Award No. 4961
Docket No. DC-5002

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Jay S. Parker, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD TRAINMEN

THE PENNSYLVANIA RAILROAD COMPANY

STATEMENT OF FACTS: Request that John L. Plaine, Dining Car Steward, Pennsylvania Railroad, be reinstated with his seniority unimpaired and paid for time lost under Rule 7-B-1 on account of being discharged without proper cause and investigation not conducted in accord with Rule 6-A-1 of our current Agreement.

OPINION OF BOARD: This is a discipline case in which J. L. Plaine, a Dining Car Steward, was given a trial, found guilty and dismissed from the Carrier's service on Charges (1) of violating instructions in failing to issue blank meal checks to patrons who were served dinner in a dining car on Carrier's Train No. 77 on July 19, 1947, (2) of failing to comply with instructions contained in Order No. 2065 in that he failed to properly control No. 6 waiter in the conduct of service and the handling of revenue for service rendered at the waiter's station during dinner service in such car on such date and (3) for accepting money from No. 6 waiter in payment for meals which were served by the latter without a meal check at dinner in the dining car on such date, and for failing to make proper accounting for the money so received.

The Petitioner asks that he be reinstated with seniority rights unimpaired and paid for time lost on grounds (1) that he was not given a fair and impartial trial and (2) he was discharged without proper cause.

A brief resume of the factual situation leading up to the institution of the discipline proceeding will clarify the issues.

Claimant held a regular assignment as a Dining Car Steward on the train described in the Charges, commonly referred to as the Trail Blazer, operating between New York and Chicago. Two Stewards were assigned to the train, claimant holding the position of second Steward, and one, F. C. Adams, the position of Steward-in-Charge.

On July 19, 1947, two Operatives, a man (C. E. Wagner) and a woman (Doris Howard), not employes of the Carrier but representatives of a concern with which it had contractual relations, entered the dining car when both Stewards were on duty and were seated near the Steward's bar, Wagner with his back to the bar and Miss Howard facing it. They were there for the express purpose of checking irregularities of employes in the operation of the diner. Eventually they were served by No. 6 Waiter Johnson. A woman, Miss Nancy Macy, was also seated at the same table.

So much for the conceded facts. Those in dispute will be referred to presently. For the moment it suffices to say that what is alleged to have

happened between the time the Operatives entered and left th diner resulted in their submitting a report charging the claimant with the serious irregularities on which the Carrier ultimately founded the instant proceeding.

The gist of the principal contention advanced by the Petitioner in support of his claim is that the Carrier failed to establish that he was the Steward involved in the alleged irregularities reported by the Operatives. It can, we believe, be fairly stated it is not seriously urged that such irregularities did not occur.

We now come to the disputed facts upon which the rights of the parties stand or fall. Others will be discussed if, and when, they become important. Those having application to Charge 1 will be first considered. However, before that is done one other matter, not in serious controversy, if in fact it is controverted at all, should be mentioned.

There is in effect in the Carrier's Dining Car Department a set of instructions, known as the Manual of Rules and Instructions for Dining Car Stewards and other employes of that department, a copy of which had been delivered to claimant. He was or should have been familiar with its provisions. Section 2 (b) thereof, pertaining to Stewards, reads:

"(b) Issuance

Spend as much time as possible in body of dining car greeting and seating guests. You must personally issue meal checks to ALL patrons. Do not give meal checks to your waiters for issuance, except for out-of-car service where you are not free to personally contact the party.

Meals must not be served anyone (except dining car personnel) without meal check being issued prior to service!

A separate check must be issued to each patron, unless they request that their orders be combined on one check."

Another section 2 (a) of the same Manual provides:

"(a) Execution

In compliance with various State tax laws, Station initials, reflected in proper space to indicate whether Breakfast, Luncheon or Dinner is served, number of persons served and waiter's number MUST BE SHOWN In Proper Spaces ON EVERY MEAL CHECK!"

