Award No. 7813
Docket No. PM-7402

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

John Day Larkin, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF SLEEPING CAR PORTERS

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY

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

Because the Chicago, Milwaukee, St. Paul & Pacific Railroad Company did, under date of September 3, 1954, dismiss former Porter Anderson from the service because of an alleged complaint from a passenger riding on the train where Anderson was the porter, known as Train No. 6, Coaches 1 and 2, August 29, 1954; which action was unjust, unreasonable, arbitrary, and in abuse of the Company's discretion, and was based upon charges unproved.

And further, for D. M. Anderson 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 any pay lost as a result of this unjust and unreasonable action.

OPINION OF BOARD: Certain facts of this case are disputed, but the following points are not questioned. The claimant, Mr. D. M. Anderson was the porter assigned to Carrier's Train No. 6, in coaches No. 1 and 2 on August 21, 1954. This train usually comes into Chicago Union Station on Track No. 19, but on the date in question, it was put in on Track No. 17 instead. Consequently, all of the baggage which had been stowed in the rear vestibule of Coach No. 1 and the front vestibule of Coach No. 2 had to be moved from one side of the vestibule to the other so that the doors could be opened on the platform side. This had to be done after the train had pulled into the station, since no prior notice of the change of tracks had been given.

From this point on the facts are very much a matter of dispute. However, as a result of three memoranda submitted to the company, one by the conductor, one by the brakeman, and one by a red cap, the Carrier's superintendent notified claimant on August 26, 1954, to appear for a hearing. And on September 3, 1954, he was notified that he was being dismissed, effective that date, as a result of the hearing held on August 31. The specific charges were as follows:

"1. For insolent and obscene reply to woman passenger's legitimate request for service in violation of Rules 2, 4, 5, 51, 52, 60, 68 and

"2. For refusing to perform assigned duties in violation of Rules 2 and 61.

"3. For improperly handling baggage by throwing it down instead of placing it on platform in violation of Rules 80 and 81.

"4. For improperly handling passengers' baggage by throwing it from one vestibule to another while preparing to unload in violation of Rule 80.

"5. For endangering passengers' saftey by your improper handling of baggage in violation of Rule 81.

"6. For leaving your assignment before completing all assigned duties necessitating other employes doing your work in violation of Rules 2 and 56."

The Organization served written notice of intent to file an ex parte submission under date of December 3, 1954. Carrier was notified on December 6, 1954, by the Executive Secretary of the Third Division, that ex parte submissions were to be filed on January 2, 1955, by Mr. M. P. Webster in three disputes involving the following:

"(1) For in behalf of A. M. Harden, porter, operating out of Chicago, Illinois (Docket PM-7383).

"(2) For in behalf of D. M. Anderson, porter, operating out of Chicago, Illinois (The instant claim)

"(3) For and in behalf of Paul T. Gay, porter, operating out of Chicago, Illinois (Docket PM-7384)."

On December 30, 1954, Carrier requested of Secretary Tummon an an extension of time to January 24, 1955. This request was granted, with proper notice to Mr. Webster.

Subsequently this claim came before the Third Division, along with those of Porter Gay (Docket PM-7384) and Porter A. M. Harden (Docket PM-7383) and was deadlocked. The three claims were referred to the Referee in the same assignment of cases and are now before us.

In the course of preparing a memorandum for the Referee, the Carrier Member of the Board had occasion to examine the master file in the office of the Executive Secretary and discovered that, whereas the Organization's ex parte submission was dated January 24, 1955, it had been received in the office of the Third Division on February 2, 1955, some nine days after the date specified by the Secretary for the receipt of ex parte submissions. Consequently, the first issue raised is whether this Board has jurisdiction to decide this claim.

This issue was first raised by the Carrier Member in argument before the Referee, March 7, 1957. The Organization Member requested and was granted permission to file a rebuttal memorandum. This issue was further discussed with the Referee March 14, 1957. It will be considered before examining the claim on its merits.

It is the Carrier Member's contention that,

"Compliance with Section 3, First (i) of the Railway Labor Act and Circular No. 1 are conditions precedent to this Division's obtaining jurisdiction of a claim."

