Award Number 136
Docket Number PM-180

NATIONAL RAILROAD ADJUSTMENT BOARD

Third Division

Wm. H. Spencer, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF SLEEPING CAR PORTERS
THE PULLMAN COMPANY

DISPUTE.—"Dispute with The Pullman Company relative to summary dismissal of Mr. J. W. Beasley from the service of said company on the 9th day of October, A. D. 1934."

FINDINGS.—The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that—

The carrier and the employee involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

The parties to the said dispute were given due notice of a hearing thereon.

As a result of a deadlock, William H. Spencer was called as Referee to sit with this Division as a member thereof.

HISTORY OF DISPUTE.—On October 9, 1934, Mr. G. H. Gibney, District Superintendent of The Pullman Company for the Chicago Northern District addressed this communication to Pullman Porter J. W. Beasley:

> "As your performance of the duties of the position has not been satisfactory to the Management, your services as Porter will not be required."

On the date of his dismissal, while in the office of Mr. Gibney and at his suggestion, Porter Beasley made a written explanation of the episode and delivered it to Mr. Gibney.

On October 15, 1934, Beasley notified District Superintendent Gibney that he had selected a committee, composed of certain named individuals, to represent him in a hearing on "the complaint filed against me by Mr. Warfel on the 9th day of October."

On November 5, 1934, Mr. Gibney met the committee for the purpose of discussing the dismissal of Beasley. On this occasion, Mr. Gibney read a written statement of the charges, but refused to furnish the committee with a copy of them.

The statement of charges was based upon a written complaint of Mr. H. L. Warfel. Mr. Warfel, although in the employ of the carrier, was on the occasion in question traveling as a regular passenger, returning home from Mayo Clinics with his wife and small son where the latter had been pronounced incurable of a disease of which he was then a victim.

Briefly summarized, the statement in question recited that Pullman Porter Beasley, "assigned to car Prairie Home on C. & N. W. train #412 leaving Rochester, Minn., 8:30 p. m., September 25th" (1) "was reported as discourteous and surly by a passenger who boarded his car at Rochester and asked porter to allow this passenger's sick son to retire at once in lower berth reserved in advance and prepared for occupancy"; (2) "failed to prepare upper berth assigned to passenger"; and (3) "was found asleep on duty at 4:00 a. m. in vacant section."

The discussion between the committee and Mr. Gibney of November 5, 1934, revolved around the question whether the carrier should furnish the employee with a written statement of the charges against which he was expected to defend himself. In concluding the conference, Mr. Gibney stated with considerable positiveness that he would not reconsider Beasley for reemployment, and that he would not furnish the committee with a copy of the charges.

The petitioner, dissatisfied with the results of the conference and the manner in which it was conducted, appealed to Mr. J. K. Tully, Zone Superintendent

of the carrier. The discussion with Mr. Tully related primarily to the question whether Mr. Gibney had afforded the petitioner a fair hearing. Mr. Tully, at the request of the representatives of Beasley, sent the controversy back to Mr. Gibney for reconsideration.

On November 22, 1934, Mr. Gibney, in pursuance of Mr. Tully's direction, gave Porter Beasley an opportunity to be heard upon the merits of his grievance. On this occasion, the petitioner was represented both by the committee and by an attorney. The attorney examined Mr. Beasley and introduced several affidavits with a view of convincing Mr. Tully that the employee was not guilty of the charges made against him, and that he should be reinstated. It is significant that at this time Mr. Gibney, although propounding some questions to Mr. Beasley, offered no evidence on behalf of the carrier. At the conclusion of the hearing, Mr. Gibney reaffirmed the dismissal.

The petitioner thereupon prosecuted an appeal to Mr. Tully who conducted a hearing on the dispute on December 10, 1934. At this hearing, the petitioner introduced additional affidavits in support of his claim; and the carrier, over the protest of the petitioner, introduced certain affidavits tending to substantiate the charges under consideration. At the conclusion of the hearing, Mr. Tully sustained the dismissal.

