Award No. 13240

Docket No. PM-14708

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

John H. Dorsey, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF SLEEPING CAR PORTERS

THE PULLMAN COMPANY

STATEMENT OF CLAIM: . . . for and in behalf of J. L. Eldridge, who was formerly employed by The Pullman Company as a porter for the past twenty-seven years.

Because The Pullman Company did finally sustain the disciplinary action taken against Mr. Eldridge under date of October 25, 1963, wherein Mr. Eldridge was discharged from his position as a sleeping car porter for The Pullman Company in the Chicago District.

And further, because the charges upon which Mr. Eldridge was discharged were not proved beyond a reasonable doubt as is provided for in the rules of the Agreement between The Pullman Company and its porters, maids, attendants, and bus boys, represented by the Brotherhood of Sleeping Car Porters, under which Mr. Eldridge and other sleeping car porters were and are working.

Further, because Mr. Eldridge did not have a fair and impartial hearing as provided for in the rules of the above-mentioned Agreement.

And further, for the record of Mr. Eldridge to be cleared of the charge in this case, and for him to be reinstated to his former position as a sleeping car porter operating out of the Chicago District with seniority rights and vacation rights unimpaired and with pay for all time lost as a result of this unjust and arbitrary action on the part of the Company, which action the Organization maintains was unjust, unreasonable and in abuse of the Company's discretion.

OPINION OF BOARD: This is a discipline case in which R. G. Brewer, Superintendent, charged Claimant, a porter, and gave notice of hearing as follows:

> "A hearing will be accorded you in my office located in Room 390, Union Station, Chicago, Illinois, commencing at 10:30 A.M.D.S.T. October 8, 1963, on the charge that on August 11, 1963, after departure on train from Ogden, Utah:
>
> You acted improperly toward two girl passengers, ages thirteen and fourteen, occupants of Room 'B', Car 1049, and Room 'C', Car

1042, respectively, placed your hands upon their persons and fondled them."

Hearing having been held, Superintendent Brewer, who was not present at the hearing, wrote Claimant:

"Referring to the hearing accorded you in my office October 7, 1963, on the charge specified in my letter of September 26, 1963:

I have given careful consideration to the transcript of hearing and I find the evidence adduced therein substantiates the charge.

It is my decision, therefore, that you be discharged from the service of The Pullman Company effective with the date of this letter."

THE ISSUES

The issues in this case are:

1. Whether Claimant was given "a fair and impartial hearing" within the meaning of that phrase in Rule 49 of the Agreement; and

2. Whether there is substantial evidence in the record to support the finding of guilty as charged.

PERTINENT PROVISIONS OF THE AGREEMENT

The following Rules of the Agreement, to the extent quoted, are pertinent:

"GRIEVANCES AND CLAIMS

RULE 49. Hearings. An employe shall not be disciplined, suspended or discharged without a fair and impartial hearing.

* * * * * "

"RULE 51. Witnesses, Testimony, and Records. At the hearing the employe aggrieved may remain throughout the proceedings and with the designated representatives of the interested parties shall have the following privileges:

(1) To produce witnesses and cross-examine any who are present at the hearing and testify;

(2) To make statements off the record upon request.

When testimony, written or oral, is presented in a hearing against an employe, only that part of the testimony which is germane or relevant to the charges against the employe shall be admitted in the record."

THE HEARING

Carrier was represented at the hearing by J. L. Murray, Assistant Superintendent, and W. W. Dodds, Assistant to Manager Labor Relations. There was no designated Hearing Officer. The reading of the record leaves the impression that Dodds acted as prosecutor and Murray, because he ruled on

objections, as Hearing Officer. Claimant who was present, was represented by M. P. Webster, 1st International Vice President of the Organization.

Dodd's introduced: (1) statements executed by each of the Complainants in which each of them purport to relate actions of Claimant that can be characterized as violating their persons; (2) statement of Claimant in which he denies having engaged in the actions asserted by Complainants; and (3) numerous statements of crew members and agents. Neither Complainants nor crew members were called as witnesses for the Carrier. Over the objection of Webster that the statements of Complainants were not admissible because Claimant was being denied the right of cross-examination to test their credibility, Murray admitted them in evidence.

The statements of the crew members disclose that they had no first hand knowledge as to the alleged incident other than Claimant, **ab initio,** denied acting as alleged by Complainants. We find these statements have no probative value.

The statement of one of the Complainants was taken by a Claim Agent of the UP; the other by an Inspector of Carrier. Claimant or a representative of Claimant was not present or afforded an opportunity to be present. The persons taking the statements testified that they did not question the Complainants; but, merely reduced to writing each of their recitations as to what each alleged occurred and then had the statements executed in the presence of witnesses. While we are of the opinion that Webster's objection to the admissibility of the statements had merit, we will assume for the purposes of the case that they were properly admitted. We need be concerned only with the probative value of the statements.