It is the further contention of the Carrier Member that the Executive Secretary's duties are ministerial in character; that he has no discretion in the performance of them; and that it was his duty and responsibility to refuse a submission received by him nine days after the date specified in his latest communication with the parties.

We have examined the language of the Railway Labor Act, Section 3, First (i) and Circular No. 1. The primary purpose of both of these is to require the parties to see that disputes are properly handled on the property, "up to and including the chief operating officer of the Carrier designated to handle such disputes; . . ." before the disputed issues are appealed to the Board. The pertinent language of Circular No. 1 deals with submissions as follows:

> **"Ex Parte Submissions.**—In event of an ex parte submission the same general form of submission is required. The petitioner will serve written notice upon the appropriate Diivsion of the Adjustment Board of intention to file an ex parte submission on a certain date (thirty days hence), and at the same time provide the other party with copy of such notice. For the purpose of identification such notice will state the question involved and give a brief description of the dispute. The Secretary of the appropriate Division of the Adjustment Board will immediately thereupon advise the other party of the receipt of such notice and request that the submission of such other party be filed with such Division within the same period of time."

This language allows thirty days within which the parties may prepare their ex parte submissions; but it in no way specifies this as an absolute. thirty-day limit. On the contrary, it is not only a common practice for one party or the other to request an extension of time, but also the Carrier did so in the instant case. That extension was granted by the Secretary, as a matter of accepted practice. In short, we find no language in either the Railway Labor Act or Circular No. 1, which specifically places an absolute thirty-day limit on such submissions.

The declaration of intention to file a claim with the Board, when received by the Secretary, establishes the Board's jurisdiction. This question was recently before the Second Division, with Referee Edward F. Carter, and was disposed of with the following statement:

> "The filing of the declaration of intention to file the appeal with the proper Division lodges jurisdiction of the dispute with the Board. From that time on the progressing of the dispute is subject to the rules of the Board. The Board may properly extend the time in which the submissions of the parties may be filed, a power inconsistent with a lack of jurisdiction. We conclude, therefore, that the filing of a notice of an intention to file an appeal with the proper Division of the Board has the effect of lodging the dispute with the Board and subjects such claim to the procedural rules of the Division from that time on." Second Division Award 2285.

Subsequently, in Second Division Award 2325, the same question was presented and the above position reaffirmed. In the latter case the Board further concluded that, "The filing of a submission with the Board is not a jurisdictional step." With this we agree. This Board has had jurisdiction of the instant case since the Secretary received notice of intention to file the claim in December 1954. It is a little late to raise the question of jurisdiction after a case has been deadlocked and submitted to a Referee.

In short, what we now have before us is not a question of the Board's jurisdiction, but a question of the proper observance of its rules after jurisdiction is established. The Board makes its rules. It sets the limits for submissions. But these are subject to change, at the Board's discretion. If

an extension is allowed, for whatever reason, it is not an issue for a referee. These are matters which the Board should establish and administer through the Executive Secretary, without a referee.

Regardless of the peculiar facts involved in the procedure in the instant case, it is too late to raise the issue of jurisdiction. The parties have submitted both ex parte submissions and reply briefs. The Board considered this case along with two others which came from the same parties at the same time. All three cases were deadlocked and referred to the Referee at the same time. It is our conclusion that the Board took jurisdiction of all three cases and all are now matters in dispute before this Board.

We are being asked to dismiss this case because of some irregularity in the observance of dates after jurisdiction was established. We think it is too late to raise this question. If there was a significant breach in the Board's rules, this should have been detected and the issue raised months ago. Regardless of the accidental nature of the detection of the technicality in processing this case to its present level, all claims of lack of proper jurisdiction have, in effect, been waived. The Board, and the parties concerned, may avoid future problems of this sort by more careful observance of the prescribed procedures.

