Award Number 13129
Docket No. DC-14795

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Daniel Kornblum, Referee

PARTIES TO DISPUTE:

JOINT COUNCIL DINING CAR EMPLOYES, LOCAL 849

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of Joint Council Dining Car Employes Local 849, on the property of the Chicago, Rock Island and Pacific Railroad Company, for and on behalf of Isaac Hayes that he be restored to service and compensated for net wage loss, with seniority and vacation rights unimpaired account of Carrier dismissing Claimant from service on August 8, 1963, in abuse of its discretion and in violation of the existing Agreement.

OPINION OF BOARD: Claimant, a dining car waiter, was dismissed by the Carrier on August 8, 1963. This followed from the Carrier's investigation on the property which persuaded it that Claimant had been guilty of dishonesty in violation of Carrier's General Rule "N" ("Employes who are . . . dishonest . . . will not be retained in the service").

Petitioner contends that (1) Claimant did not have a fair trial; (2) the evidence adduced at the investigation does not support the charge; and (3) the extreme measure of the discipline meted out was an abuse of discretion by the Carrier. Apart from the merits, the Carrier now argues that the claim is not properly before the Board because it was not progressed on appeal to the General Superintendent Dining Cars as provided by Rule 11 (f), but instead was appealed directly to the Carrier's Vice President of Personnel.

We direct ourselves first to the procedural point. At the terminal appellate step on the property the claim was denied by the Vice President of Personnel solely on the merits. There was then no suggestion or objection by the Carrier that resort to this terminal step had been premature or that there had been a fatal by-pass of a requisite intermediate appellate step under the agreement. The contention was raised for the first time in the Carrier's ex parte submission to this Board.

We need not pause too long in assessing this procedural objection. It has been frequently held in prior awards that failure, as here, to raise such a defense in timely fashion on the property spells out a waiver or estoppel against raising it for the first time before the Board (e.g., Award 4488; see also Awards 12173, 11676, 11570, 11451, 11214, 8484, 8324 and 7916). Accordingly we overrule this procedural objection and go on to a consideration of this claim on its merits.

On July 7, 1963, Claimant was assigned as a waiter on Train No. 18, en

route from Houston to Minneapolis. Among the passengers on the train were two operatives associated with a private firm of investigators in the employ of the Carrier. They, together with their four minor children, were occupying two bedrooms in one of the Sleeping car cars. Their contemporaneous reports of the causative incident, later supported by their oral testimony as witnesses at the investigation, is that at about 1:15 P. M. they asked their sleeping car Porter whether he could help them get four hamburgers and four milks served in their compartments. The Porter suggested that they write their order on a slip of paper. They did so and the Porter took the slips of paper to the Dining Car.

About an hour later the Claimant returned to the Sleeping car compartment with the ordered food. After setting down the tray, Claimant was asked by the male operative what was owed for the food. Claimant then apparently computed the amount due on a piece of plain paper held on top of a Dining Car meal check. He orally stated that $5.72 was owed, was given $6.35 by the operative and told to "keep the change." According to the Carrier, no Dining Car check was ever turned in for the amount owed, nor was any part of the payment made to the Claimant ever received by it.

The record shows that before the investigation recessed for lunch, the Sleeping Car Porter involved testified, positively and without equivocation, that the operatives and their party of children were in his Sleeping car, had transmitted to him the slip of paper containing the food order and that, in turn, he went to the Dining Car where he transmitted the slip to the Steward. Moreover, he testified that after the food was served by the Claimant he cleared the table. In effect, this witness corroborated the report and testimony of the two operatives, at least to the extent of the fact that the food in question was ordered and served.

Although after the luncheon recess this witness appears to have suffered a lapse of memory, still his post-prandial confusion did not serve to recant his earlier testimony as to the details of the episode. It remains that at most in this later testimony the witness merely said he could not recall the very incident he had so vividly described in his testimony that morning.

For the part of the Claimant and his witnesses there was complete denial that the food in question had ever been ordered or served by him. Obviously if we accept this denial we have to discredit the entire testimony of the Carrier's witnesses. But the Board has consistently refused to determine the credibility of witnesses. See e.g. Award 11105 (McGrath), 10876, 10505 (Hall), 10791 (Ray) and 10642 (LaBelle). So, too, the Board has left to the trier of the facts the matter of weighing or resolving conflicts in the evidence. See e.g. Award 11105 (McGrath), 10899 (Boyd), 10791 (Ray), 10717 (Harwood) and 10596 (Hall). And in light of the testimony of the Sleeping Car Porter, a witness who surely had nothing to gain or lose by this proceeding, it is difficult to find that there was not substantial corroborative evidence to support the operatives' reports and, therefore, the conclusion of the Carrier both as to the propriety for disciplining the Claimant and its extreme measure. As was said in Award 8574 (Sempliner): "Where dishonesty is involved leniency cannot be lightly indulged in by the reviewing authority."

So, too, a careful review of the entire record shows that, in balance, Claimant was given a fair hearing in accordance with applicable rules. While if this were a court of law we would look with disfavor on the operatives' refusal to answer certain questions, among others, as to aspects of their personal and employment backgrounds, we can understand their desire to withhold information that might impair the efficacy of their future operations or even

expose them to personal peril. It remains that there was substantial evidence to support the Carrier's conclusion that Claimant was guilty of the dereliction charged.

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 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 Adjustment Board has jurisdiction over the dispute involved herein; and

That the Carrier did not violate the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 11th day of December 1964.