more in the nature of exceptional error, innocent of purpose and partially imposed on him by others, rather than wilful misperformance by him. This must have some bearing on the appropriateness of the penalty levied.

This employee has been in the service of the Carrier for 43 years. It is true that his record shows three previous reprimands, all dealing with improper procedure in securing chef's copy of check and occurring in 1946 and 1962. But, as Claimant's Organization points out, none of these entries charge the Claimant with actual failure to receive a check in return for food disposed.

It is our considered conclusion that, under all the proven circumstances, the imposition of the discharge penalty is harsh and excessive. (Awards 5126, 6062, 6074, 5835, 4722). We shall therefore award that it be amended to a disciplinary suspension for the period from date of dismissal.

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 Employees involved in this dispute are respectively Carrier and Employees 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 Agreement was violated to the extent that the penalty of dismissal was excessive.

A W A R D

Claimant shall be restored to service with seniority and other rights unimpaired but without pay for time lost while out of service.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 25th day of June 1969.