Upon the completion of Carrier's case Webster moved to dismiss the charge on the grounds that Carrier had failed to make a **prima facie case.** Upon denial of the motion Claimant rested.

Toward the close of the hearing we find Dodds making the following admissions:

> "MR. DODDS: Mr. Webster, Superintendent Brewer has the responsibility of rendering the decision in this case. After the transcript of the hearing has been prepared he will review it carefully and will render a decision based upon the evidence set forth in the transcript. Neither Mr. Murray nor I have the authority to drop charges of this type as requested by you."

It is significant that Superintendent Brewer issued the charge against Claimant; and, he was not present at the hearing.

Insofar as our appellate review, we look only to the question as to whether the record contains substantial evidence which supports the decision, on the property, that Claimant was guilty as charged.

BURDEN OF PROOF

In a discipline case the burden of proving the charge is upon Carrier. The Claimant is not obligated to prove his innocence. Indeed, it is not unusual in cases where a person is wrongfully charged that he can adduce no evidence other than to deny that he took the action alleged.

A FAIR and IMPARTIAL HEARING

Legal authorities are in agreement and it is generally understood by laymen that the following are indispensable elements of "a fair and impartial hearing."

1. The charge must be drafted so as to fully inform a person of the charges against him;

2. The person charged must be given a reasonable time in which to prepare his defense;

3. The judge or hearing officer must be impartial. One who has formed an opinion before hearing all the evidence is devoid of impartiality. The person making the charge is not qualified to sit in judgment as to its merits in the absence of acquiescence by the person charged;

4. Every testimonial assertion must be made in the presence of the tribunal and the person charged: (a) primarily, in order that the person charged may exercise his opportunity to cross-examine; and (b) secondarily, in order that the tribunal may be enabled to observe the personality and the demeanor of the witness, while testifying, for the purpose of assisting in determining the credit to be given to his testimony. There are some exceptions to this element; none of which is applicable in the instant case;

5. Only the material and relevant evidence adduced in the hearing—other than subjects of judicial notice and common knowledge—can be considered in arriving at and in support of a decision.

RESOLUTION

In this case we have only the statements of the Complainants in absolute conflict with that of Claimant. Which, if either, is worthy of credit could be determined only by an impartial hearing officer who had the opportunity to observe the personality and demeanor of the witnesses while testifying. Upon the facts of record, herein, the mind of man has developed no other acceptable manner to resolve credibility. See, Sahm, **Demeanor Evidence; Elusive and Intangible Imponderables**, 47 A.B.A.J. 580 (June 1961).

The Hearing Officer, in this case, never saw the Complainants. He was, therefore, not qualified to pass on their credibility. Worse, still, the Hearing Officer made no finding of credibility and made no decision. It is offensive to the concepts of fairness and impartially that credibility was determined and decision made by Superintendent Brewer who had issued the charge and was not present at the hearing.

In the absence of a finding of credibility by a qualified hearing officer the statements of Complainants have no probative value. Consequently, the decision made on the property is not supported by substantial evidence. We will sustain the Claim.

The Carrier argued that in those cases in which a complainant will not voluntarily testify it would be deprived of administering discipline. There is no requirement that Carrier must produce a complainant at a hearing. The requirements are that the Carrier has the burden of proof and to prevail must adduce substantial evidence which proves the charge. We are not unmindful that in some cases the Carrier might be unable to prove the charge absent

testimony of the complainant. This is a potential juridical liability which attaches to all litigants. It is no defense for failure to afford an employe his contractual right to "a fair and impartial hearing;" nor, does it mitigate Carrier's burden of proof.

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 Carrier discharged Claimant without a fair and impartial hearing within the contemplation of Rule 49 of the Agreement.

That Carrier's decision that Claimant was guilty as charged is not supported by substantial evidence.

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 January 1965.

DISSENT TO AWARD NO. 13240, DOCKET NO. PM-14708

In Award 13240 the majority has again completely ignored the issue of whether Carrier was justified in dismissing Claimant account of acting improperly toward two girl passengers, ages thirteen and fourteen. Instead, the majority has again chosen to revoke the discipline assessed against Claimant on a most unwarranted finding that:

> "The Hearing Officer, in this case, never saw the Complainants. He was, therefore, not qualified to pass on their credibility. Worse, still, the Hearing Officer made no finding of credibility and made no decision. It it offensive to the concepts of fairness and impartiality that credibility was determined and decision made by Superintendent Brewer who had issued the charge and was not present at the hearing."

Neither Rule 49 (Hearings) nor Rule 51 (Witnesses, Testimony and Records), or in fact any rule in the Agreement, makes any provision as to who should prefer charges, or conduct hearings, or issue the decision. This Division has no jurisdiction to prescribe that which the parties have not supplied through negotiations.

In Award 2608 this Division, without the assistance of a referee, held:

"The Board finds nothing in the rules of the controlling Agreement defining who shall prefer charges or conduct hearings. There being no such definition in the rules, the Board cannot supply same."

