

Award No. 4974
Docket No. DC-4824

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Robert O. Boyd, Referee

PARTIES TO DISPUTE:

**JOINT COUNCIL DINING CAR EMPLOYES, LOCAL 351
THE NEW YORK CENTRAL RAILROAD**

STATEMENT OF CLAIM: Claim of Joint Council Dining Car Employees, Local 351, on the property of New York Central Railroad (Line West) for and in behalf of J. L. Hicks, waiter, Chicago District, and J. P. Johnson, waiter, Chicago District, that their records be cleared of the charges placed against them and that they be compensated for net wage loss suffered as a result of unjustified and unwarranted discipline of suspension from service of 30 days and 10 days respectively, which discipline was imposed in violation of Rule 6 (a) of Current Agreement.

OPINION OF BOARD: The claimants, J. L. Hicks and J. P. Johnson, are waiters employed by the Carrier and work out of the Chicago District. They were assigned to a diner-lounge on a special train, Indianapolis to New York, July 24-25, 1948. Conduct of the claimants on this tour of duty resulted in charges being filed, and after a hearing was held, the claimant, Hicks, was found guilty of the charge of absenting himself from the diner-lounge without permission, indulging in intoxicants while on duty and attempting to induce the waiter-in-charge to defraud the company. Claimant Hicks was found not guilty on the other three charges involving failure to return change, short-changing guests, and becoming unfit for service by reason of intoxicants. Claimant Johnson was charged with indulging in intoxicants while on duty and rendering himself unfit for service by reason thereof. He was found guilty of the first charge, and not guilty on the latter. Waiter Hicks was suspended 30 days and Waiter Johnson 10 days.

The record before the Board discloses that the notice of the charges filed against these employes by the Carrier and the hearing held pursuant to the notice were in accordance with the provisions of the scheduled rules.

The evidence presented at the hearing which is material to the three charges upon which the Carrier found Claimant Hicks guilty and the one charge upon which Claimant Johnson was found guilty is conflicting. But it is not the function of this Board to weigh the evidence. If there is credible testimony which has probative force, we will not attempt to resolve any conflict therein. The testimony of the waiter-in-charge was that Waiter Hicks was absent from the diner "about 3 hours—the whole duration of the dinner"; and Waiter Cannon testified that Hicks was not in the dining car at all times during the dinner meal. With reference to the charge of indulging in intoxicants, the testimony of the waiter-in-charge was that Waiter Hicks "looked to be drunk" and there was a discernible odor on his breath that "was from either beer or whiskey * * *". And in addition, the waiter-in-charge testified that he saw Waiter Hicks "taking a glass of beer." With respect to

the charge of attempting to induce the waiter-in-charge to defraud the company, there is the testimony related by the waiter-in-charge of a conversation between him and Waiter Hicks concerning which he testified that Waiter Hicks "wanted to split the money" received from the sale of sandwiches.

With respect to the charge against Waiter Johnson of indulging in intoxicants while on duty, there is the testimony of the waiter-in-charge that Johnson while on duty absented himself from the car and when he returned, the waiter-in-charge smelled the odor of liquor on his breath. He testified further that "I just smelled alcohol on his breath and I know he was drinking but he wasn't what you call intoxicated. He had just enough in him to be rather nasty."

In the Opinion of the Board, with Referee Parker assisting, Award 2769, it was said: "* * * that testimony to the effect one smelled intoxicating liquor on another's breath is admissible in consideration of the question of whether the accused had been indulging in the use of intoxicating liquors."

The claimants testified in their own behalf at the hearing and denied that they were guilty of any of the charges filed against them.

From a careful consideration of the whole record before this Division, we have concluded there was ample evidence on which the Carrier could properly base its judgments of suspension; and we do not find that the Carrier's decision to suspend Waiter Hicks 30 days and Waiter Johnson 10 days was arbitrary or unjust or that the Carrier abused its discretion in so suspending the claimants.

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 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 action of the Carrier in suspending Waiter Hicks and Waiter Johnson was not in violation of the Agreement.

Claims denied.

AWARD

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.