Award No. 9422

Docket No. DC-11396

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Merton C. Bernstein, Referee

PARTIES TO DISPUTE:

JOINT COUNCIL DINING CAR EMPLOYES, LOCAL 516

GREAT NORTHERN RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of Joint Council Dining Car Employes Local 516 on the property of the Great Northern Railway Company, for and on behalf of Waiter James G. Anderson, that he be restored to Carrier's service with seniority and vacation rights unimpaired and with compensation for net wage loss account of Carrier dismissing claimant from service May 23, 1957 in abuse of its discretion and in violation of the agreement.

OPINION OF BOARD: Dining Car Waiter James G. Anderson was dismissed by the Carrier in 1957 on the grounds that he had:

1. Served verbal orders on Diner 1252, Train 32 on April 30, 1957;

2. Failed to account, collect or remit for all food items served on that run; and

3. Mishandled revenue on that run.

The Issues

The Claimant seeks restoration to service contending that:

1. Verbal orders were a recognized practice and hence not a proper ground for dismissal;

2. There was insufficient evidence that the claimant served, collected for, but failed to remit the money collected for serving a baked apple ordered verbally; (which also covers the allegation as to "mishandling of revenue"); and

3. Even if the factual charges are sustained by sufficient evidence, it was an arbitrary and excessive penalty to dismiss the Claimant for a single and minor improper action, especially in view of his record of long service without previous blemish.

The Carrier responds that:

1. There was sufficient evidence for all the findings against the Claimant;

2. The Claimant's breach of duty to the Carrier constituted a sufficient ground for dismissal even if only thirty-five cents of unremitted funds were directly involved; and

3. The Board cannot inquire into the propriety of the discipline absent a clear showing that the findings were so baseless or the discipline so incommensurate with the offense as to be arbitrary or capricious.

The Carrier contends that the Claimant's long service is not a proper ground for questioning the propriety of dismissal.

In addition, we are concerned over the standing as evidence of a confession signed by the Claimant after the close of the inquiry on May 15, 1957 at which witnesses were heard and cross-examined. The confession first appeared in the record before us as an exhibit attached to the Carrier's 1959 submission. While several pieces of correspondence during the attempted settlement of the claim on the property are in the record, they are silent as to whether the confession was made known by the Carrier to the Employes at any time before such negotiations came to a close. The Employes do not affirmatively allege that the confession was not part of the record made on the property.

At the argument before the Division with the Referee sitting as a member, the question was raised for the first time whether the notice of "the formal investigation, to determine facts and place responsibility" was a sufficient charge under the Rules. However, the question was not pressed. In view of this fact and the full opportunity of the claimant and his representatives at the hearing before Superintendent Kirby to cross-examine witnesses and present testimony, it is the opinion of the Board that this question is not before us.

The Evidence

The affirmative evidence against the Claimant was contained in the testimony of two "spotters", Messrs. Jukam and Quast and Steward Ragon.

Operative Jukam testified that he entered the diner on the day in question at 7:45 A. M. and was served by Waiter #1. He ordered his breakfast by writing his food requests on a check which, during the course of the meal, was totalled by Steward Ragon for the proper menu amount of $1.15. Thereafter the Steward did not deal directly with Mr. Jukam. There is a meal check in evidence bearing the same number as the meal check appearing on Mr. Jukam's written report (also in evidence) which shows that it was totalled for $1.15, the receipt portion punched for $1.15 and noting that Waiter #1 served the food. However, Mr. Jukam testified that he verbally ordered more coffee and a baked apple. Later, he said, Waiter #1 picked up the check, seemed to write on it, quoted a total price of $1.50, received a $5 bill in payment and returned with $3.50 in change. Mr. Jukam gave him a tip of thirty-five cents and left the diner at 8:50 A. M.

Operative Quast entered the diner with Operative Jukam and shared the table with him. His written report and oral testimony show that he was served by Waiter #1, ordered his breakfast in writing, was properly charged for it and received the proper change. His report and testimony also show that he verbally ordered a second pot of coffee and a second order of toast which were served without charge.