The cases cited by the Carrier Members are clearly distinguishable from the one now before us. In Award 137 the question at issue was whether the claim had been properly handled on the property. There is no such issue in the instant case. In Award 2556, with Referee Shake, this Board was again confronted with a situation which had not been properly handled on the property. In Award 6623, a claim, filed by the Carrier, was dismissed because the matter had not been handled **on the property** in accordance with the provisions of the Railway Labor Act. In Award 6696, this Board dismissed the claim for notice to third party. Award 6954 presented no issue as to the Board's jurisdiction.

The two Awards of this Board (cited by the Carrier Member) which involve cases dismissed for failure to appeal within stipulated time limits are also distinguishable from the instant case. In Award 2765, with Referee Parker, we dismissed the claim for failure to appeal **within the time limits stipulated by the rules of the parties' agreement.** And in Award 2222, with Referee Fox, we dismissed the claim for the same reason; there was in the agreement a thirty-day limit on appeals from decisions made on the property. In none of these cases was there presented or decided, a question involving ex parte submissions comparable to the issue here presented.

Since the Carrier Member has failed to show that there is a thirty-day limit in the parties' agreement in the instant case, and since we fail to find such a limitation in either the language of Section 3, First (i) of the Railway Labor Act, or in Circular No. 1, we cannot deny or dismiss this claim on the technical point here raised. The matter must be considered on its merits.

The remaining issue involves the question as to whether the Claimant was dismissed for proper cause in accordance with rules of the Agreement. We have generally refused to substitute our judgment for that of management in discipline cases, except where there is evidence of unfairness either in the matter of an improper hearing on the property, or in the imposition of unreasonable penalties. But it is our responsibility to review the record in such cases to see that sufficient evidence is adduced at the hearing to support the charges made and to determine whether the penalty assessed was in keeping with those commonly accepted in sound industrial relations practice.

The record of the proceedings on the property in this case leaves something to be desired as a model of good industrial relations practice. But we believe that there is substantial evidence to support the Carrier's contention that claimant Anderson's conduct at the conclusion of his run on

August 21, 1954, was improper and warranted some disciplinary action. Whether the Carrier "let the punishment fit the crime," or too hastily adopted Conductor Proeber's rather heated and emotional recommendation for termination is a matter which warrants careful consideration.

Let it be noted that Claimant had served this company for approximately ten years prior to this incident. His conduct, while far from perfect, had not been bad. In no instance prior to this had this employe committed an act which the Carrier considered serious enough to warrant a disciplinary layoff.

At the hearing on August 31, 1954, the Carrier presented written memoranda from three witnesses who were not present for cross examination. When Claimant's representative objected to this, the Carrier agreed to recess the hearing until such time as the three witnesses could be brought in. Claimant's representative did not insist that this be done, but continued his objection to the written statements and noted for the record that the Carrier had failed to give specific notice, prior to the hearing, of the charges that Claimant was to answer.

This Board has repeatedly ruled that written statements may be accepted as evidence in such hearings as that here involved. But it is most unusual in a case involving the termination of one's employment and ten years' seniority to act upon this type of evidence alone. Particularly is this so where it was quite possible for the Carrier to have scheduled this hearing at a time when at least two of the three complaining witnesses could have been produced. We think the Carrier's offer to postpone the hearing until such time as these men could be brought in should have been accepted. Since it was not, we are left with only the written complaint and Claimant Anderson's denial of most of what is contained in the charges.

From the record it would appear that something like the following must have happened. When Train No. 6 stopped in Milwaukee a woman came aboard with a Red Cap carrying three items of luggage which the Red Cap stowed away at some point in the car. When Porter Anderson, who was in charge of two cars, went through to find out which passengers wanted help with their baggage, this woman, according to Porter Anderson, "couldn't make up her mind." Consequently, he did not take her luggage. When the train unexpectedly came into Chicago on a different track than usual, this necessitated shifting all of the baggage which had been stowed at the exits of both cars. While Claimant Anderson was busy helping passengers detrain (after having shifted the baggage from one side of the cars to the other), the woman requested that her baggage be brought out. She was then in a great hurry to make her connection on the New York Central. Conductor Proeber directed Porter Anderson to go into the car and get the woman's baggage. There remained some twenty-five items of baggage to be removed from Car No. 2, to be passed on to the waiting passengers. While Porter Anderson was gone to get the woman's baggage, Conductor Proeber removed the remaining baggage from Car No. 2.

