Award No. 2772

Docket No. PM-2746

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Jay S. Parker, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF SLEEPING CAR PORTERS

THE PULLMAN COMPANY

STATEMENT OF CLAIM: * * * for and in behalf of P. H. Benson, who was formerly employed as a porter by The Pullman Company, operating out of the Chicago Northern District. Because The Pullman Company did, under date of February 15, 1944, discharge P. H. Benson from his position as a reporter in the above mentioned district on charges unproved; which action was unjust, unreasonable and in abuse of the company's discretion. And further, because Benson did not have a fair and impartial hearing. And further, because the discharge was based upon charges alleged to have occurred as far back as 1918 and upon which alleged charges Benson had been previously disciplined. And further, for P. H. Benson to be restored to his former position as a porter in the Chicago Northern District with his seniority unimpaired and for him to be compensated for all time lost as a result of this unjust and unreasonable action.

OPINION OF BOARD: P. H. Benson, a Pullman Porter, was notified by the Company that he would be given a hearing on the charge he had acted in an insolent and discourteous manner toward certain passengers on a train to which he had been assigned and that when one of the passengers requested a suitable apology he exhibited an open knife and attempted to use it on such passenger. In the same notice there appeared the following statement:

> "Previous incidents involving improper conduct or unsatisfactory services on your part as appearing on your record of service and occurring on October 14, 1918, June 17, 1931, July 11, 1932, June 14, 1934, June 29, 1936, October 2, 1936 and May 27, 1937, respectively, will also be introduced for consideration at this hearing."

Petitioner bases its claim for relief upon three grounds. They are (1) the action was unjust, unreasonable and in abuse of the Company's discretion, (2) deprivation of a fair and impartial hearing, and (3) because the disciplinary action—dismissal from the service—was based upon charges alleged to have occurred as early as 1918, upon which there had been previous discipline. Since the contentions advanced in their support, if sustained, would of necessity result in the upholding of the claim other than on its factual merits we should deal with the grounds relied on in inverted order.

Petitioner's contention on ground 3 is that the charge made against him was not a single one based on the event which was the direct cause of the institution of the disciplinary proceeding, but that in reality it was two, one predicated on the affair just mentioned and the other based on the grouping of a series of derelictions occurring over a period of many years, and for which he had theretofore been tried and punished. In argument it

supplements its contention but insists claimant was not only charged but tried for two offenses and then complements its supplemented contention by the statement that if in fact Benson was not actually charged or tried for two offenses of the character referred to, the evidence relating to former acts was actually taken into consideration by the Company in determining the question of his guilt. Boiled down its position is that he was twice tried and convicted on identical charges and that since the order of dismissal rests on that basis he is entitled to have it set aside on the fundamental proposition that one cannot be twice placed in jeopardy for the commission of the same offense. There would be merit in this contention were it not for the fact Petitioner's entire argument is predicated upon a mistaken and erroneous conception of the state of the record. As will be noted the portion of the notice, or letter as it is referred to in the record, heretofore quoted is not susceptible of an interpretation that previous incidents constituted one of the charges made against the Porter. Quite to the contrary it definitely states that they will be introduced for consideration at the hearing. It should also be noted that at such hearing it was made clear the accused was not being tried for the previous offenses. In a colloquy between representatives of the parties, Mr. McCaffrey, representing the Company, in answer to Mr. Webster, representative of the Brotherhood, made the statement, "You have referred to them as charges. I repeat they are not charges," and again, "The hearing is predicated on the letter." In the light of what has just been recited we think it is clear that Benson not only was not charged with previous offenses, but that evidence of their commission was not introduced for the purpose of establishing his guilt on the particular charge for which he was being tried.

Under almost identical circumstances (see Award 2498) and numerous similar ones (see Awards 430, 431, 562, 1022, 1128, 1144, 1599, 2440) this Division has approved like action. The decision in Award 2499, cited, by the Petitioner, will on careful examination be found to rest on an entirely different factual basis and does not support its contention.

The position Benson was deprived of a fair and impartial hearing is based on the fact that he was not confronted by, and did not have an opportunity to cross-examine, two witnesses, Miss Vaughn and Mrs. Reed, whose statements were offered in evidence. Without unduly laboring the question it can be stated the Contract does not specify the type of evidence that can be submitted at a hearing and our decisions recognizing the competency of statements are numerous and require no citation. Moreover there was ample other evidence on the subject of what took place at the scene of the incident which was not objected to. The contents of the statements to which objection is made were therefore cumulative in character and it cannot be said the result of the hearing depended on that testimony or changed the result. Under those circumstances the admission of such statements, even if they had not been properly admissible, a fact which we do not concede, would not have prejudiced the accused or resulted in his having an unfair hearing.

With contentions heretofore discussed disposed of there remains for consideration one final question. Is the Company's action in dismissing Benson from the service subject to criticism on grounds of unreasonableness or abuse of discretion? Our search of the record fails to reveal any facts or circumstances evidencing either. Therefore, under the rule that this Board will not substitute its judgment for that of the Carrier when the record discloses a reasonable basis for disciplinary action we have no other alternative and must sustain it. The plain unvarnished facts are that at a hearing which disclosed beyond peradventure of a doubt that one of its employes had become involved in an avoidable altercation with several passengers under circumstances where it was required to either believe their statements and that of another of its employes, a Pullman Conductor, or discard them and give credence to Porter Benson's uncorroborated statement, the Company chose to accept the version of the by far greater number of witnesses. In fact the

record reveals a situation where it could hardly do otherwise. Having concluded discipline was required, it was faced with the dilemma of what to do with an employe whose record not only evidenced a quarrelsome disposition and bellicose attitude toward both passengers and fellow employes, coupled with resorts on at least two occasions to the use of a deadly weapon, but a service that must be conceded to have been far from satisfactory from the standpoint of both employer and the public. It decided to, and did, remove him from the service. Under such circumstances even if the rule to which we have referred did not require us to permit it to exercise its discretion in assessing punishment, we would not be justified in disturbing the employer's action.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

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 record discloses no grounds for disturbing the action of the Company.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 19th day of January, 1945.