From the decision of Mr. Tully, the petitioner appealed to Mr. B. H. Vroman, Assistant to the General Manager of the carrier. On this occasion, Mr. Vroman read certain statements concerning Porter Beasley with a view of justifying his dismissal. The only occurrence of significance in connection with this hearing was the arbitrary refusal of Mr. Vroman to allow representatives of the petitioner to make a record of what transpired at the hearing. Mr. Vroman refused to reinstate the petitioner.

On April 8, 1935, the committee representing Beasley filed an ex parte submission of facts with the Third Division of the Adjustment Board asking for a determination of "the dispute with Pullman Company relative to summary dismissal of Mr. J. W. Beasley from the service of said company on the 9th day of October, A. D. 1934." On May 20, 1935, the Third Division of the Board notified the petitioner that "the Third Division is unable to agree upon your right to have said matter adjusted by this tribunal without representation by the organization, organized in accordance with the requirements contained in the Railway Labor Act approved June 21, 1934, representing the craft or class of employees of the carrier cited in your petition. Your petition is therefore dismissed without prejudice."

In the period prior to July 1, 1935, a committee representing the Brotherhood of Sleeping Car Porters had been negotiating with The Pullman Company for recognition of the Brotherhood as a bargaining agency. It carried this controversy to the National Board of Mediation for assistance in its settlement. On July 1, 1935, the National Mediation Board notified the Brotherhood of Sleeping Car Porters that it had been designated as a bargaining agency to represent Pullman porters under the provisions of the Railway Labor Act of 1934.

Pursuant to this authority, the representatives of the Brotherhood, on July 12, 1935, conferred with Mr. Vroman concerning the reinstatement of Beasley. Mr. Vroman, however, refused to enter into any negotiations concerning this alleged dispute and stated that, so far as the Company was concerned, the case was closed. Following this, Milton P. Webster, Chairman of the General Executive Board of the Brotherhood of Sleeping Car Porters, on July 24, 1935, filed with the Third Division of the Adjustment Board notice of its intention to make an ex parte submission of the dispute in question.

CONCLUSIONS OF THE DIVISION.—At the outset it is important to note that the issue in this controversy is not whether Beasley had a fair hearing before the management, but whether the management had just cause for his dismissal. It is also important to note that in this case Beasley was dismissed because of the events which occurred on September 25, 1934, and not on his general record. The Division concedes, however, that the employee's past record must be considered in determining whether the events in question constituted just cause for dismissal.

While the Adjustment Board should be cautious in the exercise of its power to order the management to reinstate an employee who has been dismissed for alleged cause, it should not hesitate to exercise this power when it clearly appears that the employer has acted arbitrarily, without just cause, or in bad faith.

In determining whether the employer has acted unjustifiably in the discharge of an employee, the Board must do so in terms of the circumstances of each controversy. There is no hard-and-fast rule on which the Division can rely in the solutions of such problems. Precedents, while helpful, are not conclusive. One may say concerning this problem what a Minnesota court said concerning the problem of determining negligence: "Theorize as we may on the subject of proximate cause (basis of negligence), it is in the last analysis a question of good common sense, to be solved by a practical consideration of the evidence in each particular case." (*Moores* v. *Nor. Pac. Ry. Co.*, 108 Minn. 100, 1909.)

Porter Beasley, at the time of his discharge had been in the employ of the carrier for approximately twenty-two years. In the hearing held before Mr. Gibney on November 22, 1934, Beasley stated that so far as he could remember, with one minor exception, no complaint had ever been lodged against him before. In its ex parte statement of April 9, 1935, however, the carrier stated that Porter Beasley "was discharged May 16, 1930, for his noisy and arbitrary manner, unruly attitude and insubordination when interviewed in his district office concerning neglect of duty and failure to carry out instructions concerning his occupancy of space in a Pullman car. He was reinstated in the Chicago Northern District on August 1, 1930, on the earnest solicitation and recommendation of his Local Committee under the Plan of Employee Representation, and thereafter remained in the service until discharged on October 9, 1934". The record does not indicate that Beasley ever denied this dismissal or attempted to explain it.

