Award No. 1989
Docket No. PM-1784

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Elwyn R. Shaw, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF SLEEPING CAR PORTERS

THE PULLMAN COMPANY

STATEMENT OF CLAIM: For and in behalf of B. A. Martin who was formerly employed by The Pullman Company as an Attendant operating out of the Chicago District Commissary. Because The Pullman Company did, under date of July 7, 1941 discharge B. A. Martin from its service in the Chicago District Commissary, which discharge was unjust, unreasonable, in abuse of the Carrier's discretion and based upon charges unproved.

And further for B. A. Martin to be returned to his former position as an Attendant to the Chicago District Commissary and to be paid for all time lost by reason of such unjust and unreasonable discharge.

OPINION OF BOARD: In this case the employe in effect is charged with a petty form of embezzlement and these charges relate to (1) two round trips between Chicago and Miami (2) one return trip from New York to Chicago.

As to the two Florida trips it is charged that the attendant sold orangeade for which no check was issued or any receipts given the passenger, and it is claimed that these charges are substantiated by reports of Passenger Service Inspectors of the Pullman Company and by photostatic copies of these reports used on the hearing. The reports were unsigned and although the Representative of the employe endeavored to do so he was unable to learn the names or addresses of the Passenger Service Inspectors, on either of them, and a definite refusal was made to produce either of them on the hearing for cross examination. As to these two Florida trips nothing else was in the record to substantiate the charge.

It has come generally to be recognized that neither technical or legalistic rules of evidence are strictly enforced on hearings before administrative boards, and many such boards receive and consider items of evidence which would be ruled out as incompetent or immaterial in a court of law. This elastic form of procedure has only opened up in the past few years and its outlines are as yet vague. In considering questions such as this one, there is some disagreement among boards, in fact among different referees between different boards and divisions.

As to the admission of these unsigned reports we think it necessary for the purpose of this particular case only to point out the distinction between what is and what is not evidence, and we need not indulge in any refinements of rules on questions of competency or materiality. It may be, as it has sometimes been said in Awards of this and other administrative bodies, that the inquiry is open to any real evidence which tends to prove any issue in question.

Even if this is true it yet remains quite obvious that if we are to preserve any semblance of due process and fair trials we must insist upon that which is offered being real evidence, i. e. it must have some probative value, and it must be vouched for by some one.

It is probably necessary for the Pullman Company to employ Traveling Service Inspectors and to use their reports in furtherance of its own business. The Pullman Company knows who these Inspectors are, what qualifications they have for obtaining their employment, whether or not they make true reports and whether or not they wish to use those reports in the legitimate prosecution of its business. The employe knows none of these facts and has no way of learning them. Even if a report should be made with the most vicious motives by a person of doubtful veracity and with malicious motives, there would be no way for an employe to attack it not knowing who made the report, and without the precious right of cross examination. It might be that if he knew who the Inspector was he could prove that he was a personal enemy of the employe, or that he had had some trouble with him, or that he was a man of low character or bad reputation for truth and veracity, or that he was in fact somewhere else than on the train he claimed to be. Some of these reasons were in the minds of our ancestors when they founded this country, and the right to personally confront the witnesses against them was one of the things they fought for. It may be said that this is not a criminal trial, but it certainly partakes of that character and even in civil trials no deposition can be admitted in any court without the opposing party having been given the right either in person or by counsel to confront the witness and cross examine him. Lacking the verification or identification of any known witness these Inspector's reports are no value at all, they should not have been considered and will be disregarded. This disposes of the contentions as to the two Miami trips and they will be disregarded.

As to the New York trip the situation is different. The evidence in the record is sufficient to show the sale of two orangeades, four cigars and one coca cola without presentation of checks or the giving of receipts. This evidence is not free from conflict but we think it clear and satisfactory, and was vouched for by two known persons, i. e. R. W. Dvorak and B. F. Biaggini. It was also reinforced by the fact that the Attendant attempted to manipulate his checks after the Traveling Service Inspector and Commissary Inspector took charge of his buffet when his train was nearing Chicago. The charges are sufficiently proved.

It is claimed by the employes however that the discipline (discharge) was unjust, unreasonable and in abuse of the Carrier's discretion. This point was brought forcibly to the attention of the referee when examining this case in connection with another one in which an award is this day made. (See Award No. 1992.) In the last mentioned award the reason for discipline was identical yet the discipline imposed was only a suspension of 30 days. Such a disparity of penalties makes the one we are now considering appear to be at least capricious and probably arbitrary and unjust. Attendant Martin whose case we are now considering had his service and seniority record of more than 14 years, and it appears to the referee that a service record of that length and a seniority of that many years is a valuable personal right which should not be destroyed in its entirety for so trivial an offense as this record discloses. It is entirely probable that a less severe penalty can accomplish the desired warning to others and possibly the reformation of this particular employe.

We will not minimize the necessity on the part of the Carrier to impose stern discipline, nor can we, as we have said in many other awards, interfere with the character and extent of discipline, except where we feel, as we do in this case, that it has been arbitrarily imposed and unreasonably harsh. This employe has now been out of service for more than a year. He has already been severely punished for his offense. It is our opinion that he should be now reinstated with seniority rights but without back pay.

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 employe involved in this dispute are respectively carrier and employe 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 discipline in this case was justified; that it has been too harsh; that the employe as of this date should be reinstated with seniority rights but without back pay.

AWARD

Claim denied in part, allowed in part; discipline approved but reduced in severity, and employe ordered reinstated with seniority rights but without back pay.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 25th day of September, 1942.