

Award No. 5366  
Docket No. DC-5252

NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION

Alex Elson, Referee

**PARTIES TO DISPUTE:**

**UNITED TRANSPORT SERVICE EMPLOYES**

**SOUTHERN RAILWAY COMPANY**

**STATEMENT OF CLAIM:** This claim is filed on behalf of Charles H. Walker, formerly employed as a Waiter in the Dining Car Department of the Southern Railway System, who was dismissed from the service of the Carrier on April 12, 1950, on unproved charges of "improper and disorderly conduct while on duty as waiter, dining car 3162, train 36, standing in Charlotte, January 5, 1950"; and "insubordination and conduct unbecoming an employe while in Mr. Thomas' office January 18, 1950".

This Organization contends that the dismissal was unwarranted because a fair and impartial trial as provided by the current rules agreement was not provided because of, but not limited to the following reasons:

- (a) The transcripts of the first two hearings were incorrect, incomplete and distorted.
- (b) Flagman C. L. Coker, one of Carrier's principal witnesses, was not present at the final hearing.
- (c) Insubordination in this case was not established.
- (d) Written statements produced by Carrier bore unmistakable evidence of having been composed by the same person.

**EMPLOYES' STATEMENT OF FACTS:** On Sunday, January 1, 1950, Waiter Charles H. Walker entered the Dining Car Department office in Atlanta to sign out for his run that day. While there, he spoke to Steward E. M. Hames who had been assigned to the car during his absence. Mr. Hames in a belligerent manner began to berate Mr. Walker because of alleged difficulties Walker had with other stewards. When Walker had stood all of the profane abuse from Hames he could, he started out of the office with Hames' threat to put him off the car the last statement he heard. Walker made that trip with Hames without incident.

On his next trip, January 5th, when the train reached Charlotte, N. C., Train Porter H. C. Needom entered the dining car for breakfast while the train was standing in the station and the steward had left the train. The Dining Car Department of the Southern uses a separate check form for serving meals to the crews. While the steward had left his guest checks with the No. 2 waiter, no crew checks had been left.

Section 3, First (i) of the Railway Labor Act confers upon the National Railroad Adjustment Board the power to hear and determine disputes growing out of "grievances or out of interpretation or application of agreements concerning rates of pay, rules or working conditions." Thus, the Adjustment Board is empowered only to decide this dispute in accordance with agreement between the parties to it.

There is nothing in the agreement here in evidence preventing respondent from disciplining or discharging its employes. In fact the agreement contemplates that it do so.

In this connection it should be kept in mind that when an employe is discharged his employment relation is severed and he no longer has any rights to employment. Management having the sole right to select its employes, may rehire a discharged man if it elects to do so, as a matter of clemency, if there is any basis for extending clemency (and there is none in this case). But no one else, certainly not the Adjustment Board, has any authority under the Railway Labor Act to extend clemency. That is the sole function of management.

#### CONCLUSION.

Respondent respectfully submits that:

It may properly refuse to continue in its service any person who shows himself to be dishonest, incompetent, inefficient, negligent, unfaithful to respondent's interests or otherwise unfit for service. Claimant has shown that he has been unfaithful to the carrier's interests by not observing its rules and by being unruly and insubordinate to his superiors.

Charges were preferred against claimant Walker in accordance with agreement rules. An investigation was held at which he was present, duly represented and testified, and from evidence adduced at the hearings he was proven guilty of the charges.

Principles of previous Board awards support position of respondent that claimant Walker was deliberately guilty of wrongful conduct and no measure of discipline would have been adequate except his dismissal.

Claimant Walker was discharged for good and sufficient cause and carrier did not act arbitrarily, capriciously, in bad faith or abuse its discretion in doing so. No violation of the agreement occurred.

Claimant Walker was dismissed from the service as a reasonable consequence of his actions.

For the reasons given the claim should in all things be denied and respondent respectfully requests that the Board so decide.

Respondent in making reply to notice of the Third Division, National Railroad Adjustment Board, without having seen petitioner's submission, undertaking to meet the issues raised in the handling of this case on the property reserves the right, after being apprised of petitioner's allegations of facts, statement of position and argument, to present such additional evidence and written and oral argument as to it may seem appropriate or necessary for a complete presentation of the case.

All factual data submitted in support of respondent's position has been submitted to representatives of employes and is part of this dispute.

(Exhibits not reproduced.)

**OPINION OF BOARD:** The Carrier discharged the claimant, Charles H. Walker, a Dining Car Waiter, after investigation and hearing, (1) for

improper and disorderly conduct while on duty as a waiter, and (2) for insubordination and conduct unbecoming an employee at one of the hearings conducted by the Carrier after his suspension.

There is sharp conflict in the record as to the events which occurred on January 5, 1950, leading to Walker's suspension. Walker refrained from serving breakfast to a porter who came into the dining car during an interval when the steward was gone from the car because there was no crew check available at the time, and serving meals on verbal orders was prohibited by rule of the Carrier. Upon returning to the car, the steward stated to Walker that since the porter was in a hurry, he should have begun serving breakfast to him and later obtained the crew check from him. The steward claims he made these statements in a calm manner but that Walker replied in a loud voice to the effect that he would follow the rule book and continued to talk loudly; that his conduct amounted to a "tantrum and fit" and that when Walker would not quiet down, he caused Walker to be removed from the train. Walker claims that the steward looked at him in a "very fierce manner" when he told Walker he could have served the porter, that he calmly and quietly told the steward he would follow the rules and turned around; while he walked to the pantry the steward followed him and three times in a loud voice asked him what he had said; that in the pantry the steward doubled his fist and made threatening remarks, and that shortly afterwards while going about his duties he was taken off the train by railroad officers.

