Award No. 3983
Docket No. PM-3849

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Fred L. Fox, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF SLEEPING CAR PORTERS

THE PULLMAN COMPANY

STATEMENT OF CLAIM: ****for and in behalf of L. Benjamin who is now, and for some time past has been, employed by The Pullman Company as a bus boy operating out of the New York District.

Because the Pullman Company did, under date of March 6, 1947, discipline Bus Boy Benjamin by giving him an actual suspension of sixteen and two-thirds (16-2/3) days on charges unproved; which action was unjust, unreasonable, and in abuse of the Company's discretion.

And further, for the record of Bus Boy Benjamin to be cleared of the charges in this case and for him to be reimbursed for the 16-2/3 days pay lost as a result of this unjust and unreasonable action.

OPINION OF BOARD: On September 12, 1946, the claimant, L. Benjamin, was a bus boy on car Meadow Lark, operated between New York City and Portland, Maine, and, beginning on that day, made a trip to Portland, returning to New York on September 14, the round trip consuming three and one-third days. The car was manned by an attendant who seems to have been in charge of the kitchen and beverage supply room, and a bus boy, the claimant herein, whose particular duty was to serve food and drink. On this particular trip, for reasons not disclosed by the record, the Carrier placed two of its special agents on the Meadow Lark for the purpose of observing the conduct of the attendant and bus boy in the performance of their duties. On their return to New York the special agents made separate reports of what they observed on the trip, corroborating each other. On the basis of these reports, charges were filed against the claimant on January 14, 1947, a hearing thereon held on January 24, 1947, and on March 6, 1947, the claimant was suspended by the District Superintendent for five trips, amounting to 16-2/3 days, to take effect between March 8 and 25, following. This action of the Superintendent was appealed to the Carrier's Assistant Vice President, who, on May 20, 1947, sustained the action of the District Superintendent, aforesaid.

Due to the development of various and sundry facts on the hearing held, it becomes important to state on what charges the hearing was held. On January 14, 1947, the District Superintent wrote claimant a letter in which he said:

> "You failed to follow instructions in the manner of handling commissary meal and beverage checks, and further, you failed to follow instructions covering the proper manner of serving beverages." And further:

"At this hearing the following entry appearing on your Official Service Record will be reviewed:

'7-3-43—Warning—Violated commissary regulations a/c neglected to tender meal and beverage checks or receipts covering sales made, failed to serve drinks in the proper manner and served commissary supplies after closing time.' "

Of course, the ensuing investigation should have been confined to the charge made as to violations on the trip beginning September 12, 1946, and while the former charge could be considered on the question of the extent of the discipline imposed, if any, for the second offense, there could not be, in a technical sense, any review of the first offense.

Based on an acceptance, by the Carrier, of the truth of the statements made by its special agents, which the Carrier had the right to do, it clearly appears that the claimant failed to tender to purchasers checks or receipts for food and beverages ordered by them. This requirement was important in connection with the Carrier's accounting system, and claimant's failure to meet such requirement fully justified the Carrier in imposing discipline therefor. The other portion of the charge against claimant is not satisfactorily established, though doubtless there was not full compliance with instructions concerning the proper manner of serving food and beverages. Based on the whole of the showing made, we reach the conclusion that the Carrier was justified in imposing upon the claimant some discipline and penalty for his failure to obey instructions, and, therefore, the only remaining question is the extent of the penalty which, in the particular circumstances, should have been imposed.

We have no disposition to depart from the well established rule, so well stated by this Division in Award 2769, which was based on its numerous awards, both before and subsequent thereto. In that award it was stated;

"In its consideration of claims involving discipline, this Division * * * (1) where there is positive evidence of probative force will not weigh such evidence or resolve conflicts therein, (2) when there is real substantial evidence to sustain charges the findings based thereon will not be disturbed; (3) if the Carrier has not acted arbitrarily, without just cause, or in bad faith its action will not be set aside; and (4) unless prejudice or bias is disclossed by facts or circumstances of record it will not substitute its judgment for that of the Carrier."

Applying the holding of this Division, quoted above, we cannot say that the evidence offered in support of the charges was insufficient to support them; nor can we say that the Carrier acted arbitrarily, without just cause, or in bad faith; nor that in handling claimant's case such prejudice or bias against the claimant was disclosed as would justify us in substituting our judgment for that of the Carrier.