In Awards 4840 (Carter), 8725 (Daugherty), 9817, 9819 (McMahon), 10355 (Harwood), 10569, 10571 (LaBelle) we affirmed the principle and findings in Award 2608.

In recent Award 10015 (Weston) we held:

* * " Petitioner nevertheless contends that the investigation was unfair since the Superintendent, who was not present at the hearing, rather than the hearing officer Mr. Buffalo, rendered the decision. There is no express requirement in Rule 39 that the officer conducting the hearing must render the decision but the problem is that a decision by the Superintendent at the first stage may deny Claimant the full avenue of appeal guaranteed by Rule 41. The objection was not raised on the property or in the submissions of the parties and Carrier has had no opportunity to explain or explore it cf. Awards 7021 and 9102.

Quite apart from that question, however, we are satisfied that the record does not establish that the Superintendent actually rendered the decision, although proof as to that preliminary point is essential to the success of this procedural objection. The mere fact that the Superintendent signed the suspension notice does not alone support the conclusion that he rather than Buffalo made the initial determination as to the credibility of witnesses and Claimant's insubordination. See Award 8310. We therefore, find the objection to be without merit in the light of this record." * *

See also Awards 8310, 10717, 8572, 9936, 12001 and 12002, among others.

The majority then states:

"In the absence of a finding of credibility by a qualified hearing officer the statements of Complainants have no probative value. Consequently, the decision made on the property is not supported by substantial evidence. We will sustain the Claim."

It is a recognized fact that anyone familiar with the handling of discipline in the railroad industry understands that any official may be delegated to conduct an investigation, and accepts as a matter of common sense that if another officer reviews the proceedings and notifies the employe charged of his innocense or guilt and/or the discipline assessed—that such second officer makes the determination after thorough discussion of the dispute with and/or upon the recommendation of the officer who conducted the investigation.

Notwithstanding the above, the majority proceeds upon a determination based on pure speculation and conjecture that the hearing officer made no recommendation to his superior.

Furthermore, due process of law does not require that the actual taking of testimony be before the same officers as are to determine the matter involved. In 42 American Jurisprudence, s 141, pp 485, 486, where it states:

"Due process of law does not require that the actual taking of

testimony be before the same officers as are to determine the matter involved. A hearing is not inadequate or unlawful merely because the taking of testimony is delegated to less than the whole number, or even to a single member, of the administrative tribunal, or to an examiner, hearer, or investigator employed for this purpose, even though such procedure has not been expressly authorized by the legislature. * * * ."

Also see UNITED STATES v MORGAN, 313 U.S., 409.

Furthermore, it is apparent that the majority has lost sight of the authority vested in this Board involving discipline cases, which can be summarized as follows:

1. The Board has refused to weigh or resolve conflicts in evidence. See Awards 11105 (McGrath), 10899 (Boyd), 10791 (Ray), 10717 (Harwood) and 10596 (Hall).

2. The Board has refused to determine the credibility of witnesses. See Awards 11105 (McGrath), 10876, 10505 (Hall), 10791 and 10642 (LaBelle).

3. The Board has refused to substitute its judgment for that of the Carrier if there is sufficient evidence in the record to support the Carrier's findings. See Awards 11017, 10928 (Dolnick), 10900, 10880 (Boyd), 10791 (Ray) and 10716 (Harwood).

Finally, in recent Award 11342 (Stark), involving a molestation case and also involving statement submitted by Complainant, we held:

"In the early hours of the morning on September 8, 1961 Conductor R. R. Grimm on the eastbound Zephyr was approached by Miss Beulah Anderson, an 18-year old college student, who said that the chair car porter had molested here in dome coach 21. **When Conductor Grimm called the two train porters, Miss Anderson identified the man she had seen as the older one, with gray hair and light skin, in his middle or late 60's.** (A. F. Burnett, the other porter, is younger and slimmer.)

* * *

In this case Management had reasonable grounds for reaching the conclusion it did. **Of course, without the statement of Passenger Anderson there would be no case. But no persuasive reason was offered to discredit her. She identified the Claimant right after the alleged incident and in a subsequent signed statement.** There is corroborating testimony (again not discredited) which places Mackey in the dome car at the time of the incident. **There is no basis in the record for challenging the testimony of Conductor Grimm who was present when Anderson identified the Claimant. Under these circumstances it cannot be said that Management's decision was arbitrary, without reference to the facts, or constituted an abuse of its discretion. The claim will therefore be denied." (Emphasis ours.)**

See also 12322 (Yagoda), 8683 (Lynch), 8300 (Bakke), 7657 (Carey), 7774 (Smith), 3985 (Fox), 2945 (Carter), among others.

Therefore, this Award is in error, and for the foregoing reasons, among others, we dissent.

/s/ R. E. Black

/s/ D. S. Dugan

/s/ P. C. Carter

/s/ T. F. Strunck

/s/ G. C. White