The portion of the report filed by the Operatives having particular reference to the first Charge on which claimant was found guilty and dismissed from the Carrier's service reads as follows:

"After leaving Lancaster, Pa., at 5:50 P.M., Operative No. 956 and I, No. 984, entered diner 4692 from rear of train. After waiting in line about ten minutes we were seated at second table, left from steward's bar by steward. No. 956 faced forward and I faced the rear, both at window seats. Steward placed a menu in front of each but he did not give us a meal check on which to write our orders."

At the trial Operative No. 984 (Wagner) and No. 956 (Howard) testified the facts as set forth in the foregoing statement were true. Each expressly stated the Steward who seated them gave them no meal check. Wagner positively and without any equivocation whatsoever identified claimant as the Steward involved. Miss Howard was not so definite. Therefore all questions propounded to her on that particular point and her answers thereto will be set forth in toto. They read:

"Reilly: Could you point out the steward who seated you? Is he in this room?

Howard: That man looks like him. (Pointing to Mr. Plaine.)"

"Reilly: The steward sitting over there, is he the man who received the money from the waiter?

Howard: It looks like the man."

"Reilly: Is there any possibility, Miss Howard, you may have confused the other steward with Mr. Plaine here as the man that received the money from the waiter?

Howard: No. That gentleman (indicating Mr. Plaine) looks like the man that was on our section."

"Price: You are positive of your identification?

Howard: I said he looks like him."

"Price: You are not positive then?

Howard: He looks very much like the gentleman."

The Carrier also offered in evidence the affidavit of Miss Macy which, in substance, corroborated everything set forth in the report of the Operatives as to what took place at the table. She further stated she had been given no meal check when seated and that the Steward gave her meal check to the waiter who brought it to her when she was through with her meal. Obviously the foregoing without anything else would have been highly probative. The trouble is that Miss Macy went on in her affidavit to say that she returned to the diner the next morning where she was seated by the same Steward who had seated her the night before and who, in response to her inquiry, advised her that his name was Mr. Adams. This last statement, it will be observed, if accepted as true, would discredit the Operatives and acquit the claimant of the first Charge.

In addition to the foregoing testimony claimant flatly denied he had seated the Operatives or that he had ever seated anyone without giving them meal checks as required by the Manual. He also stated that on the night in question he was tending bar and seated no customers. Johnson, who appeared as a witness after the procuring of an adjournment for the purpose of making his testimony available, stated he had never served anyone who had not been given a meal check by the Stewards. He could not remember whether claimant had seated anyone on the night in question. At a still later adjournment, conceded to have been for the purpose of procuring a statement from the Steward-in-Charge, Adams, who occupied that position, could not remember anything that happened on the evening in question. However, he did state it was the custom for both Stewards to seat customers and that usually meal checks were placed on the bar where they would be available to each of them.

It has been pointed out that Miss Macy's affidavit states the Steward told her his name was Adams. The claimant argues all statements made by her therein must be resolved in his favor and that therefore the Operatives' statements are disproved and should be disregarded. The Carrier's position is exactly contrary. It insists that Miss Macy was either mistaken or that claimant had seated her the next morning and for some hidden purpose of his own had told her his name was Adams notwithstanding it was actually Plaine. We agree with neither position. The Carrier had a right to give consideration to her statements along with all the other testimony adduced at the hearing and resolve the guilt or innocence of the claimant upon the basis of the entire record.

Next it is argued the evidence heretofore outlined compelled the Carrier to hold the Charge had been disproved. With this we cannot agree.

When all of the evidence is carefully reviewed it becomes apparent that so far as such Charge is concerned the Carrier had before it the statement of the two Operatives which, notwithstanding the contentions of the claimant regarding the force and effect to be given the testimony of Miss Howard, must be regarded as positive in its identification of the claimant. It also had the Macy affidavit which was susceptible of several constructions and probably should have been disregarded as having little probative force and effect. It had also the flat denial of the claimant, the self serving testimony of the waiter, and the testimony of the Steward-in-Charge which was as detrimental to claimant as it was beneficial.