But, as a general proposition, it may be said that no rule or policy can be applied in all cases. In the very nature of things, peculiar and particular cases require handling suitable to such cases, even though to do so seemingly amounts to a departure from some general rule. There are elements in this case which lead us to believe that the discipline enforced was too severe. In the first place, there was undue delay in making the charges. Claimant's misconduct occurred on September 12, 1946, and charges based thereon were not preferred until January 14, 1947. The hearing was held promptly within Rule 50 of the current agreement, on January 24, 1947, but, in violation of the same rule, decision was not made until March 6, 1947, and the case was not finally disposed of until May 20, 1947, more than eight months after the alleged failure to obey instructions. That prompt disposition of charges, and prompt mailing thereof is contemplated by the agreement appears from a reading of Rule 50 thereof. The rule does not provide within what time charges shall be preferred by the Carrier, but, under it, an employe with a grievance must act within thirty days, and

when charges are filed there must be a hearing thereon witin ten days, and a written decision thereon within fifteen days after the hearing is completed. It may be said that none of these failures on the part of the Carrier prejudiced the claimant, and this may be true, but the Carrier, if it seeks to have its actions sustained, should keep its skirts clean.

Then, we think that in the hearing held, whether intentional or not, the evidence was offered in such a way as to make claimant appear to be guilty of acts and conduct as to matters over which he had no control. In fairness the the claimant, the testimony, as to him, should have been confined strictly to the charges made, which related solely to the serving of food and beverages. In that aspect of the investigation we think the claimant was prejudiced.

We give no consideration to the fact that the Carrier used its special agents to detect claimant's failure to follow instructions. What they reported was not information obtained by entrapment, but through the voluntary act of claimant, for which he can offer no legitimate excuse. The use of detective methods is, generally speaking, the only way that disobedience to instructions can be proven, and the Carrier was well within its rights in employing this method, both in its own interest and that of the public. The record does show that in one instance, on the trip involved, one of the agents attempted to purchase liquor while the car was stopped in a station, a practice prohibited, but claimant refused to be entrapped. If, by this method, he had been induced by the Carrier's agent to violate instructions, the Carrier itself could not with very good grace impose discipline, for the entrapment method should never be used to induce employes to violate rules or instructions. In attempting in this one instance to procure a violation of instructions, the Carrier, through its agents, was at fault, but being unsuccessful, its attempt should not be allowed to prejudice us in respect to disobedience to instructions, proof of which has been obtained through legitimate means.

Clearly, the claimant is shown to be guilty of failure to furnish to purchasers of food and beverages checks or receipts therefor, as he was instructed to do; and we think, though the proof is unsatisfactory, that he was probably guilty of the charge of improper practices in respect to serving food and beverages, an offense of a minor nature, when compared with the offense first charged. For these offenses the Carrier was fully justified in imposing discipline and punishment. Claimant had once before been guilty of substantially the same offense, and was let out with a "warning". The Carrier could not be expected to content itself by repeating that "warning". But, considering all the elements entering into this case, involving fault on both sides, many of which we have discussed, we are of the opinion that the punishment imposed, a suspension for 16-2/3 days, was too severe, and that what the Carrier did, while not arbitrary, capricious, or lacking in good faith, in a strict sense, was in fact an abuse of the discretion which the Carrier possessed in this case. There is a distinction between acting in bad faith or being arbitrary, and the lesser offense of an abuse or discretion, for discretion may be abused in the utmost good faith, and that is what we think happened in this case. We think a suspension of two round trips, amounting to 6-2/3 days, would have been justified in this case, and that any suspension beyond that was an abuse of the discretion vested in the Carrier in cases of this character, and such will be our finding and award.

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 Carrier violated the Agreement when it suspended claimant beyond two round trips between New York City and Portland, Maine, amounting to 6-2/3 days' work.

AWARD

1. Claim sustained as to suspension of 10 days, or three round trips between New York City and Portland, Maine.

2. Claim denied as to suspension of 6-2/3 days, or two round trips between the same points.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 15th day of July, 1948.