From the record we must conclude that Porter Anderson did become upset over these events, and let it be known to those present that he was unhappy with the situation. Conductor Proeber's statement leads us to conclude that he, too, was not in the best of temper. That there were some unpleasant remarks, and possibly some obscene language is evident from the record. But there is no proof that Porter Anderson refused to do anything he was ordered to do. Nor is there any evidence that the alleged obscene language was heard by anyone other than Brakeman Listle, who reported it. He admitted that he did not know whether any passenger heard the vulgar language.

The specific charges made at the August 31, 1954 hearing are all based upon Conductor Proeber's written report. A study of the record including the

other two written statements, offers corroborative support for some of Proeber's allegations, but not all of them. Taking the charges in the order presented, we think there was an unpleasant scene concerning the woman passenger's request for service; but there is no proof that Porter Anderson made any obscene remark which was heard by this passenger. The woman made no complaint of record.

The second charge, "refusing to perform assigned duties," is not substantiated by the evidence adduced at the hearing. While we do admit such written charges as evidence, it is taken seriously only if corroborated by other testimony or circumstantial evidence. We do not believe that the record supports this allegation.

As to the third charge that Porter Anderson "threw" baggage to the platform, the statement of the Red Cap who received the baggage does not confirm this, and his is the most dispassionate statement of the three collected by the Carrier in connection with this incident.

Charge No. 4 is that Claimant "threw" baggage from one vestibule to the other. Considering the extenuating circumstances, already discussed, we think that if the baggage was thrown from one side of the vestibule to the other in some haste, it was done only to help the waiting passengers off more promptly. There is no evidence that any baggage was damaged in the process. No passengers reported any complaints. Under the circumstances, we think it absurd to use this as a basis for disciplining a porter.

Charge No. 5 is that Porter Anderson endangered a passenger's safety by the improper handling of baggage. There is no corroborative evidence of any kind to support this. The Red Cap, who was present and receiving the baggage when it was put off, makes no reference whatever to anything of this kind. He was apparently aware of the allegations of Conductor Proeber, and in concluding his statement without any reference to this he simply said that "the foregoing is the full extent of my knowledge of the matter."

The final charge is that Claimant left his post before completing his assigned duties, "necessitating other employes doing your work in violation of Rules 2 and 56." According to the Conductor's statement there were some bags on Car No. 2, which he unloaded. This is confirmed by the Red Cap's statement. The Porter admits that the Conductor removed some 10 or 15 bags, but contends that he volunteered to do so while Anderson, at the Conductor's request, returned to the coach to bring out three more pieces of luggage. The record indicates that Claimant left the train at 3:00 P. M., which was some five minutes after his regular release time. Under the circumstances, there does not appear to have been a serious infraction of the rules in this instance.

In short, there was an unpleasant incident on August 21, 1954, in which Porter Anderson was involved. While the record indicates the claimant's conduct was unbecoming and in fact unwarranted, there were some extenuating circumstances which the Carrier failed to take into account. And in failing to produce the complaining conductor for cross-examination, Claimant was not given a full hearing. But in this, Claimant's representative must share some responsibility, in that he did not accept the Carrier's offer to reconvene the hearing at a time when the conductor would be available. The whole proceeding left something to be desired in the matter of a full and fair hearing. But the record is not without evidence to support disciplinary action.

In view of the evidence before us, it is our conclusion that Claimant Anderson should not have been discharged for his misconduct on August 21, 1954, but that some disciplinary action was in order. We are, therefore, of the opinion that Claimant should be restored to his position, with full seniority rights, but without retroactive pay.

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 Carrier imposed an unreasonable penalty in view of this employe's past record, and in the light of certain extenuating circumstances at the time of the incident in question.

AWARD

Claim sustained, subject to the limitations set forth in Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 4th day of April, 1957.

