Award No. 13250

Docket No. DC-14776

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Don Hamilton, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD TRAINMEN

SOUTHERN PACIFIC COMPANY (PACIFIC LINES)

STATEMENT OF CLAIM: Request of Dining Car Steward Samuel B. Miller, Northern District, for reinstatement with seniority unimpaired and claim for compensation for all time lost as a result of his dismissal from the service, June 21, 1963, for alleged violation of Rules 10-A, 12-A, 12(e), 12-A (a), 12-A (b) and 12-A (c) of the Rules and Regulations Governing Service by Dining Car, Coffee Shop Car and Cafe Car Stewards, effective January 1, 1956, Dining Car 10275, Train No. 75, February 26, 1963.

OPINION OF BOARD: This is a disciplinary case concerning the dismissal of Dining Car Steward, Samuel B. Miller. The facts are somewhat in dispute, but we shall state the circumstances as we believe they exist.

It appears that on the morning in question, Inspector Whitfield entered the diner, was seated and given a meal check. Shortly thereafter, Inspector McMurray entered the diner and there is a dispute as to whether or not he in fact did receive a meal check.

Waiter Waggener apparently removed the check previously given Inspector Whitfield, and received a verbal order from the inspector. It later appears that a check was presented to the steward for Inspector Whitfield. Waggener admittedly received a verbal order from Inspector McMurray.

Waggener advised Claimant Miller that he had received a verbal order from McMurray, and Miller then wrote out a check for the meal served Inspector McMurray.

Claimant first alleges that the notification for the investigation on the property was so vague, general and indefinite, that he could not prepare a proper defense and therefore he was not given a fair and impartial hearing. We agree that the notice could have been made more specific. However, we note that this hearing was continued from time to time over a period of several months. Therefore, we believe that Claimant had sufficient opportunity to present all of his defenses to the charges presented at the investigation. In effect then, the opportunity presented by the continuances

effectively gave rise to a waiver of whatever hardship the Claimant may have suffered from the indefinite charges in the notice. This result may well have been different, if Claimant had been forced to proceed with the investigation immediately upon the presentation of the charges at the hearing, and without adequate time to prepare a defense or obtain witnesses.

The record raises the question of entrapment, through the actions of the inspectors. There is very little testimony on this point and certainly it is insufficient to prove that the inspectors did in fact entrap the Claimants by their conduct. We do not intend to infer that we would condone even the slightest instance of entrapment, if the same were to exist in a case before the Board. The Carrier must be very careful in using employes to prosecute other employes for violations. It would seem to us that the proper function of an inspector is to spot irregularities, not to create the same.

One of the most perplexing problems presented in any disciplinary case is the matter of the so-called past record of the Claimant. It is said that this Board follows the rule that the Carrier may not use the past record of the Claimant in determining his guilt or innocence in the instant case. The record is to be considered only in determining the quantum of discipline to be administered after the charges have been independently substantiated. We agree with this rule as stated. The problem is presented in attempting to determine if the Carrier has in fact followed this procedure. In this case, as is usual, the Carrier makes an affirmative statement that it acted precisely as the rule provides. However, we do not feel that such a self serving declaration is sufficient to protect the Claimant, absent some showing that this is exactly what happened. This is a pure and simple matter of due process and we believe the Carrier should be required to present the case in such a manner as to make it evident that the rights flowing from this rule, were not abused.

We are concerned about the procedure used in introducing the record in this case. However, we do not believe that this issue is determinative of the claim, especially since the Clainant's record does not disclose previous offenses or other matters, which would prejudice the mind of one who examined said record at an improper point in the investigation process.

We are most persuaded in this case, by the testimony of the Claimant. He admits that the taking of the verbal order by the waiter, and his own preparation of the meal check, were violations of the rules of the Carrier. Claimant further admits that it was his responsibility to report to the Commissary the above-mentioned infraction of the rules by the waiter. He recognizes that his failure to do so was in violation of the rules. He also admits that he was aware that such violations could possibly result in his dismissal from the service of the Carrier.

We recognize that it may seem harsh to impose such a severe penalty for the infraction of the rules involved in this case. However, we should point out that these rules and the penalties for the infraction thereof were written to protect the Carrier from fraud and dishonesty. Even though we are able to find, as a question of fact, that there has been no proof whatsoever of fraud or dishonesty in this case, we must recognize that Claimant was exceedingly careless in his conduct when he knew that a deviation from the rules could cause him to be dismissed. It must also be noted that proof of fraud or dishonesty is not a condition precedent to the imposition of the penalties involved in cases of this nature. We are of the opinion that

the intent of the party violating these rules is not a proper part of the offense, and that dismissal is a prescribed penalty, at the Carrier's discretion, whether or not the element of dishonesty is present in the case.

We must come to the conclusion that the evidence submitted in this case is sufficient to substantiate the decision of the Carrier and the discipline will not be disturbed.

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 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 29th day of January 1965