

Award No. 16169
Docket No. DC-16799

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 Maxwell Williams, Chef Cook, that he be returned to service and compensated for net wage loss, with vacation and seniority rights unimpaired since April 6, 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 a Chef Cook on Diner No. 769 of Train No. 1 of the Carrier, departing from Hoboken, New Jersey on February 18th, 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 employes represented by Joint Council of Dining Car Employees Union, Local 351, you are hereby notified to present yourself for investigation in connection with your alleged violation of Rule 2 of General Rules for Guidance of Dining Car Department Employees effective September 1st, 1954, for allowing food order consisting of bacon-potatoes-eggs, a pot of coffee, and a dish of ice cream 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, Friday, February 18th, 1966, between Hoboken, New Jersey and Scranton, Pennsylvania.

This investigation will be held in the office of Superintendent, Dining Car Dept., Passenger Terminal, Hoboken, New Jersey on Monday, March 21st, 1966 at 1:30 P. 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.

/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 Richard Phillips, who was 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.

It is the Claimant's contention, 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. 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 is a lengthy one and most of it relates to the charges preferred against the Waiter-in-Charge and does not, in any manner, apply to the Claimant herein.

The testimony, in the transcript, that applies to the Claimant, is as follows:

"JPS: Did you receive this notice Mr. Williams?

MW: Yes I did.

* * * * *

JPS: Mr. Williams did you dispense the order of bacon-potatoes and eggs on that day?

MW: I didn't.

JPS: Did you dispense any order of bacon-potatoes and eggs on that day?

MW: I didn't.

* * * * *

JPS: Mr. Williams the letter of notification stated that the investigation was in connection with the alleged violation of Rule 2 of the General Rules for the Guidance of Dining Car Department Employees effective September 1st, 1954 which read 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.'

JPS: Are you familiar and do you understand that rule?

MW: Yes I do.

JPS: Did you comply with that rule on February 18th, 1966?

MW: What do you mean comply?

JPS: Did you receive chef's portion of a meal check for the meal that Miss Dreyer stated she requested from Mr. Phillips?

MW: I receive checks for all meals that leave the kitchen, all food that leaves the kitchen I receive a check.

* * * * *

WSS: Mr. Williams you were the Chef-Cook on Train 1, on February 18th, 1966?

MW: That's right.

WSS: Did you get this letter from Mr. Elwyn dated February 14th, 1965, or rather dated March 14th, 1966?

MW: Yes I did.

WSS: Do you confirm the charges as contained in the letter as being true or do you deny them?

MW: I deny them.

WSS: Do you see that you get a check at all times for orders coming out of your kitchen?

MW: For all orders that leave the kitchen, yes."

During the course of the examination of Mr. Elwyn the question arose as to the number of waiters and cooks on the train. His testimony on that question is significant. He testified as follows:

"WSS: How many cooks?

ALE: Two — M. Williams and J. Flamer."

This Board has held, on numerous occasions, that in a discipline case it is not its function to determine the credibility or weigh 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 one of the chefs 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. That 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 positive, material and relevant evidence that the Claimant, in this dispute, was guilty of the charges preferred against him. We find that this the Carrier has failed to do, especially when we find that the testimony adduced at the hearing reveals that there were two cooks or chefs on the train in question, the Claimant and one J. Flamer.

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 6, 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.

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