The carrier introduced statements of Conductors Eigenbroadt, O'Brien, Leach, Robinson, Baltzer, all addressed to Mr. Gibney, bearing dates around February 5, 1935, concerning Beasley's reputation as a porter. These statements tend to show that Beasley was somewhat unruly, independent in manner, hard to manage, and not as solicitous about passengers as he should have been. These comments, however, are vague and general; they do not cite specific instances of misconduct. Moreover, they bear internal evidence that they were prepared on the basis of a common pattern.

The series of events which provoked the discharge of Porter Beasley ocurred on September 25, 1934. Mr. and Mrs. Warfel, whose small son had just been pronounced incurable at the Mayo Clinics, were preparing to leave Rochester, Minn. Arriving at the Northwestern station about 7 P. M., Mr. Warfel was told by Conductor Gunderson that he could put the boy to bed immediately, although the train was not due to leave until 8:30 P. M. and the car was not scheduled for occupancy until 8:00 P. M. At the time, Porter Beasley, not yet properly uniformed, was making the car ready for occupancy. Conductor Gunderson accompanied the Warfels into the car. The evidence clearly indicates that as the group entered the car words took place between Porter Beasley and Conductor Gunderson as to the right of Mr. Warfel and his family to enter the car at that time. There is, however, the sharpest conflict of evidence as to what was said and the manner in which it was said. Mr. Warfel, in his letter of October 5, 1934, reporting the events, said: "Porter Beasley, who was on this car, was at the end of the car at this time and in a very surly manner told the conductor he could not bring anybody into the car at that time as he was not through with his work yet. I overheard his remark and took a look through the car and found he had entirely made down the car, and this was an erroneous statement. I asked him if he would be so kind as to let the little fellow go to bed as he was sick and his attitude was not that which our Company would stand for towards any passenger." The written statement of Conductor Gunderson, while supporting that of Mr. Warfel, is not as strong. Porter Beasley denied that he had been surly on this occassion. The evidence as a whole, however, clearly indicates that Beasley on this occasion was guilty of discourtesy of some degree of seriousness.

Another phase of the charge made against Beasley was that he did not prepare upper berth #12 until midnight and then only after he had been directed to do so. Beasley, while admitting that he had not prepared the berth in question when he prepared others, alleged that he had not known that it was reserved. The reservation card, however, indicated that the berth had been assigned to Mr. Warfel. It is fair to assume that Beasley should have known this fact.

The Third count in the charge made against Porter Beasley was that while he should have been on duty he was found asleep by Mr. Warfel in a vacant

section at 4:00 A. M. There is the same conflict of evidence on this count as on the first. Beasley denies the charge and introduced some evidence tending to show that at the time he was on the platform of a station at which the train had stopped.

The circumstances under which these events transpired, particularly the act of discourtesy, were most unusual. Because of the tragic news which Mr. Warfel had just received concerning the condition of his son, he was emotionally upset and distraught. Laboring as he was under great mental strain, there is little doubt that his judgment was to some extent warped, and that he was extremely sensitive to any slight or sign of discourtesy on the part of an employee of the company. In these circumstances, Beasley's dereliction of duty assumes dimensions which under normal circumstances it would not possess. Moreover, it must be remembered that Beasley, although informed that the boy was sick, had no appreciation of the seriousness of the illness. That Beasley was a victim of an unusual set of circumstances is tacitly admitted by Mr. Warfel in his letter of complaint. "In my estimation", he states, "this porter is not fit to handle a run of this sort where he might have requests to take care of people who are sick."

Viewing the record as a whole, the Referee reaches the conclusion that the carrier acted without just cause in the dismissal of Porter Beasley. Since, however, the petitioner was guilty of some discourtesy on the occasion in question, the carrier should not be required to give him back pay.

AWARD

The petitioner shall be reinstated as a porter within five days after reporting for duty, with seniority rights possessed by him on the date of his dismissal.

By Order of Third Division:

NATIONAL RAILROAD ADJUSTMENT BOARD.

Attest:

H. A. JOHNSON,
Secretary.

Dated at Chicago, Illinois, this 2nd day of January 1936.