The Carrier's version of what transpired on January 5 was supported at the hearing conducted by the railroad, by the testimony of the steward, the three railroad officers who removed him, and the written statement of a flagman who was going through the dining car at the time some of the events variously described above occurred. The claimant's version is supported by his own testimony, three other waiters, the cook on duty in the dining car at the time, and the porter in question.

The claimant also introduced evidence which the Carrier claims is irrelevant of a conversation between the claimant and the steward on January 1, 1950. According to the claimant, the steward told him in a nasty and vile manner he understood claimant had some differences with one or two other stewards and that if he didn't do as he was told, he would be put off the train, and after telling him to shut-up concluded the conversation by threatening not to let him go out on the train that day.

The steward admits there was a conversation, but says that the incident began when claimant came in without saying good-morning, looking half mad. He says he told claimant, "You have been having a little trouble on the cars. I don't want any trouble. Let's straighten up and fly right." He then said if there was any trouble he would put him off the first opportunity. He also admits saying of claimant as he was walking out of the office, to a fellow supervisor, "that is the G. D. man I have ever seen in my life."

The second ground for discharge arises from certain conduct attributed to claimant at the investigation into the first charge conducted by F. C. Thomas, Superintendent, Dining Cars, on January 18, 1950. A transcript of this investigation is in the record. It shows that claimant repeatedly interrupted the presiding officer, stated he was framed a number of times, addressed discourteous and provocative remarks to the presiding officer; and generally spoke in a rude manner.

The Organization contends that Walker was dismissed without a fair and impartial hearing in violation of Rule 22(a) of the applicable rules agreement which reads as follows:

"(a) Except as provided in Rule 11, employees in service for more than ninety (90) days will not be disciplined without a fair

and impartial hearing. Suspension pending a hearing, which shall be prompt, shall not be deemed a violation of this principle."

It is first contended that the transcript of the first two hearings were incorrect, incomplete and distorted. This contention is made primarily in connection with the second charge against the claimant arising out of his conduct at the hearing held on January 18, 1950. While the Organization points to possible omissions in the record, the Organization has not sufficiently met its burden in this respect. Moreover, what is reported in the transcript of the January 18 hearing is for the most part unchallenged. The transcript is sufficient as a record for the purpose of showing what transpired on January 18, the date of the hearing. The Carrier held another hearing on both charges at which the Organization was represented and was permitted to introduce all of the evidence on which it is relying.

The failure to produce Coker, the flagman, as a witness, and use of his statement, another ground for complaint by the Organization, would not render the hearing unfair. This Board has repeatedly sanctioned the use of statements.

An additional ground for claim of unfairness of hearing relates to the identity of certain statements of several of the Carrier's witnesses. We agree that the similarity of the statements is such an unusual coincidence as to support the conclusion that they were probably prepared by the same person. However, the testimony related to what transpired at the hearing held on January 18, 1950. The transcript of the hearing is the best evidence of what occurred. The Organization's contention is an insufficient basis for concluding that the hearing was not a fair hearing.

The principal ground of the Organization is that insubordination was not established. It is not a proper function of this Board to weigh the evidence and if the evidence introduced is such as to support the findings of the Carrier, it will not be disturbed. While there is considerable conflict in the testimony as to the events in the dining car on January 5, 1950, the evidence introduced by the Carrier, and even some of the testimony of the employees, support the finding of improper and disorderly conduct. The transcript of the hearing which took place on January 18 also shows a course of conduct on the part of the employee which can be regarded as insubordinate.

The principle question the Board has relates to the severity of the punishment. Although this Board has the power to order reinstatement of employees, numerous opinions of the Board have established the principle that the Board should be very cautious in the exercise of this power. As a general rule, the Board should not exercise the power to reinstate unless the evidence clearly indicates that the employer has acted arbitrarily without just cause or in bad faith. The wisdom of this principle cannot be doubted and need not be discussed here.

Viewing the entire record of the case, however, we believe that the discipline was harsh and arbitrarily imposed. Here we have an employee with a record of 8 years of service with the Carrier. The discipline arises out of an incident which occurred on January 5, 1950. It is clear from the record that the Carrier excluded from its decision the events of January 1, 1950, only 5 days previous. In the course of conversation with the employee on that date, the steward in question showed considerable animosity. It is sufficient to accept the steward's own version of what took place, and particularly his remark to one of his associates describing the claimant in derogatory terms. It is clear that the steward did not like Walker, and the incident which occurred on January 5 should be considered in the light of this background.

The second basis for discharge grows out of Walker's conduct at the hearing inquiring into the incident of January 5. The Carrier's reluctance

to forgive the employe's conduct at the bearing is understandable. But it must be remembered that Walker was emotionally aroused because his entire future was at stake, and believed, in all probability without just cause, that he was being unjustly treated. In any event, the Board has considerable reservation about using the conduct of an employe at a hearing called for the purpose of inquiring into charges against him as a basis for discipline against him. We are not passing on that question since it is unnecessary to do so to reach the decision in this case.

All in all, the real cause for complaint is the conduct of the employe in the dining car on January 5, 1950. While the conduct was serious, in the opinion of the Board it did not warrant the drastic action taken. It is the opinion of the Board that insufficient thought was given by the Carrier to the above factors and hence the discipline imposed was arbitrary.

Claimant has been out of work since January 5, 1950, when he was suspended. The penalty thus imposed upon him for his insubordination is sufficient and he should be reinstated with seniority rights and other rights unimpaired but with no right to monetary loss because of time lost.

**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 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 some disciplinary action was warranted but dismissal from service found to be excessive.

#### AWARD

Claimant should be reinstated with seniority and other rights unimpaired but without pay for lost time.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

ATTEST: A. I. Tummon,  
Acting Secretary.

Dated at Chicago, Illinois, this 20th day of June, 1951.