Award No. 12090
Docket No. PM-13951

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Michael J. Stack, Jr., Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF SLEEPING CAR PORTERS

THE PULLMAN COMPANY

STATEMENT OF CLAIM: * * * for and in behalf of A. L. Jennings, who was formerly employed by The Pullman Company as a porter operating out of the Chicago District.

Because The Pullman Company did, under date of January 4, 1963, take disciplinary action against Mr. Jennings by discharging him from his position as a porter for The Pullman Company, effective as of January 4, 1963.

And further, because Mr. Jennings did not have a fair and impartial hearing as is provided for in the Agreement between The Pullman Company and the class of employes of which Mr. Jennings is a part, represented by the Brotherhood of Sleeping Car Porters.

And further, because the charge preferred against Mr. Jennings was not proved beyond a reasonable doubt as provided for under the rules of the above-mentioned Agreement.

And further, for the record of Mr. Jennings to be cleared of the charge in this case and for him to be returned to his former position as a porter for The Pullman Company operating out of the Chicago District with seniority rights and vacation rights unimpaired and with pay for such time that was lost as a result of this unjust and arbitrary action.

OPINION OF BOARD: This is a Rule G case in which the discipline was dismissal.

Two questions are raised:

a. Was the hearing fair and impartial within the meaning of Rule 49, and

b. Does the record support the Carrier's action?

Our review of the record leaves us to conclude that under the facts of this case the failure to confront the employe with the witnesses against him and to afford him an opportunity for cross examination prevented this hearing from being fair and impartial.

The employe, a twenty-five year man with the Carrier, operated out of the Chicago District. The incident complained of took place in Seattle. All of the witnesses against him were located in Seattle. The hearing was held in Chicago. The case for the Carrier was submitted in the form of written statements with no witnesses actually testifying.

An examination of these statements reveals the following facts. The employe reported for work an hour and a half late. At that time he explained that he had left a request with the hotel clerk that he be called two hours before his starting time. Through an error on the part of the hotel personnel he was not called. He stated that he had gone to bed in the afternoon after taking 8 anacin tablets, cough medicine and pills and other medication prescribed by his own doctor. He in fact had a heavy odor of Vicks about his person. An examination of his baggage disclosed a bottle of cough medicine and the pills mentioned.

He denied having had any intoxicants. Of the individuals who had an opportunity to smell his breath Superintendent Brown stated he could smell intoxicants on it and the odor of Vicks about his person. Electrician Slereth detected Vicks which was so strong he could not state whether or not the employe was under the influence of intoxicants. Stationmaster Steiner stated the employe had a strong odor of Vicks on him and a slight odor of some kind of alcohol on his breath. Patrolman Buxton said he smelled of Vicks medication and some other odor that he could not definitely identify. He said "there was no doubt that his breath smelled of some foreign odor". Conductor Hecke stated the only odor he could detect was a strong medicinal odor. Porter Smith did not observe his breath. The results of a blood test voluntarily taken afterwards showed the presence of 0.20 grams alcohol in the employes blood. The report further stated that in concentrations above 0.15 "is usually considered . . . that there is some degree of intoxication". The employe was taken to the hospital because he stated he was sick. There is nothing in the record to show the results of his examination other than the blood report.

The employe stated he was made nervous and embarrassed by the questioning he received. His speech was described as slightly incoherent and his eyes as glassy. He was quite cooperative and did not become belligerent or arrogant except for one reference that the questioning reminded him of the Army.

We have set forth the facts at length not to evaluate them but to show that they are susceptible to inferences consistent with proper behavior and also with improper behavior. The further development of these facts by cross-examination is essential to a fair determination of this case.

We do not hold that in all cases the employe in a discipline case has the right to a confrontation of the witnesses. In fact in some cases a fair hearing would be rendered where the Carrier's case is made out on the basis of statements alone. Here, however, where there is a great and expensive distance between the witnesses and the hearing location where the evidence is conflicting or ambiguous, where there was an unqualified denial of wrong doing, where the discipline is dismissal and when the employe has such long

service we believe ". . . a fair and impartial hearing . . ." requires confrontation and the opportunity to cross-examine the witnesses against him.

We believe this matter should be remanded to the property for a rehearing in accordance with this opinion.

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 violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 14th day of January 1964.

CARRIER MEMBERS' DISSENT TO AWARD 12090
DOCKET PM-13951

Award 12090 is palpably wrong because, after reciting facts of record which irrefragably evidence Claimant's guilt of the charges against him, the majority reaches its conclusion —

> "* * * that under the facts of this case the failure to confront the employe with the witnesses against him and to afford him an opportunity for cross examination prevented this hearing from being fair and impartial. * * *"

by citing Rule 49 and ignoring —

1. Rule 51 of the Agreement between the parties.

2. Principles firmly established and consistently followed by this Board.

3. Precedent Awards cited to the Referee and involving the same parties and issue.

In Awards too numerous to mention, this Division has consistently interpreted Rule 51 as imposing no obligation on the Carrier to produce its witnesses in person at hearings but as specifically permitting the introduction

of written statements thereat. The authority of this Board is limited to interpreting Agreements as written by the parties. We cannot assume that the parties performed a vain and useless act in negotiating Rule 51, or consider it as superfluous.

For the foregoing reasons, among others, we dissent.

/s/ R. E. Black

/s/ R. A. DeRossett

/s/ W. F. Euker

/s/ G. L. Naylor

/s/ W. M. Roberts