DISSENT TO AWARD NO. 7813, DOCKET NO. PM-7402

Neither party contended that a declaration of intention to file a claim establishes the Board's jurisdiction. No one cited Second Division Awards 2285 and 2325. It was argued on behalf of Carrier that Petitioner defaulted, and thus failed to place an issue within the Board's jurisdiction. The Representative of the employes argued, "* * * once this Division has accepted and docketed submissions the case is properly here," and "* * * there is no mandatory requirement governing the date of filing a submission, no such question can be raised." Therefore, emphasized opinion that **"The declaration of intention to file a claim with the Board, when received by the Secretary, establishes the Board's jurisdiction"** is surplusage, is incorrect and of no effect because such declaration was not an issue and this Board has long since ordered that "the written submissions alone invoke the official action of the Board."

The "CHECK LIST" of the Attorney General's Committee on Administrative Procedure contained these questions, among others:—

"B. **What is the method of invoking official action**

1. By conference
2. Informal complaint or application
3. Formal complaint or application
4. Are forms utilized
5. Must complaints or applications be under oath
6. Are fees involved in invocation or utilization of official **processes"**

The response thereto, made by Order of the National Railroad Adjustment Board, Chairman Charles J. MacGowan and Vice Chairman E. W. Fowler, dated the Eighth day of January, 1940, was as follows:—

"Under the rules of the Board, cases are filed in two ways:

"First: 'Joint' submissions:

* * * * *

"Second: 'Ex Parte' submissions:

"In such submissions the moving party gives notice of intent to file an 'ex parte' submission; thereupon, the Board requires each party to file independently within thirty days such party's 'statement of facts' and 'position'.

"A copy of the presently effective rules (Circular No. 1 and resolutions re ex parte submissions,

"First Division—adopted June 18, 1935

Second Division—adopted March 27, 1936

Third Division—adopted October 9, 1935

Fourth Division—adopted September 27, 1935)

is hereto attached and marked Exhibit 'A'.

"As respects the check list: 1-2-3. The written submissions alone invoke the official action of the Board. 4. Forms are not utilized. 5. The submissions are not under oath. 6. No fees are chargeable to parties to disputes."

Therefore, inasmuch as Petitioner was delinquent in filing his submission, and since the written submissions alone invoke the offical action of the Board, the conclusion of the issue as to jurisdiction in this docket finally rested on that part of the Opinion reading, in part, "* * * since we fail to find such a (thirty day) limitation in either the language of Section 3, First (i) of the Railway Labor Act, or in Circular No. 1, we cannot deny or dismiss this claim on the technical point here raised."

As to the merits of the claim, the Representative of the employes argued that we were deprived of material facts, but he admitted the employes were foreclosed from raising objection to the absence of witnesses. He said,

"True, Carrier did offer to postpone the hearing to arrange for the presence of these witnesses. The Employes elected not to postpone the hearing. We think Carrier's offer should have been accepted. *Failure to do so forecloses Employes from raising objection here* regarding the absence of such witnesses."

Having thus removed the question of "absence of witnesses" from dispute in this docket, the action of the author in his Opinion is patently wrong in qualifying the statement that:—

"This Board has repeatedly ruled that written statements may be accepted as evidence in such hearings as that here involved."

with the conjectural remark:—

"But it is most unusal in a case involving the termination of one's employment and ten years' seniority to act upon this type of evidence alone."

The statement that:—

"And in failing to produce the complaining conductor for cross-examination, Claimant was not given a full hearing."

was the outgrowth of a fictional premise and contrary to the well-established principle that written statements of witnesses are acceptable evidence. The Referee was cited Awards 2978, 3213, 4771, 4976, 5104 and 6866, all accepting written statements as evidence, resulting in dismissals from service; three of these awards on this same Carrier. Where does this leave the Carrier when it had a perfect right to proceed as it did in the light of Awards 2978, 4771 and 4976 on its property and many more recognizing the propriety of written statements of witnesses not present at investigations? The unsoundness of reasoning in this award is glaringly apparent.

For these reasons, we dissent.

/s/ J. F. Mullen
/s/ W. H. Castle
/s/ R. M. Butler
/s/ C. P. Dugan
/s/ J. E. Kemp