Award No. 8693
Docket No. PM-9482

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Lloyd H. Bailer, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF SLEEPING CAR PORTERS

THE PULLMAN COMPANY

STATEMENT OF CLAIM: For and in behalf of R. W. Patterson, who was formerly employed by The Pullman Company as a porter operating out of the Toronto, Canada District.

Because The Pullman Company did, under date of December 12, 1956, discharge Mr. Patterson from his position as a porter in the Toronto District, and further because the charge upon which Mr. Patterson was discharged was not proved beyond a reasonable doubt as is required in the rules of the Agreement between The Pullman Company and Porters, Attendants, Maids and Bus Boys employed by The Pullman Company in the United States of America and Canada, represented by the Brotherhood of Sleeping Car Porters, and hence said discharge of Mr. Patterson was in violation of the second paragraph of Rule 49 of the above-mentioned Agreement, which provides as follows:

> "Discipline shall be imposed only when the evidence produced proves beyond a reasonable doubt that the employe is guilty of the charges made against him."

And further, for former Porter Patterson to be returned to the service of The Pullman Company as a porter in the Toronto, Canada District with vacation rights and seniority rights unimpaired, and with pay for all time lost as a result of having been discharged in violation of the above-mentioned rule.

OPINION OF BOARD: Claimant was discharged as a result of an alleged incident occurring while he was on duty as a Pullman Porter on a run from North Bay, Ontario to Toronto, Ontario on May 28-29, 1956. A grievance protesting Carrier's action was progressed on the property in the manner prescribed by the controlling Agreement, which covers designated classifications of employes in Carrier's service in the United States and Canada. Following denial by Carrier's highest officer designated to handle such matters, an appeal was taken to this Board, pursuant to which both parties participated in proceedings before the Third Division with respect to the merits of the case. The proceedings included two oral hearings, the second

hearing being held with the referee sitting as a member of the Division. During the subsequent executive session the question of our jurisdiction to decide this dispute was raised for the first time when the Carrier Members asserted such jurisdiction is lacking because the claim involves an assignment wholly within Canada.

We note that in a prior dispute before this Division involving the same Carrier and also dealing with operations wholly within Canada, Management raised the identical jurisdiction question which the Carrier Members of the Division now urge. We dismissed that claim with prejudice, on the ground that it had already been settled on the property, but we did not comment on Carrier's contention that the operations involved were outside our jurisdiction. (Award 7061, Carter.)

As already noted, Carrier has not raised this procedural question in the present dispute. We think its failure to do so here, and its participation in this proceeding solely on the merits of the controversy, must be construed as a waiver of any jurisdictional contention. In effect the Carrier has joined with the Organization in requesting us to interpret and apply the Agreement to the facts of this case.

The Claimant's dismissal was based on Carrier's finding that he was guilty of the following charge: That while in service on a given trip, "You invaded the privacy of the woman occupant of berth lower 3 car 4601 and placed your hand upon her person." The Organization contends Claimant's discharge was in violation of the following Agreement provision appearing in Rule 49:

> "Discipline shall be imposed only when the evidence produced proves beyond a reasonable doubt that the employe is guilty of the charges made against him."

It should be noted at the outset that both parties agree that Carrier has a heavy responsibility to protect the traveling public against the type of incident that is alleged to have occurred in this instance. It must also be apparent, however, that Carrier's employes are entitled to the protection afforded them by the Agreement. The contract provision quoted above sets forth the standard with which the Carrier must comply in determining whether to impose discipline upon an employe. In reviewing Carrier's disciplinary action, its is our function to ascertain whether there has been any departure from the contractual standard developed by the parties.

Claimant's seniority date is December 31, 1939. There is no indication in his prior record of any tendency along the lines here asserted. Management's investigation of the alleged incident was precipitated by a letter received from an adult female passenger approximately five weeks after the incident is said to have occurred. The letter stated in substance as follows: At about 2:30 A.M. on the date in question the passenger was awakened by someone feeling her body between the bed clothing. She turned over and away, and "the person withdrew his arm." She turned on the light and read a book until she became sleepy. About an hour after she turned off the light, two more attempts were made to feel her body. She did not get up to see who the person was because she was too scared. At about 4:50 A.M. she felt a hand on her bare leg above the knee, at which time she yelled and looked out of the curtains—which were found partially unbuttoned—and recognized the Porter of her car. She thereupon requested that he get the Conductor. The Porter left but the Conductor did not appear. Thereafter the passenger sat in her berth reading, and was not further annoyed. The Porter rendered no service to her and she had to carry her own baggage out of the car at Toronto.

