



Award No. 16167
Docket No. DC-16794

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Bernard E. Perelson, Referee

PARTIES TO DISPUTE:

JOINT COUNCIL DINING CAR EMPLOYEES
(Local 351)

ERIE-LACKAWANNA RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of Joint Council Dining Car Employees Local 351 on the property of the Erie-Lackawanna Railroad, for and on behalf of William Billingsley, Chef Cook, that he be returned to service and compensated for net wage loss, with vacation and seniority rights unimpaired since April 8, 1966, account of Carrier dismissing Claimant from service on that date, in abuse of its discretion and in violation of the Agreement.

OPINION OF BOARD: This is a discipline case.

The Claimant was Chef Cook on Diner No. 769 of Train No. 1, of the Carrier, departing from Hoboken, New Jersey, on February 13th, 1966.

Under date of March 14, 1966, the following communication was addressed to the Claimant:

"Dear Sir:

In accordance with Rule 29 — Investigation, Appeal and Decisions, of Agreement effective November 15, 1961, between Erie Lackawanna Railroad Company and their employees represented by Joint Council of Dining Car Employees Union, Local 351, you are hereby notified to present yourself for investigation in connection with alleged violation of Rule 2 of General Rules for the Guidance of Dining Car Department Employees effective September 1, 1954, for allowing food order consisting of cold turkey sandwich and tea to leave your kitchen without receiving Chef's portion of meal check to cover such food order while assigned as Chef on diner of Train No. 1, Sunday, February 13, 1966, between Hoboken, New Jersey and Scranton, Pennsylvania.

This investigation will be held in the office of Superintendent, Dining Car Department, Passenger Terminal, Hoboken, New Jersey on Tuesday, March 22, 1966, at 9:30 A. M.

At this investigation you may have present witnesses and/or representative of your own choice, without expense to the Company.

If you are unable to attend this investigation you should contact the undersigned at once, giving the reason, as failure to report at the time and place specified herein will be considered as an admission of guilt and grounds for discipline.

Yours very truly,

/s/ A. L. Elwyn, Supt.
Dining Car Dept."

The hearing took place as scheduled with the Claimant present together with representatives of his Union. The hearing in this dispute was held concurrently and simultaneously with the hearing of the charges against the Waiter-in-Charge of the dining car on the date in question. The testimony adduced at the hearing is contained in one transcript, a copy of which is attached to and made a part of the record.

Under date of April 7, 1966, Claimant was advised that he was dismissed from the service of the Carrier.

The Claimant contends, before this Board, that:

1. He was not accorded a fair and impartial investigation as contemplated by the rules.
2. The evidence adduced at the investigation was insufficient to support the charge.
3. The penalty of dismissal from service was, in any event excessive.

An examination of the transcript of the investigation discloses that the Claimant did not object to the notice of the hearing received by him; that he had sufficient time to prepare for the investigation; that he was ready to proceed with the investigation. That Claimant not having raised nor offered objection to the investigation taking place, such failure, on his part, constitutes a waiver. See Awards 15027; 14573; 14444.

The manner in which the investigation was conducted, with reference to the Claimant herein, by the Hearing Officer, leaves much to be desired. We find that the evidence was offered in such a way as to make this Claimant to appear to be guilty of acts and conduct, as to certain matters, over which he had no control. The testimony, with reference to the charges against him should have been confined solely and strictly to those charges, i.e. a violation of Rule 2. We do not look with favor nor do we approve of the manner in which the hearing was conducted.

The unorthodox manner in which the hearing was conducted, in and of itself, will not void the hearing, unless it can be shown that the Claimant was prejudiced thereby. We think, however, that the Claimant was prejudiced by the manner in which the investigation was conducted.

The transcript of the testimony adduced at the hearing contains many pages, most of which relates to the charges against the Waiter-in-Charge and do not in any way apply to the Claimant herein.

That part of the testimony that applies to the Claimant is as follows:

"J. Sipple: Mr. Billingsley, were you the Chef on the diner on Train No. 1, February 13, 1966?

W. Billingsley: Yes.

J. Sipple: Do you recall making up the food order that Miss Blair stated that she received on that day?

W. Billingsley: No, I don't, I don't have tea in the kitchen.

J. Sipple: Would you explain to us please how tea is prepared on the Dining Car?

W. Billingsley: In the pantry.

J. Sipple: Is the pantry the area between the Dining room and the kitchen?

W. Billingsley: Yes.

J. Sipple: Is the pantry inaccessible to the chef in his normal procedure?

W. Billingsley: It is.

J. Sipple: Did you prepare any food on that day without receiving a chef's copy of the meal check?

W. Billingsley: No sir, I did not.

* * * * *

J. Sipple: Mr. Billingsley, in the letter of notification to you it alleges the violation of Rule 2, of General Rules for the Guidance of Dining Car Department Employees, effective September 1, 1954, Rule 2 reads as follows:

'Chef Cook must receive Chef's portion of Meal Check for any food going to the Dining Room with the exception of the crew meals which must be carried on crew meal sheet and signed by the Chef after each meal. Coach Lunch is to be checked by the Chef and Chef's check obtained for Coach sales.'

