Award No. 10595
Docket No. PM-11828

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION
(Supplemental)

Levi M. Hall, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF SLEEPING CAR PORTERS

THE PULLMAN COMPANY

STATEMENT OF CLAIM: * * * for and in behalf of A. N. Langford, who is now and for some years past has been, employed by The Pullman Company as a porter operating out of the District of Detroit, Michigan.

Because The Pullman Company did, through Superintendent F. W. Finnegan of Detroit, take disciplinary action against Mr. Langford by giving him an actual suspension of thirty (30) days from his regular job without pay.

And further, because the charge against Porter Langford and upon which he was penalized was not proved beyond a reasonable doubt as is required by the rules of the Agreement between The Pullman Company and Porters, Maids, Attendants, and Bus Boys employed by The Pullman Company, represented by the Brotherhood of Sleeping Cars Porters.

And further, for the record of Mr. Langford to be cleared of the charge in this case, and for him to be reimbursed for the thirty (30) days pay lost by him as a result of this unjust action.

OPINION OF BOARD: This is a discipline case. Certain of the facts involved are not contested. On the 7th of October, 1959, the Claimant, A. N. Langford, received notice that a hearing would be held on October 14, 1959, on the charge that while he was assigned in extra service to "Car Lorain County", Loading #109, Line Special, leaving Detroit, Michigan, on C & O Chevrolet Special Train, en route White Sulphur Springs, West Virginia, he had the odor of intoxicants on his breath and that in the hearing set consideration would be given to a former incident wherein Langford had, on April 10, 1953, been given 15 days suspension for having the odor of intoxicants on his breath. (The date was later corrected to April 10, 1955). A hearing on the charge was held on October 14, 1959.

It is the contention of the Claimant that the charge made against him was not proved beyond a reasonable doubt as required under Rule

49 of the Agreement; that the evidence against him was all written and he was afforded no opportunity of cross examining any of those making written statements; that the Carrier has not given consideration to all the evidence presented and he, the Claimant, has not had a fair hearing.

Carrier on the other hand insists that the Claimant was afforded a fair and impartial hearing; that Claimant Langford had disobeyed the instructions furnished to the Claimant in the respects claimed was amply substantiated by competent evidence which established his guilt beyond a reasonable doubt.

The Carrier had promulgated and issued to its employes a book of INSTRUCTIONS TO PORTERS AND BUS BOYS, dated August 1, 1952. The pertinent part of the instructions pertinent to this inquiry appears on Page 4, Paragraphs 1 and 4, and reads, as follows:

> "Any of the following derelictions will subject the employe to discipline or dismissal:
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> > "Transporting, using, or having possession of intoxicants or narcotics of any kind while in service or deadheading, or while on Company or railroad property. An employe reporting for duty, whether the assignment is to service with passengers or for a deadhead movement on car or on pass, with the odor of intoxicants on his breath or under the influence of intoxicants or narcotics will be consider in violation of this regulation".

Though not presented on the property, at the panel hearing it was urged by the Petitioner that the language in the instruction—"An employe reporting for duty . . . with the odor of intoxicants on his breath . . . will be considered in violation of this regulation"—limits the Carrier to proof of the "odor of intoxicants on his breath" to the time that the employe reports for duty, only, and there is no such evidence in the record, that for the foregoing reason the claim should be sustained. A careful reading of the entire instruction warrants no such inference and the contention is without merit.

The Carrier has an absolute responsibility to furnish the utmost protection to the traveling public. In the performance of that duty, it has a right to exclude the unfit from the railroad service, if it becomes necessary. Historically, it has been uniformly recognized that an employer may discipline employes if it becomes necessary to a proper conduct of the service. Of course that right, or a portion of it, may be bargained away. In conformity with its right to discipline employes the Carrier in the instant case issued a book of instructions a portion of which has been herein before cited and is the basis for the charge made against Claimant Langford.

However, the Carrier has limited in part its right to discipline an employe by Rule 49, of the Agreement effective January 1, 1953, which reads, in part, as follows:

"RULE 49. Hearings. An employe shall not be disciplined, suspended or discharged without a fair and impartial hearing.

"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."

Petitioner complains that all of the statements presented by the Carrier were in writing and the Claimant was afforded no opportunity to cross-examine the persons making statements. This Division is definitely committed to the proposition that there is nothing in the Agreement which specifies the type of evidence that may be submitted at a hearing. There is no obligation resting on the Carrier to produce its witnesses in person at any hearing. In fact in the instant case, Rule 51 of the Agreement provides, as follows:

"RULE 51. Witnesses, Testimony, and Records. At the hearing the employe aggrieved may remain throughout the proceedings and with the designated representatives of the interested parties shall have the following privileges:

"(1) To produce witnesses and **cross-examine any who are present at the hearing and testify;**

* * * * *

"When testimony, **written or oral,** is presented in a hearing against an employe, only that part of the testimony which is germane or relevant to the charges against the employe shall be admitted in the record." (Emphasis ours.)