A report filed by Carrier's Special Agent indicated his investigation disclosed the complaining passenger is a person of good reputation in her home community. It is established that Claimant was assigned to the car occupied by the complaining passenger on the date involved. He was off duty from 3:30 A.M. to 5:30 A.M. but occupied a berth in his car during this period.

The complaining passenger appears to have spoken to no one concerning her alleged experience, either during or immediately upon the termination of her journey. A female passenger and a male passenger who also occupied the same car during this trip could offer no information when later interviewed by the Carrier's investigators. The Pullman Conductor on this trip submitted a statement declaring the complaining passenger had every opportunity to speak to him before arriving at Toronto, but she did not do so. The Porter on duty in the adjoining car stated he periodically patrolled the car in question while Claimant was off duty but that he had no knowledge of the alleged incident.

Under the set of facts contained in this record, we think Carrier was not justified in concluding the charge against Claimant was proved beyond a reasonable doubt. We find it difficult to believe that an adult woman passenger who was repeatedly molested as charged would not, at the very least, have reported this incident to someone in authority not later than the termination of her trip in Toronto. Her failure to do so casts serious doubt upon the accuracy of her statement submitted five weeks later. We note that there were three other women occupying the same car on the subject trip, to none of whom the complaining passenger appears to have made any comment about her alleged experience. The male passenger noted above was the police chief of the complaining passenger's home town of North Bay, but as we have seen, he knew nothing of this incident. We think it most unlikely that the complaining passenger would not have commented about her alleged experience to someone even before leaving the train at Toronto.

In view of what has been said above, we must conclude that Claimant was dismissed in violation of the Agreement. He must be made whole in accordance with Rule 57 of the Agreement, minus any compensation that otherwise may be due for the period involved in the postponement of the hearing on the property at the Organization's request.

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 Employe involved in this dispute are respectively Carrier and Employe 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 in accordance with the above Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 16th day of January, 1959.

DISSENT TO AWARD NO. 8693, DOCKET NO. PM-9482

Award 8693 should have dismissed the instant claim for lack of jurisdiction because it arose in the Dominion of Canada. Carrier's not having raised this procedural question in the present dispute should not have been construed as conferring extraterritorial jurisdiction upon this Board. This can be done only by an Act of Congress.

In Award 8676, this Division held:

> "The jurisdiction of the Board is conferred by the Railway Labor Act, and must be exercised in accordance with the terms of that Act * * *."

Therefore, unless it can be ascertained that it was the intention of Congress to have the provisions of the Railway Labor Act apply beyond the territorial limits of the United States, it follows that the jurisdiction of the Adjustment Board is also limited to the territorial limits of the United States, see:

50 Am. Jur., Statutes, par. 487

> "Unless the intention to have a statute operate beyond the limits of the State or country is clearly expressed or indicated by its language, purpose, subject matter or history, no legislation is presumed to be intended to operate outside the territorial jurisdiction of the State or country executing it. To the contrary, the presumption is that the Statute is to have no extraterritorial jurisdiction of the State or country executing it, and it is generally so construed. An extraterritorial effect is not to be given the Statutes by implication. Accordingly, a Statute is prima facie operative only as to persons or things within the territorial jurisdiction of the lawmaking power which executed it. * * *"

The question of whether it was the intention of the Congress to have the Railway Labor Act operate beyond the territorial limits of the United States has been before the Courts on at least two occasions. On both occasions the Courts concluded that the Act has no extraterritorial application.

In the first of these cases, **Air Line Dispatchers Association** v. **National Mediation Board,** 189 F. 2d 685, this question was raised because the Mediation Board dismissed an application looking to certification under the Railway Labor Act. The facts reveal that the Mediation Board refused certification because the airline involved and its employes were based outside of the continental United States. It reasoned that, under the circumstances, certification would give the Act extraterritorial jurisdiction—something which it concluded was never intended by Congress. The Court agreed, and in its opinion gave the following reasons:

> "Turning to the merits of the decision made by the Board, we agree that the Act does not extend to an air carrier and its employees located entirely outside the continental United States and its territories. **The basic statute, the Railway Labor Act, defines the carriers to which it applies as 'any * * * carrier by railroad, subject to chapter 1 of Title 49 [Interstate Commerce Act] * * *.' (45 U.S.C.A. § 151, First.) 'Employee' is defined as a person in the service of a carrier who performs any work defined as that of an employee or subordinate**

