Award No. 1443
Docket No. DC-1464

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Thomas F. McAllister, Referee

PARTIES TO DISPUTE:

JOINT COUNCIL DINING CAR EMPLOYES—LOCAL 351

CHICAGO AND EASTERN ILLINOIS RAILWAY COMPANY

STATEMENT OF CLAIM: "Claim of the Joint Council Dining Car Employes for and in behalf of Waiters Albert Frierson, H. B. Watson and Carl Allen, formerly employed by the Dining Car Department, Chicago and Eastern Illinois Railway Company, that because of dismissal from service without sufficient reason, and denial of their right to appeal, they be reinstated in the service with full seniority rights and reimbursed for net wage loss from May 24, 1940."

There is in evidence an agreement between the parties bearing effective date of September 1, 1936.

OPINION OF BOARD: Albert Frierson, H. B. Watson, and Carl Allen were waiters in the Dining Car Department of carrier and were dismissed for failure to report for duty at Evansville, Indiana, March 19, 1940, on carrier's Florida train, bound for Chicago.

The carrier furnishes sleeping quarters at Evansville for the dining car crew, where they are called by a call boy and advised of the time to report for duty. It is the practice that when trains are late, the employes are permitted to sleep until it is necessary to be called to report for such trains. On the morning in question the call boy stated that he called the waiters and that they answered. The three waiters denied that they heard anybody call them. Waiter Ellis, third cook Winters, and the chef stated that they also called to the three waiters. Waiter Ellis stated that he heard the call boy and arose, lowered the windows, shook Watson's arm, and pulled the covers off Allen's shoulder. The third cook stated that he was awake before the call boy arrived and that before he left for the train endeavored to arouse each of the three waiters by shaking them by the shoulder. The three waiters in question claim they were not awakened and through no fault of theirs, failed to report in time to make the train.

The result of the failure of the three employes to respond was that only one waiter out of the crew of four reported for duty on the Florida train. Passengers were greatly inconvenienced and made complaints; and as a result of their failure to report for duty the three waiters were discharged.

The practice at Evansville has been for the call boy to call the employes in the morning. Nothing appears from the evidence as to whether the waiters are to be merely called, or whether they are to be awakened. It appears that two of the three waiters had been guilty of failure to report on only one or two occasions, over a period of many years, so that it could not be reasonably said they were guilty of the habit of failing to report, or that the evidence of such infrequent derelictions indicates their negligence on the

occasion in question, or that they were undependable. It is strongly urged that the waiters have the right to rely upon being awakened rather than on being merely called, in view of the previous practices. From the evidence it appears that there is no question that they are allowed to sleep as long as they wish, when trains are late, subject only to being called and reporting for duty in time to make the train. It was suggested during the presentation of the claim that the failure of the waiters to awaken and report was due to the fact that they were in an intoxicated condition, but all claim of this nature was withdrawn by the carrier upon the hearing. With such suggestion withdrawn, our only conclusion is that the waiters did not awaken when called; and under the circumstances, while there was the obligation to report for duty, nevertheless they relied upon being awakened rather than being called.

Without any definite rule on the subject, we are of the opinion that it was the duty of the waiters to report for service at the train, whether they were awakened or not. There does not appear to have been any obligation on the part of the carrier to see that they were awakened, and calling them in the morning is largely for their own convenience. However, because of the fact that they relied upon being called in such a manner as to awaken them and because there is no deliberate misconduct on their part, we are of the opinion that they should be reinstated.

> "Although this Board has the power to order the reinstatement of an employe, it should be very cautious in the exercise of the power. It should not exercise it unless the evidence clearly indicates that the employer has acted arbitrarily, without just cause, or in bad faith." See Order of Sleeping Car Conductors v. The Pullman Company, Award No. 135, Docket No. PC-148, this Division.

It is easy to understand the action of the carrier in this case. The carrier may have determined upon discharge of the waiters because of reported intoxication on their part. If the claim that the employes had been in an intoxicated condition on the morning in question or the night before, had been substantiated, we would have no hesitation in refusing to reinstate such employes. But as stated, such charge was withdrawn, and there was no evidence worthy of belief to support the accusation. If the discharge was based upon intoxication or upon mistake or misapprehension of fact, It could not be said to be based upon just cause.

The fact that three of a crew of four failed to report for duty, causing much inconvenience and criticism, doubtlessly gave the carrier reason to believe that it was justified in discharging the waiters. However, the inconvenience and complaints resulting from such an unfortunate situation, should not be considered as the basis for discharge. This should be founded only upon the negligence or misconduct of the employes. And, while the case is not free from doubt, we are of the opinion that, because it raises the question on this railroad for the first time, and in view of the circumstances above recited, the employes should be reinstated without pay.

With regard to the contention of the failure of the employes to handle their claims within the time provided by rule, it appears that a letter was sent June 8, 1940, by the employe representatives to Mr. Lord, assistant to the general manager of the carrier, claiming appeal. These representatives also claimed that they mailed a copy of such letter to Mr. Stone, the official whose decision was appealed. Mr. Stone states that he never received this copy. Non-receipt is only evidence that a letter was not mailed, and it is not conclusively presumed therefrom that such letter was not mailed. We are not inclined to conclude that the representatives of employes are guilty of fraud or prevarication merely upon such a claim of non-receipt. The officials of the company assumed that the appeal was in time, if the copy of the letter was mailed at the same time as the original letter. We are of the opinion that the contention that the rules for appeals were not complied with, is not meritorious.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

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 employes were guilty of failure to perform their duty in not reporting for service under the circumstances set forth in the above opinion.

AWARD

Claim for pay denied; employes reinstated.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 28th day of May, 1941.