Thus, while we must confess we are not as complacent as the Carrier regarding the high quality of the evidence indicative of guilt, it appears the Carrier had before it some substantial evidence which, if believed, would justify it in finding the claimant guilty of having seated customers in the diner without having furnished them with meal checks as required by its rules. Therefore, under the long established rule (See Awards Nos. 373, 2216, 2768, and 4479) to the effect that so long as the Carrier's action is not so arbitrary and capricious as to be clearly wrong this Division cannot resolve questions as to the credibility of witnesses or the weight to be given their testimony, we hold that under the facts of this case as disclosed by the record the Carrier was warranted in finding the claimant guilty of that offense.

Turning to the second Charge we must admit that if it had been based upon other violations of the rules to be found in the Manual it too would have to be upheld. Claimant, while testifying in his own behalf, admitted that he had failed to require the waiter to place his number upon the meal checks through oversight. That, as we have heretofore indicated, was a violation of Section 2(a) of the Manual. However, the Charge is that he failed to comply with instructions contained in Order No. 2065. So far as the record discloses there are only two provisions of this Order having any possible application under the evidence, one to the effect waiters are forbidden to serve orders given orally and another providing they shall place duplicate portions of checks on the aisle edge of the tables face up to have entered thereon by the Steward or waiter charges for items ordered by guests in addition to those shown on original portion and also to have prices extended and checks totaled. There was no testimony at the hearing that claimant knew the Operatives gave their orders to the waiter orally. Neither was there any evidence to the effect he knew that checks of those two individuals had not been furnished, made out and totaled by Adams, the Steward-in-Charge, or the waiter, or that the latter had not left such checks on the table as required. In that situation we do not believe it can be held the Carrier maintained the burden of establishing any provision of such rule had been violated by any substantial competent evidence. This notwithstanding it be assumed the claimant had seated such persons without giving them meal checks.

Nor does it follow, as Carrier suggests in an argument more applicable to Charge 3 than Charge 2, that because the fact last stated is assumed claimant knowingly permitted the waiter to serve the meals without checks and accepted the revenue therefor without them. In fact, even the Operatives admitted that the waiter took checks from another table and presented them to claimant at the time he handed the latter the money they had paid for their meals. For all the record discloses claimant may have thought the checks handed him came from the table at which the Operatives were seated or that the money given him was to pay the amount of such checks. Mere speculation and suspicion, founded upon the inference claimant's initial violation established the further offense of appropriating the Carrier's money to his own use as charged in the third Charge, was not enough, in and of itself, to convict him. Under the conditions just stated we do not think it

can be held there was any direct evidence to sustain Charge 3. The very most that can be said for it is that it was circumstantial. Even so, the rule is that circumstantial evidence when relied on to sustain a conviction of crime, which we pause to note was the essence of the offense with which claimant stood charged, must be of such character as to exclude every other hypothesis. This we have concluded, after long and careful consideration of the record, the Carrier failed to establish by the degree of evidence required to sustain conviction in circumstantial evidence cases. It follows the Carrier's action in finding claimant guilty under Charge 3 was erroneous.

Our examination of the entire proceedings discloses nothing to indicate the claimant did not have a fair and impartial trial on Charge 1. Therefore claimant's contentions to the contrary cannot be upheld.

We do believe, however, the record discloses enough mitigating circumstances to justify the conclusion that he should have been severely disciplined by suspension instead of dismissal. For that reason his restoration to the Carrier's service with seniority rights unimpaired within ten days from the date of the adoption of this Award is directed without payment of retroactive compensation.

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 Adustment Board has jurisdiction over the dispute involved herein; and

That under the facts and circumstances set forth in the Opinion suspension not dismissal from service was the proper disciplinary penalty.

AWARD

Claim as to monetary compensation denied. Claim for restoration to the Carrier's service sustained as set forth in the Opinion and the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 31st day of July, 1950.