It can be readily observed that the only restriction on written testimony is that it be "germane or relevant to the charges."

This conclusion has been previously arrived at in many awards of this Board—that written statements may be received and considered at the hearing on the property and if they contain relevant facts which are worthy of belief may form the basis for the discipline of one charged with a dereliction of duty.

The principal and most serious contention of the Claimant is—that the evidence adduced at the hearing did not prove "beyond a reasonable doubt" that Langford was guilty of the charge made against him by the Carrier. The words "reasonable doubt" are words of common connotation as intelligible to laymen as to those by profession learned in the law. Award 6924 (Rader) Rule 49 requires a careful analysis by the Carrier through its hearing officer of all the evidence submitted on the property both written and oral. It means that, if, after considering and weighing all of the evidence both that submitted by the Carrier in support of the charge made and that submitted in defense of the Claimant, there is a substantial doubt remaining in the mind of the hearing officer as to

whether Claimant is guilty, then the Claimant is entitled to the benefit of that doubt and it is the duty of the hearing officer to find the charge has not been sustained by the testimony.

However, the degree of proof required in Rule 49, does not change the concept of the function of this Board in discipline cases. The appeal to this Board is not to be considered as requiring a hearing "de novo" or a new trial on the part of the Board. We sit here, only, as an appeal board. We cannot substitute our judgment for that of the Carrier. To the Carrier is reserved the right to pass on the credibility of the witnesses and the weight it will attach to testimony. It is for the Carrier to say who it will believe and whom it will disbelieve. It is not within the province of this Board to weigh conflicting testimony.

As members of the appeal board, then, what are our duties and responsibilities?

We have a right to review the testimony submitted at a hearing on the property to determine whether there is any substantive testimony, if believed by the Carrier, from which the Carrier could have found that the charge against the Claimant was sustained in compliance with Rule 49; secondly, we have a right to review the testimony to determine whether a conclusion which has been reached by the Carrier is supported by competent evidence as contrasted to testimony that is speculative, conjectural or based on mere conclusions unsupported by any substantial evidence; thirdly, we have a right to review the record to determine whether the conduct of the Carrier in reaching a conclusion has been arbitrary, capricious, unfair or unreasonable.

Having, as it were, laid down the rules we must now consider their application to the instant case. Reference will only be made in this Opinion to that testimony in the record which is necessary to properly demonstrate the propriety of the reasoning on which a conclusion has been reached. It is the testimony of Commissary Inspector McGann that, while at the buffet in the club car at 6:30 P. M., he observed the Claimant Langford came to the door of the buffet to get some liquors and glasses; that because of his unusual conduct he followed him from the club car to the "Lorain County" car, that there he approached Langford, had some discussion with him and observed that—"He had a very noticeable odor of liquor on his breath as he spoke". McGann then went in search of Service Supervisor W. J. Kochan who returned with McGann to "Lorain County" car and who stated—"There was a heavy odor of liquor" on Langford's breath. Langford was put off from the train at Columbus at approximately 9:30 P. M. There were two railroad employes who observed him at that time and stated they did not detect any odor of liquor on Langford's breath. There was also a letter from a doctor who examined Langford at 12:00 P. M. and wrote that Langford was not under the influence of liquor at that time but said nothing about any odor on his breath.

Langford appeared and testified at the hearing on October 14th in his own behalf. He denied that McGann and Kochan detected any odor of liquor on his breath. At no place in the record is there a denial by Langford that he had been drinking on the day in question. The only reference to the subject was that contained in a statement of the Claimant addressed to the District Superintendent on August 12, 1959—"Nor had I consumed of intoxicants of any nature that would result in the odor of liquor on my breath."

Testimony of McGann and Kochan that they detected a strong odor of liquor on Langfords breath is sufficient to justify the Carrier's conclusion that Langford was guilty of the charge (testimony of a layman that he smells the odor of liquor on a man's breath is competent evidence to sustain a finding that the man did, in fact have the odor of liquor on his breath in a court of law).

However in the instant case the Carrier could have made no other finding under the evidence. The only testimony in conflict with the statement of McGann and Kochan was that of the Claimant himself, who simply asserted their statements were not true. He doesn't deny anywhere that he had imbibed in any intoxicating liquor; from the statement he made to the Superintendent; heretofore referred to, you could well conclude that he had. Little weight could be given to testimony of witnesses who understandingly might not have detected the odor of liquor on Langford's breath three hours later at 9:30 P. M.

There was some question raised as to the propriety of receiving evidence of prior disciplinary action against Claimant on a similar charge and having it considered at the hearing. Consideration of this was perfectly proper, not for the purpose of proving Claimant guilty of the charge in the instant case, but, for the purpose of determining the degree of severity of discipline required for the present dereliction of duty.

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 Agreement has not been violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 4th day of May 1962.