official in the orders of the Interstate Commerce Commission. (Id., § 151, Fifth.) The Interstate Commerce Act is limited in its application to common carriers engaged in interstate and foreign transportation 'but only in so far as such transportation * * * takes place within the United States.' (49 U.S.C.A. § § 1 (1) (c), 1 (2).) THERE IS NO QUESTION THAT AS APPLIED TO RAILROADS THE RAILWAY LABOR ACT DOES NOT EXTEND BEYOND THE UNITED STATES. By Title II (45 U.S.C.A. § § 181-188), approved April 10, 1936, the Act was extended, with certain exceptions not now material, to common carriers by air 'engaged in interstate or foreign commerce' and their employees. (45 U.S.C.A. § 181). But Section 202 of said Title II provides: "The duties, requirements, penalties, benefits, and privileges prescribed and established by the provisions of Title I of this Act, except section 3 thereof, shall apply to said carriers by air and their employees in the same manner and to the same extent as though such carriers and their employees were specifically included within the definition of "carrier" and "employee", respectively, in section 1 thereof.' (45 U.S.C.A. § 182.)

The Board therefore properly concluded that the territorial scope of the Act in its application to air transport was like that applicable to railroads. The legislative history, though somewhat ambiguous, confirms this view.

* * *

Legislation is ordinarily to be given only domestic application. **Foley Bros.** v. **Filardo,** 1949, **336** U.S. 281, 69 S. Ct. 575, 93, L. Ed. 680 [16 Labor Cases No. 65,014]. Explicitness is to be expected from Congress if its intention is to extend the legislation extraterritorially. Ibid.

The interwoven structure of the original Act and the amendments respecting air transportation do not supply such explicitness. On the contrary, as said in the well reasoned Determination under review, 'The Board fails to find any specific direction in the Act, as amended, permitting it to extend its jurisdiction beyond the continental limits of the United States and its territories." (Emphasis added.)

The second of these cases, **Air Line Steward's Association** v. **Northwest Airlines,** is reported in 35 Labor Cases, paragraph 71, 595. All that need be said in connection with this case is the Court agreed in full with the conclusions set out in the opinion of the **Air Line Dispatcher's Case, Supra.** Language indicating this approval can be found in the following paragraphs:

"The question is not wholly one of first impression. In **Air Line Dispatchers Association** v. **National Mediation Board,** 189 F. 2d 685 [Labor Cases No. 66,340], cert. den. 342 U.S. 849, the Court of Appeals for the District of Columbia concluded that the National Mediation Board had properly dismissed an application looking to certification under the Act. * * *

* * *

Petitioner would distinguish the **Air Line Dispatchers' case, supra,** upon the grounds that the air carrier involved operated solely outside the United States and its territories and that the employees involved were not members of aircraft crews. * * *

* * *

An Act of Congress is intended to apply within the territorial jurisdiction of the United States, unless a contrary intent appears. *The instant case has to do with regulating labor conditions, beyond* the bounds of the United States. The intention so to do cannot be attributed to Congress in the absence of a clearly express purpose."

The Carrier Members cited First Division Awards 11149, 11150 and 11151 as precedent for a dismissal award. In the latter two awards, like in the instant case, the Carrier had not raised this same procedural question, but, notwithstanding, the First Division dismissed the claims.

Authorities agree that jurisdiction which is lacking cannot be conferred by *failure of the parties to raise the question.* **Spencer v. Patey,** 243 F. 555.

Furthermore, jurisdiction, when lacking cannot be conferred upon a tribunal by agreement, consent or collusion between the parties. **Page** v. **Wright,** 116 F. 2d 449. That this rule applies to the Adjustment Board, see Award 1697 where Referee Thaxter stated:

"* * * the parties cannot by agreement confer on this Division of the Board jurisdiction over a dispute not covered by the applicable provisions of the statute. * * *"

In this connection, the now defunct **United States Railway Labor Board** refused to take jurisdiction when it was called upon to dispose of claims of foreign origin. In this respect attention is directed to **Decisions Nos. 380 and 394,** wherein that Board held:

"The employee in question being engaged in work outside of the boundaries of the United States and the Labor Board being of the opinion that the authority vested in it by the Transportation Act, 1920, does not extend beyond the territorial limits of the United States, the Labor Board decides that it has no jurisdiction in this dispute and the case is therefore removed from the docket and the file closed."

In addition to lacking jurisdiction to decide the instant claim on its merits, the record in the case covered by Award 8693 did not warrant the majority's sustaining of the claim.

This is a discipline case. It is the well settled policy of this tribunal in such cases not to overrule the decision of the carrier's hearing officer, in whom by contract the power to weigh the evidence and adjudge guilt or innocence is vested, unless it can be shown that said officer's decision was so arbitrary, unreasonable, or capricious as to amount to an abuse of discretion. We have repeatedly held that where the record contains evidence upon which a finding of guilt is premised, even though contradicted by other evidence, we will not weigh the evidence and/or substitute our judgment for that of the carrier.

