# Award No. 9455
# Docket No. PC-11412

## NATIONAL RAILROAD ADJUSTMENT BOARD

## THIRD DIVISION

**William E. Grady, Referee**

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## PARTIES TO DISPUTE:

## ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN
**(Pullman System)**

## THE PULLMAN COMPANY

**STATEMENT OF CLAIM:** The Order of Railway Conductors and Brakemen, Pullman System, claims for and in behalf of Conductor R. A. Viall of the Chicago Western District, that The Pullman Company acted arbitrarily and capriciously in discharging Conductor Viall from service under date of December 18, 1958.

We further contend that based on the evidence of record, Conductor Viall should not have been discharged.

We now ask that Conductor Viall be restored to service, with all rights, including vacation rights, and paid for all lost time in accordance with the applicable rules of the Agreement.

**OPINION OF BOARD:** This is a discipline case. Conductor R. A. Viall was discharged on December 18, 1958 on a finding that on August 15, 1958 he had been discourteous to three passengers seeking Pullman accommodations and to several coach passengers receiving beverage service in a Pullman lounge car. For convenience we shall refer to Viall as the "Claimant".

The Organization contends that Claimant was not given a fair hearing and that his guilt was not established beyond a reasonable doubt; that, consequently, the Carrier violated Rule 49 of its Agreement with the Organization, dated September 21, 1957, and acted arbitrarily.

The nub of the Organization's contention that the hearing was unfair lies in the fact that the Carrier, in support of its charge against Claimant, received in evidence signed statements by persons not present at the hearing, gave the statements probative value and thereby deprived Claimant of an opportunity to cross-examine.

Much has been written about a defendant's right to confront adverse witnesses. It evolved at common law as a procedural safeguard against arbitrary judgment when government asserted its penal powers or its civil powers

were invoked. In that frame of reference it generally is deemed a necessary safeguard in order for a hearing to be fair.

Here we have a different frame of reference. At common law, absent an individual employment contract, an employer was free to discharge an employe without any hearing. That is so today unless a hearing is required by statute (e.g., war veterans in civil service) or, as here, by a collective bargaining agreement.

Rule 49, subdivision (a) of the Agreement requires a "fair" hearing and other portions of the Rule provide how the hearing on a charge against an employe, shall be conducted. Rule 49 thus establishes the criteria by which the "fairness" of a hearing, within the sense of the Agreement, must be judged.

The material portions of Rule 49 are subdivisions (e), (g) and (h).

Subdivision (e) provides that names, addresses and statements of witnesses shall be exchanged and may be used as evidence. Claimant received copies of the statements used and the names and addresses of the authors.

Subdivision (g) provides for cross-examination of any witness "who is present at the hearing." None of the authors of the statements were present.

Subdivision (h) provides that an employe of the Carrier who is a primary accuser or who has knowledge of the facts or who has given a statement, shall be present at the hearing (if "immediately available"). None of the authors of the statements were employes of the Carrier. The only employe witness, other than Claimant himself, was produced by the Carrier and was cross-examined by Claimant's representative.

Thus the conduct of the hearing comported with the requirements of the Rule and Claimant was not denied any safeguard provided by it. The hearing was therefore "fair" and as that term is used in the Rule (Award Nos. 8987 and 9311).

The Carrier's finding of guilt beyond a reasonable doubt is adequately supported under the applicable principles of review (Award No. 6924). The Carrier was entitled to consider Claimant's prior record of discourtesy to passengers in setting the penalty and no sound ground appears for disturbing it.

**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 did not violate the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 2nd day of June, 1960.