

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Curtis G. Shake, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF SLEEPING CAR PORTERS

**CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD
COMPANY**

STATEMENT OF CLAIM: * * * for and in behalf of Mr. Leander Jackson who was formerly employed by the Chicago, Milwaukee, St. Paul & Pacific Railroad Company as a porter operating out of the Chicago, Illinois district.

Because the Chicago, Milwaukee, St. Paul & Pacific Railroad Company did, under date of July 13, 1944, discharge Mr. Leander Jackson from his former position as a porter for the Chicago, Milwaukee, St. Paul & Pacific Railroad Company on charges unproved. And, further, because Mr. Leander Jackson did not have a fair and impartial hearing as provided for under the rules of the agreement between the Chicago, Milwaukee, St. Paul & Pacific Railroad Company and the Brotherhood of Sleeping Car Porters, the duly authorized representative of the class of employes to which Mr. Leander Jackson was a part, in that the Management took the action against Mr. Leander Jackson (discharging him) as a result of evidence produced in a hearing under conditions which precluded Mr. Leander Jackson or his duly authorized representative from having the opportunity to confront or cross-examine the persons giving this evidence. And further, because the discharge of Mr. Leander Jackson was unjust, unreasonable and in abuse of the Company's discretion.

And further, for Mr. Leander Jackson to be returned to his former position as a porter for the Chicago, Milwaukee, St. Paul & Pacific Railroad Company and for him to be reimbursed for all pay lost as a result of having been deprived of his position unjustly.

OPINION OF BOARD: It was charged that the Claimant, while on duty, sold intoxicating liquor to a member of the armed forces of the United States. There was a hearing and finding of guilty, followed by a dismissal from service. The pertinent basis of the claim for reinstatement and reimbursement for pay lost is that the Carrier's action was unjust, unreasonable and an abuse of discretion. The other contentions made on behalf of the Claimant may be passed as having been resolved against him by awards of this Board too numerous to mention.

The evidence upon which the Carrier relies to sustain its action consists of the written statements of a Naval Shore Patrolman, a Military Police officer, and the Conductor of the train. The statement of the Shore Patrolman recites that on the train and day in question he confiscated a bottle of intoxicating liquor from a Sailor, naming and describing him; that the Sailor stated that he had purchased the liquor from the Claimant in Car "J" for

\$18.00; that the Shore Patrolman took the Sailor to Car "J," where he "identified Porter Jackson as the person from whom he had purchased the whiskey," in the presence of the affiant, the Military Police officer and the Conductor. The Military Police officer said in his statement that the Sailor, in the presence of himself, the Shore Patrolman and the Conductor, "positively identified Porter Leander Jackson as the person from whom he had purchased the whiskey." The Conductor said he went to Car "J" in company with the Sailor, the Shore Patrolman and the Military Police officer, where the Sailor "identified Porter Jackson as the Porter he had purchased the whiskey from. . . ." The evidence of the Sailor was not produced at the hearing.

While it has frequently, and very properly, been held that the strict legal rules as to the admissibility of evidence are not required to be observed in administrative proceedings of this character, the fact yet remains that the basic and fundamental concepts of due process must be adhered to and essential facts must be fairly established by evidence of rational probative force.

Here, all that we have is hearsay evidence of the conclusion of an absent witness, to the effect that he identified the Claimant as the person who had made the sale. The matter of the identity of the accused was an ultimate fact to be determined by the trier in the first instance, and now to be subjected to review by this Board. Manifestly, the Carrier could not delegate to others the determination of so important an issue, yet that is practically what occurred. We do not know and cannot know upon what evidentiary facts the Sailor based his conclusion of identity. Perhaps if these facts were known they would not support his deduction. Carried to its logical end, the practice here indulged would permit the guilt of an accused to be established by a showing of the opinion of an absent witness.

The Carrier's representatives should familiarize themselves with the fundamental principles as to what constitutes evidence of rational probative value, and should see that these principles are observed at every hearing. These rules are not technical or difficult of comprehension. They are so engrained in our American conception of the rights of the individual that they may not be ignored.

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 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 finding is not supported by evidence of rational probative force.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois this 8th day of February, 1945.

DISSENT TO AWARD NO. 2797, DOCKET PM-2863

The sustaining Award in this case finds defect in testimony of the four responsible agents of the armed forces and the Carrier, by reason either of their failure or their inability because of doubt, in their statements of that which occurred when, as a group facing the accused on the train, each gave their testimony by stating that Sailor McCarthy had:

“identified Porter Jackson as the person from whom he had purchased the whiskey,”

instead of putting their testimony in the form of saying that Sailor McCarthy:

“said that Porter Jackson was the person from whom he had purchased the whiskey,”

the latter statement, as explained by the Referee rendering the decision, being one sufficient to remove it from the class of hearsay evidence of an absent witness.

The Referee's opinion does not make clear the reasons for his award, nor does it lay down any clear principle which may be followed.

Here Sailor McCarthy made his oral statement to two train conductors, representatives of the Carrier in charge of the train, and to two enforcement officers of the armed forces of the United States, a Navy Shore Patrolman and an Army Military Police Officer, all of whom positively stated that Sailor McCarthy identified Porter Jackson as the person who sold him the whiskey. The case, then, resolves itself simply into a question of whether Sailor McCarthy or Porter Jackson is to be believed. The Carrier did not delegate to others that right of determination, but itself made the determination and found complainant guilty.

We do not understand the distinction between statements Sailor McCarthy “identified Porter Jackson as the person from whom he had purchased the whiskey” and statements that Sailor McCarthy “said that Porter Jackson was the person from whom he had purchased the whiskey,” and this appears to be a narrow and legalistic distinction not sanctioned by other decisions of this Division.

Such difference in the form of expression, by persons not trained in legal refinements as to admissibility of evidence of that which they observe has not heretofore been considered as changing the meaning or substance of their testimony in respect to an identification such as that by Sailor McCarthy of Porter Jackson as testified to in this case.

The decision illustrates the difficulties of the very thing which the Award decries, i. e., the observance of strict legal rules in respect to admissibility of evidence in administrative proceedings, such as that to which this decision addresses itself.

(s) C. C. Cook
(s) R. H. Allison
(s) A. H. Jones
(s) C. P. Dugan
(s) R. F. Ray