

Award No. 12000
Docket No. DC-13936

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

David Dolnick, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD TRAINMEN

SOUTHERN PACIFIC COMPANY
(Pacific Lines)

STATEMENT OF CLAIM: Ex Parte Submission of the Brotherhood of Railroad Trainmen in—

Request of Dining Car Steward Herman P. Keller, Southern District, for reinstatement with seniority unimpaired and claim for compensation for all time lost as a result of his dismissal from the service, March 2, 1962, for alleged violation of Rules 12(a), 12(e), and 12-A, Sections (a), (b), and (c) of the Rules and Regulations Governing Service by Dining Car, Coffee Shop Car and Cafe Car Stewards, Train No. 98, January 9, 1962, en route San Francisco to Los Angeles.

OPINION OF BOARD: On January 26, 1962 Carrier notified Claimant to attend a hearing on February 2, 1962 on charges of "irregularities in connection with the handling of meal checks while assigned as Steward, Dining Car 10259, Train No. 98, on January 9, 1962, while en route San Francisco to Los Angeles." Specifically, Claimant was charged with violation of Rules B and 801 of the General Rules and Regulations of the Dining Car Department dated November 1, 1951, and Rules 1A, 12(a), 12(e), and 12-A, Sections (a), (b) and (c) of the Rules and Regulations Governing Service by Dining Car, Coffee Shop Car and Cafe Stewards, effective January 1, 1956. A formal investigation was conducted on February 2, 1962. On March 2, 1962 Claimant was notified that based upon the evidence adduced at the investigation it was established that he had mishandled meal checks and violated Rules 12(a), 12(e) and 12-A, Sections (a) (b) and (c) referred to in Carrier's letter of January 26, 1962 and that Claimant is dismissed from service.

Petitioner contends as follows:

- "1. That claimant did not receive a fair and impartial investigation as contemplated by Rule 20 of the Agreement.
2. The evidence adduced at the investigation does not support the charges."

Specifically, Petitioner argues that the Carrier did not comply with the provisions of Rule 20(b) which reads:

"(b) When a formal investigation is to be held the steward shall be given written notice as to the specific charge, time and place, sufficiently in advance to afford him the opportunity to arrange representation and for attendance of any desired witnesses. A telegram will be considered written notice. The Company will require the presence of all employees whose testimony may be necessary to develop all of the essential facts. In fixing time at which investigation will be held due consideration will be given to the need of rest by employees."

It is the position of Petitioner that it was the duty of the Carrier to require Waiter No. 5, the Chef and the Pantryman to be present at the investigation and, since they were not so present, that Claimant did not receive a fair and impartial investigation.

The record of the investigation shows that at the hearing Claimant was represented by Petitioner's Local Chairman and that several of his witnesses were also present and testified. At the conclusion of the hearing, the Assistant Superintendent, who conducted the investigation, asked if there was anything further anyone wished to add. Petitioner's Local Chairman had this to say:

"I feel that Mr. Keller is the unfortunate victim of certain circumstances, and the brunt of the whole thing has been cast upon him. I think that Mr. Keller is innocent of the charges and I think they got the wrong party on trial here. I think the waiter was the sole perpetrator of the whole thing. The passengers, if they observed these overt acts, should have called them to the attention of Mr. Keller. So, therefore, at this time I move for a dismissal with restoration to duty without impairment to his seniority rights and with all back pay."

At no time did Claimant or the Local Chairman request that Carrier arrange for the attendance of Waiter No. 5, the Chef or the Pantryman, nor did they request that the investigation be recessed so that arrangements could be made for their appearance at a later hearing date. Had Claimant or Petitioner requested the appearance of these individuals as witnesses, Carrier would have been obliged under Rule 20(b), to require their presence. Rule does not initially require Carrier to make sure that all persons who may be material witnesses be present. The Rule requires Carrier to give written notice of the charge, the time and place of the investigation so that it may afford Claimant "the opportunity to arrange representation and for attendance of any desired witnesses." If Claimant was caught by surprise at the hearing, he had every right to request that the investigation be recessed to afford him the opportunity to arrange for the attendance of Waiter No. 5 and the kitchen employees. On the basis of the record, Claimant received a fair and impartial investigation.

Did the evidence introduced at the investigation support the charges and justify Claimant's dismissal from service? On January 9, 1962, two Inspectors rode train No. 98 between San Francisco and Los Angeles. They observed at breakfast, that Waiter No. 5 used their check No. 109486 to collect the cost of a meal ordered by a soldier in civilian clothes sitting at another table. Waiter No. 5 took the Inspectors' check to the Claimant, left it with him and returned the change to the soldier. Shortly thereafter, Claimant brought the same check back to the table which had been occupied by the soldier and left there face downward. When the Inspectors finished their breakfast, Waiter No. 5 picked up the check from table No. 11 (left vacant by the soldier) and

placed it in a tip tray on the table occupied by the Inspectors. They paid the full amount of the check.