Mr. Quast also testified as follows:

"Q: You were seated at table with Mr. Jukam, is that correct?

"A: That is correct.

"Q: And you observed what transpired?

"A: Yes.

"Q: And it is as Mr. Jukam stated?

"A: Yes."

He also corroborated Mr. Jukam's testimony that Jukam gave Waiter #1 a $5 bill and received some bills and fifty cents in silver as change. (Tr. 19)

Steward Ragon described his normal method of operations, identified the check and his report. He was asked whether his report showed $1.15 for the service rendered Mr. Jukam and responded "I hope so". This is not affirmative evidence that it did, but there is no evidence to the contrary.

Messrs. Jukam and Quast also testified that during the hour and five minutes they spent in the diner there were a total of eleven patrons; the car can accomodate thirty-six. In other words, there was not a heavy press of business and activity.

The testimony of the Steward and Chef make it clear that it was the frequent practice in this diner to accept and serve on verbal order despite the Carrier's general rule against the practice.

Further, it appears from the transcript that in some cases verbal orders were Company policy. For example, Steward Ragon testified that the Company's written rules possibly direct serving a second pot of coffee and additional toast on verbal order and without charge and that, in any event, it was the practice.

This testimony eliminates the verbal order count and the failure to account and remit for the extra coffee and toast served to and reported by Operative Quast and the second pot of coffee verbally ordered by and served without charge to Mr. Jukam. (The investigation apparently resulted from the accounting department's review of the reports of Jukam and Quast about the verbal order and non-payment for the extra orders of coffee and toast.)

Sufficiency of the Evidence

The charge against Claimant boils down to accepting a verbal order for the baked apple, collecting thirty-five cents for it without having the order entered on the check and not remitting the collection to the Company.

Mr. Jukam's testimony on this charge is not complete and was not wholly convincing in and of itself. On cross-examination he mistakenly identified an employe representative as Waiter #1. Mr. Wood, the person identified, was not on the train on the day in question. (Subsequently, the Claimant was identified as Waiter #1.)

Moreover, Jukam denied knowledge that the menu and check bore notations that all food orders were to be in writing despite testimony to the ubiquity of the printed injunction and the fact that the instructions appeared on the check he personally filled out less than an inch away from his handwriting. However, the Jukam testimony does show that he ordered the baked apple verbally, apparently was charged for it by Waiter #1, but not in writing, and received only $3.50 in change from a $5 payment rather than change for the $1.15 check which appears in the record. On these allegations, Mr. Quast's testimony is corroborative.

The fate of the thirty-five cents is not fully established by the transcript and the documents introduced with it. Employes argue speculatively that the claimant, under the pressure of work, forgot to have the Steward fill in the check for the verbal order in accordance with the custom on this diner. This possibility is negated by the light patronage on the diner during the period in question. There is no evidence that there was any collusion between the Steward and the Claimant, and even if there were this would not exonerate the Claimant.

It is possible that the Steward was informed of the verbal order, charged for it and made change accordingly but mistakenly failed to enter the charge on the check. This inference is no more compelling than the possible inference that the Claimant charged Jukam for the baked apple, failed to report it and pocketed the thirty-five cents.

We decide that there was evidence from which the Carrier could conclude that the Claimant served verbal orders and failed to account and remit as to the baked apple transaction only. This is not to say that this was the only permissible inference or that the evidence was conclusive.

The "confession" as Evidence

The Board does not base its opinion upon the confession offered as part of the record.

As indicated above, nothing in the record shows whether the confession was part of the dealings between the parties on the property. If it was not, it is not properly before us, as the parties agree. The Carrier contends that in order to disqualify the confession as evidence it must be denied affirmatively as truthful and must be challenged affirmatively as not properly part of the record on the ground of non-presentation on the property.