In Award 8693, the record shows that the incident upon which the charge is based occurred during the early morning hours on May 29, 1956, and came to the attention of The Pullman Company on July 4, 1956, at which time the woman passenger involved addressed a letter to the carrier's Superintendent at Toronto, detailing the events which occurred on the former date. The woman passenger permitted use of her name and address in the investigation

and was accessible for interview by the accused's representative, although the record does not show that such an interview was sought notwithstanding that the employes had a copy of the passenger's report. The record shows that careful investigation of the passenger's reputation was made by carrier's representatives, and it was found she is a woman with "a very good reputation, is well educated and the type of person any father or mother would be proud to have for a daughter."

In her written testimony, the woman passenger, who occupied lower berth 3 on the trip in question, described the repeated attempts made by the accused to invade her privacy and further pointed out that she was certain of the identity of her molester, since she saw him face to face at the time he last attempted his intrusion and knew by his appearance and the sound of his voice that he was the porter of her car. Although she attempted to report the actions of the porter promptly to the conductor, the record shows that, notwithstanding her request, the conductor did not appear and she was, in her own words, "afraid to get out of my berth on account of my porter molesting me several times before 2:30 A.M. and 5:00 A.M."

Testimony of the woman passenger's father, whose reputation was also investigated and found to be good, disclosed that "shortly after" his daughter made the trip on May 28, he received a letter from her describing her experience with the porter, and that he immediately contacted the Canadian National Railway in North Bay and informed it of the incident.

Thus, the report addressed to The Pullman Company on July 4, 1956 by no means constituted the first endeavor on the part of the passenger to report the improper actions of the porter.

Ignoring this fact, and ignoring also the fact that the record unquestionably contains substantial evidence upon which the carrier's hearing officer premised his finding of guilt, the majority asserts that the complainant's "failure" to report the incident to someone in authority not later than the termination of her trip "casts serious doubt upon the accuracy of her statement submitted five weeks later." In so holding, the majority pre-empts the authority of the carrier's hearing officer and finds "serious doubt "where the hearing officer, who had the accused and all the evidence before him, found none.

The majority ostensibly recognizes that the "carrier has a heavy responsibility to protect the traveling public," but proceeds to make a mockery out of this statement by gambling the public interest upon the assumption that a woman of known good character would for unknown reasons detail a most serious charge against an employe who the record shows was a stranger to her. In assuming without basis that the complainant passenger deliberately fabricated a false story for the purpose of incriminating a porter, the majority has adopted an unreasonable and strained interpretation of the facts.

Carriers have a legal and moral responsibility to the traveling public to exclude the unfit from their service. In **M. St. Paul & S. S. M. Ry. Co. v. Rock,** 297 U. S. 410; the court held:

> "The Carriers owe a duty to their patrons as well as those engaged in the operating of their railroads to take care to employ only those who are careful and competent to do the work assigned to them and to exclude the unfit from their service."

Award 4471 (Stone):

"* * * Upon the management rests the obligation of safe operation of the railroad, the courteous treatment of its patrons and the working conditions of its employes. To maintain that obligation it is necessary that Carrier have the right for proper cause to discipline and to discharge. * * *"

Award 3985 (Fox):

" * * * the Carrier, in performing a service patronized by the public, should not be required to keep in its employ a person reasonably believed to have a tendency to molest women passengers. * * *"

In **O.R.C. et. al. vs. Pullman Company** (D.C. Wisc. 1948), the court, in a similar molestation case, held that "The Pullman Company, even to a greater degree than a Railway, must impose discipline upon its employes who willfully violate its rules." In Award 7774, we stated this carrier "owes the traveling public unlimited assurance that it will not be exposed to such possibilities as are here alleged to have happened." Numerous similar Awards have been ignored by the majority, although it professes to recognize the importance of protecting the traveling public from incidents of this kind.

It is evident The Pullman Company has a special problem in dealing with employes accused of molestation. The privacy and semi-darkness of a Pullman car lend themselves to acts of this kind. There usually are no witnesses about since such actions are engaged in when no one is present. The testimony of the victim is usually the sole source of evidence. If, as in this case, the Board chooses to ignore this evidence and to overrule the carrier, the carrier is helpless to remove employes guilty of the most reprehensible acts from its employ. The decision of the majority herein represents a victory for the guilty and a defeat for the traveling public.

For the foregoing reason, among others, Award 8693 is in error and we dissent.

/s/ W. H. Castle

/s/ J. F. Mullen

/s/ R. H. Butler

/s/ C. P. Dugan

/s/ J. E. Kemp