Award No. 11008
Docket No. PM-12473

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Robert O. Boyd, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF SLEEPING CAR PORTERS

THE PULLMAN COMPANY

STATEMENT OF CLAIM: ". . . for and in behalf of Frank Brown, who is now, and for some time past has been employed by The Pullman Company as a porter operating out of the Chicago District.

Because The Pullman Company did, under date of December 9, 1960, take disciplinary action against Porter Frank Brown by giving him an actual suspension for fifteen (15) days without pay.

And further, because the Charge upon which this penalty was based was not proved beyond a reasonable doubt as is required under the rules of the Agreement governing the wages and working conditions of the class of employes of which Porter Brown is a part.

And further, for his record to be cleared of the charge in this case, and upon his return from furlough, he not be required to lose fifteen (15) days pay as a result of this penalty."

OPINION OF BOARD: On October 1, 1960, the Claimant, an extra porter, was assigned to Car 312 scheduled to leave Chicago at 3:00 P. M. for Portland, Oregon. Prior to reaching St. Paul, the Pullman Conductor wired the Superintendent at St. Paul suggesting that the Claimant be relieved because he was incapacitated. At St. Paul the Conductor, the Superintendent not being available, relieved the Claimant of his assignment and he was furnished transportation back to Chicago. On November 8, 1960, the Carrier wrote Claimant that a hearing would be held on the charge that the Claimant while on the above mentioned assignment was "under the influence of intoxicants". The hearing was duly held at the time and place given in the notice and thereafter the Carrier notified the Claimant he was suspended from service for 15 days, with credit for 9 days lost by reason of being taken off his assignment, and therefore the suspension to run from December 9 to December 15, 1960. At the time of the notice of suspension the Claimant was on furlough.

The Carrier's book of instructions provides that an employe is subject to discipline or dismissal if he transports, uses or possesses intoxicants, while in service, and reporting for duty "under the influence of intoxicants" is to be considered a violation of the regulation. The parties

in their collective bargaining agreement have provided rules of procedure for the handling of discipline or discharge matters. Rules 49 and 51 are pertinent here. Rule 49 reads:

> "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 is the contention of the Claimant that the charge against him was not proved beyond a reasonable doubt.

At the outset we must therefore determine what is meant by "reasonable doubt". For this purpose we adopt here the language dealing with that question in Award 10595 (Hall) reading as follows:

> ". . . 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.
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> "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."
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> "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 conductor of the Carrier in reading a conclusion has been arbitrary, capricious, unfair or unreasonable."

In the light of these rules we must examine the evidence adduced at the hearing. Except for the oral testimony of the Claimant the record

consists of various written statements. A summary of the statements follow:

1. The statement of the Pullman Conductor shows that shortly after departure of the train he found the Claimant in a confused condition and detected the odor of liquor on his breath; that the Claimant was inattentive to his duties; that about 4:45 P. M. he still detected the odor of liquor on his breath; that the Claimant spent most of his time sleeping in one of the rooms on the car.

2. The statement of the passenger representative shows that he thought the Claimant had the outward characteristics of a man under the influence of alcoholic beverages.

3. The statement of a passenger shows that the actions of Claimant made it perfectly apparent to him that the Porter (Claimant) was either under the influence of some alcoholic beverage or drug.

These statements were based on observation of the Claimant following departure from Chicago.

The Claimant denied the charge and contends that other statements placed in the record refute the ones mentioned above. He refers to the statement of the Day Agent who was very close and face to face with Claimant before departure to the effect that neither actions, appearances or breath gave indication that he had indulged in intoxicants. To the same effect was the statement of the Pullman Electrician. There were also statements of various people who saw the Claimant after arrival in St. Paul to the effect that Claimant was sober. These people observed the Claimant several hours after the Conductor first noticed the condition of the Claimant Porter. There were also statements of two passengers to the effect that the Claimant rendered prompt service.

In reviewing the entire record and applying the rules mentioned above we conclude that there is substantive and competent testimony upon which the Carrier could find the charge sustained beyond a reasonable doubt, and that such conclusion was not capricious or unreasonable.

The Claimant objected to the Documents being introduced into the record, asserting they contained opinion and the Claimant had no opportunity to cross-examine the persons making the statements. The Claimant relies on Rule 51. This rule has been analyzed and discussed in many recent awards (9311, 10595 and 10596) all to the effect that there is no obligation on the part of the Carrier to produce its witnesses in person at hearing and that testimony in writing is permitted by Rule 51 of the Agreement. It should be noted that the Carrier furnished to the Claimant, in advance of the hearing, the statements of the Conductor which included the names of other possible witnesses.

Based on the entire record we have, therefore, concluded that there is no proper basis for this Division to over-turn the decision of the Carrier.

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 was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 20th day of December 1962.