The confession itself is incomplete. While it is not alleged that claimant did not sign it, the confession describes another paper (not signed by claimant) which was not produced. The confession states that it was voluntarily given, but this assertion is questioned by the Employe's representative.

In legal proceedings generally, confessions must affirmatively be qualified to be admissible in evidence. This is the usual rule throughout the United States. (Wigmore, **On Evidence** (3rd Ed.), Sec. 860). The purpose of the rule is to prevent the extraction of involuntary confessions by force, duress or improper inducements.

Nor is a confession obtained outside the presence of an employe's representative in harmony with Rule 21 which provides in part for an investigation "at which . . . he may be assisted by an employe of his choice or by one or more Representatives of the Organization party hereto . . ." absent a showing,

at the very least, that there was an opportunity for the Employe's Representatives to inquire into the authenticity and circumstances of the alleged confession.

No cases have been cited in which confessions signed after a formal investigation hearing have been used as a basis for findings of wrongdoing. For these reasons, the alleged confession is not considered to be properly before us and was not considered.

Carrier Determination Not Arbitrary or Capricious

In sum, we conclude that, while not wholly free from doubt, the Carrier's determination that the Claimant committed some of the wrongs charged was not arbitrary or capricious.

We will not disturb it. See Awards 9175 (Begley), 9046 (Weston), 8275 (Daugherty).

The Propriety of Dismissal

The Employes contend that even if the Claimant were guilty as charged, the offense involved only a small amount of funds, his service was long (21 years), his record without blemish and his age (middle fifties) all militate against the most extreme form of discipline available—dismissal.

It is not for the Board to substitute its judgment for that of the employer in assessing the propriety of the discipline imposed. See Award 4622 (Carmody). The test is whether the discipline is arbitrary, capricious or discriminatory, amounting to abuse of discretion. See Award 8431 (Daugherty).

The Board may inquire into the propriety of the discipline only in the event of extenuating circumstances. Award 4622 (Carmody). The length of service of an employe is put forward as an extenuating circumstance. While this has been considered a factor in some cases, e.g. Award 6104 (Messmore), it is not an extenuating factor "in and of itself", Awards 6108 (Messmore) and 5026 (Parker).

Cases have been cited on behalf of Claimant in which dismissal was deemed too harsh a disciplinary measure and was reduced. In some of the Awards cited, however, there were extenuating circumstances (e.g. Award 6104 (Messmore) "The claimant was endeavoring to perform a service for the patrons at his table in the absence of the Steward who was not on the job." In others the offense was less serious than that charged here (e.g. Awards 6713 (Shake) and 6074 (Begley) by insubordination of a minor character; 6638 (Wyckoff) — exchange of "billingsgate" with supervisor; 5645 (Wenke) — oversight and mistake; 4829 (Carter) — disturbing others with arguments and discussions; and 4722 (Robertson) — vulgarity.

Only one case cited deals with an infraction comparable to that involved here. Award 5835 (Yeager) concerned the taking of five gallons of gasoline belonging to the carrier. It does not appear that the handling of such property was in the regular course of his work and it was found that there possibly was an intention to pay for it.

In Award 5849, Referee Guthrie found that a conductor failed to report or turn in $1.38 he had collected from a passenger. But the conductor had made note of the extra fare on the ticket which he took from the passenger

and turned in, thereby indicating a lack of intent to convert the money and to defraud the carrier of it.

In this case, however, the combined infractions of the Carrier's rules amounted to the converting of the employer's funds to his own use. Moreover, the handling of such funds is a regular part of the duties of a waiter.

As an original proposition it might strike the Board that the Claimant's breach of duty to the Carrier occurred only once and was small in amount and that in view of his long service and fairly advanced years he should be given another chanec.

But, we are not the Carrier. If there is a finding of wrong doing which is not arbitrary, the Carrier has a right to impose the discipline it thinks necessary to maintain the standards of duty and service deemed desirable even though the sanction chosen may be greater than that which the Board might choose.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employe involved in this dispute are respectively Carrier and Employe 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 Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 16th day of May 1960.