About three hours later the same Inspectors again entered the diner, sat at the same table No. 12 and ordered coffee and tea on check No. 109500. Waiter No. 5 did not pull the kitchen copy. He served the coffee and tea, they paid it and received the proper change. At no time did Claimant total check No. 109500. They later saw this check on another table where food was being served.

At 12:20 P. M. the Inspectors entered the diner for lunch. They sat at table No. 8. Claimant placed check No. 109528 on their table. At table No. 12 were a woman and two girls. Waiter No. 5 had served them a pineapple and cottage cheese salad, two hamburgers and three drinks. Waiter No. 5 wrote the food prices on the back of the check, totaled them, read the total to the woman with the two girls, collected a five dollar bill, took the check and money to the Claimant and returned with the change. After the woman and the two girls left, the Claimant returned and casually placed the check face downward on table No. 12. There were then no diners seated at table No. 12.

A short while later a lone woman was seated at table No. 12. Waiter No. 5 took an oral order for a three decker combination cold sandwich and a 7-Up. While Waiter No. 5 was in the kitchen, Claimant placed a new check on table No. 12. When Waiter No. 5 returned, he took the new check from table No. 12 and placed it on table No. 11 across the aisle which was empty. Claimant later walked by table No. 12, picked up the used check and placed it on table No. 11. When the woman at table No. 12 finished her sandwich and 7-Up, Waiter No. 5 picked up the used check from table No. 11, held it in his hand and quoted the amount to the woman. He took the money and the check to Claimant and said, "Two dollars, twenty cents for drink." Claimant handed Waiter No. 5 change from a five dollar bill.

Claimant agreed that the handling of the meal checks as described by the Inspectors was prohibited by the Carrier's rules and regulations. He denied any wrongdoing and insisted that he did not violate such rules and regulations. He was given the meal checks turned in by him at the conclusion of the trip. He could find no check for a pineapple and cottage cheese salad, two hamburgers and three drinks as ordered by the woman with the two girls. He could find no check for a three decker sandwich and a 7-Up ordered by the lone woman.

It is evident from the entire record that Claimant was guilty of the charges. His was a position of trust. Dishonesty cannot be condoned. He was responsible for the acts of all dining car employees. It was his duty to be alert for any dishonesty, discourtesy and all other acts which affect the operation of the dining car service. His guilt justified that he be penalized.

The noted irregularities are not the acts of Claimant alone. There is little question but that they were perpetrated by joint actions of Claimant, Waiter No. 5 and the kitchen help. Claimant could not have carried them out alone. This was a conspiracy among the persons mentioned.

There is nothing in the record to show whether charges were filed against Waiter No. 5 and the kitchen help and whether disciplinary action was taken against them. Claimant's guilt and punishment does not depend upon the guilt and punishment of his co-conspirators. But there are extenuating circumstances which need to be considered.

Claimant had more than nineteen years of seniority. There had never been an adverse report against him prior to the incidents which occurred on Jan-

uary 9, 1962. He was never previously disciplined or kept out of service. We do not know whether Waiter No. 5 or the other co-conspirators were disciplined or dismissed from service. In the absence of such affirmative knowledge, we can only presume that they were not disciplined or dismissed.

While we are generally committed to the principle that the Board should not interfere with a discipline penalty assessed after a full and impartial investigation, we have intervened when due process has been violated, or when the discipline imposed is discriminating or out of proportion to the offense. Under the latter circumstances we have held that the penalty may be arbitrary or capricious. In assessing the penalty assessed to the offense we need to evaluate (1) the seriousness of the offense, (2) the employee's past work record and length of service, (3) the likelihood of similar violations by the employee, and (4) discrimination, if any exists.

There is no question that the offense of Claimant was serious and that he deserves a heavy penalty. His past work record over a period of more than nineteen years was without a blemish. In view of such a work record it is most unlikely that Claimant will again violate his obligations as an employee of the Carrier. The mere fact that Waiter No. 5 and the kitchen employees may not have been disciplined or dismissed from service does not per se constitute discrimination. The fact remains, however, that Carrier had the Inspectors' report about a month before the date of the investigation. Carrier knew that Waiter No. 5 and the kitchen employees were equally involved in the work rule violations. We must assume that they made additional inquiries. What they discovered we do not know. Whether or not Carrier's inquiries established the guilt or innocence of Waiter No. 5 and the kitchen employees, it had knowledge of these facts and it should have arranged for them to be present at the investigation. Their presence would have either supported Claimant's plea of innocence or it would have firmly confirmed his guilt.

On the basis of all the facts in the record, we conclude that a dismissal from service was too severe a penalty. Claimant has been out of service for nearly two years. This is a heavy and adequate penalty. He should now be returned to service with full seniority rights, but with no compensation for lost time.

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 penalty of dismissal from service was too severe.

AWARD

That the Claimant be restored to service with all rights unimpaired, but without compensation for lost time.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 16th day of December 1963.