J. Sipple: Mr. Billingsley, are you familiar and do you understand that rule?

W. Billingsley: Yes.

J. Sipple: Did you comply with that rule that day?

W. Billingsley: I did.

W. Seltzer: Mr. Billingsley, you received this letter from the Company?

W. Billingsley: Yes, I did.

W. Seltzer: This letter dated March 14, 1966 containing certain allegations. Are you familiar with the contents of the letter? Are you guilty of the allegations contained in this letter or do you deny them?

W. Billingsley: Not guilty.

W. Seltzer: Not guilty. On the date in question you were chef cook on the train?

W. Billingsley: Yes sir.

W. Seltzer: You are accused of violating Rule 2 of the General Rules for the Guidance of Dining Car Employees. Do you know what rule 2 means?

W. Billingsley: Yes. It means that I should get a check for all foods out of the kitchen, and pantry, and that I do.

W. Seltzer: Whatever food you served on Train No. 1, February 13, 1966 or any other day, you receive a check, is that correct?

W. Billingsley: Yes sir.

W. Seltzer: Now do you have anything to do with the preparation of tea?

W. Billingsley: No.

W. Seltzer: And you would not know if someone got tea. Let me take you back to the beginning of serving to a patron, the chef's portion of the check if it does not have all the items ordered at the very beginning of the serving, whatever that may be added to that check would not show on the chef's portion:

W. Billingsley: No.

W. Seltzer: That would remain on the hard card portion of the check but would not be evident on the chef's portion of the check. To make that clear, if someone ordered dessert or tea or coffee after the check had been made out and you received your portion, you would not know the party received those items?

W. Billingsley: No sir.

W. Seltzer: Do you have anything to do with the serving of coffee?

W. Billingsley: No sir.

W. Seltzer: Dry cereal?

W. Billingsley: No sir.

W. Seltzer: Ice cream?

W. Billingsley: No sir.

W. Seltzer: And if anyone of those items were on your portion of the check, would you know that they were served to the patron?

W. Billingsley: No.

W. Seltzer: Could be pie, you have no jurisdiction of that."

* * * * *

Miss E. Blair testified as follows:

"J. Sipple: Were you able to identify these men to your own satisfaction that they were the men in the dining car on Train No. 1, on February 13, 1966?

E. Blair: This man yes (pointing to Mr. Foster). (Pointed to Mr. Billingsley.) No.

J. Sipple: How come you cannot identify Mr. Billingsley?

E. Blair: I never saw him before."

* * * * *

This Board has held, on numerous occasions, that in a discipline case it is not its function to determine the credibility or weight of the evidence nor will it substitute its judgment for that of Management as to the degree of the discipline. We have held, however, that in view of the nature of the proceeding, that:

"It was incumbent upon the Carrier to establish the findings on which it assessed discipline by **positive evidence**. Failure to do that, or when the case is brought here for review on charges of impropriety and unfairness, failure to produce a record disclosing testimony of that character, is fatal and **precludes the sustaining of its action.**" See Award 2813. (Emphasis ours.)

In Award 13179, we said:

"In discipline cases, the Board sits as an appellate forum. As such, our function is confined to determining whether;

- (1) Claimant was offered a fair and impartial hearing;
- (2) the finding of guilty as charged is supported by **substantial evidence**;
- (3) the discipline imposed is reasonable.

We do not weigh the evidence DE NOVO. If there is **material and relevant evidence**, if believed by the trier of the facts, supports the finding of guilty, we must affirm the finding." (Emphasis ours.)

It may be that the Claimant failed to carry out his duties, under the rule, as the Chef of the dining car in question, but we fail to find any direct, positive, material or relevant testimony in the record to sustain such contention.

What he did or did not do can only be determined from the record before us and then only by conjecture, speculation and inference. This is not enough. We may not and cannot speculate as to nor may we infer or assume facts not in the record.

The burden was on the Carrier to prove by direct, positive, material and relevant evidence that the Claimant was guilty of the charges preferred against him. We find that this the Carrier has failed to do.

We are not and should not be concerned, in this dispute, with what determination might be made with reference to the charges preferred against the Waiter-in-Charge, which investigation was conducted simultaneously with the charges preferred against the Claimant. Each case must be judged and stand or fall on its own set of facts and circumstances.

We find and hold that the Carrier's action was arbitrary, unjust and without any foundation in law and fact, and that

1. The discipline imposed by the Carrier was arbitrary, unjust and without any foundation in law and fact.
2. That the Claimant be returned to service and compensated for NET wage loss, with vacation and seniority rights unimpaired since April 8, 1966.

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 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 Carrier violated the Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 29th day of March 1968.

Keenan Printing Co., Chicago, Ill.

Printed in U.S.A.