# Award No. 2770

# Docket No. PM-2686

## NATIONAL RAILROAD ADJUSTMENT BOARD

## THIRD DIVISION

**Jay S. Parker, Referee**

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## PARTIES TO DISPUTE:

## BROTHERHOOD OF SLEEPING CAR PORTERS

## THE PULLMAN COMPANY

**STATEMENT OF CLAIM:** * * * for and in behalf of T. P. Bartholomew who is now, and for a number of years past has been, employed by The Pullman Company as a porter operating out of the district of Denver, Colorado. Because The Pullman Company did, under date of October 17, 1943, take disciplinary action against Porter Bartholomew by giving him twenty-seven days actual suspension without pay upon charges unproved; which action was unjust, unreasonable and in abuse of the company's discretion. And further, because Porter Bartholomew did not have a fair and impartial hearing as provided for under the rules of the contract between The Pullman Company and its Porters, Attendants, Maids and Bus Boys. And further, for the record of Porter Bartholomew to be cleared of the charge made against him in this case and for him to be reimbursed for all pay lost as a result of this unjust and unreasonable action.

**OPINION OF BOARD:** At the conclusion of a hearing Porter, T. P. Bartholomew who had theretofore been charged with being under the influence of intoxicating liquor and with drinking that beverage with soldiers while employed on Car 1854, was found guilty of the charges and punished by the imposition of 27 days actual suspension without pay. The claim was based on the usual ground—that charges were unproved and that action taken by the Carrier was unjust, unreasonable and in abuse of its discretion, with one other, that the hearing as conducted violated the rules of the Contract between the Company and its Porters, Attendants, Maids and Bus Boys.

So far as the claim charges were unproved the record has been examined. It discloses ample evidence in the form of three written statements—one by the Pullman Conductor, another by a Military Police official, and still another by Pullman Superintendent Gaddis, detailing facts given him by the Military Police official in a personal interview—which if their contents were given credence make applicable the rule we will not weigh the evidence or resolve conflicts therein, and compels the conclusion that the action of the Company must be upheld unless some other reason of a character that requires a contrary finding appears in the record. So evident as to almost preclude the necessity of making it is the comment that the order of suspension is proof in itself of the fact the statements of the witnesses—not those of the Porter—were believed by the Company. It is true the Porter flatly denied he used liquor in any form or that he had taken a drink or become intoxicated on the occasions in question. It is likewise true that his testimony was corroborated by statements of several witnesses to the effect he was not a drinking man

and had a reputation for sobriety. Proper of consideration as it was in arriving at a conclusion on guilt or innocence this evidence did not, as suggested by Petitioner, compel belief or acquittal of charges. It merely served to create a conflict in the testimony, the determination of which, as we have stated, is not our function. We turn then to the Petitioner's position that both before and during the hearing there was violation of rules of the current Agreement.

Its first contention has to do with sufficiency of notice of hearing. Two such notices were given. The first was dated July 22, 1943, and stated a hearing would be granted on the charge of intoxication. The second was dated September 22, 1943, and advised a hearing would be granted on September 29, on the two charges here involved. The hearing there referred to was the one held and in question here. Petitioner argues that since the Porter was not notified of the change from one charge to two prior to the hearing, Rule 50 was violated. The point is devoid of merit as to the facts relied on. The record shows the notice was dated seven days prior to the hearing and the Porter who was present and testified made no pretense of claim that he did not receive it prior thereto. Also advanced is the argument that because the first date set for a hearing was postponed by mutual agreement the Company had no right to include the additional charge of drinking with soldiers but was restricted to the charge of intoxication. This contention is too technical and cannot be sustained. We venture the opinion that prior to hearing the Agreement permits the Company to change the charge as it sees fit so long as proper notice is given of its action. Also urged is the proposition that even if the second notice was given it was not in time to afford Bartholomew an opportunity to make a defense. In view of the fact the charges all involved one incident and that intoxication follows drinking we do not believe the action under the circumstances had the effect of making the hearing unfair. So, with respect to the notice it follows there was nothing connected with the change resulting in violation of Rule 50.

Lastly, it is pointed out the Carrier refused to produce the Conductor and Military Policeman for cross-examination, although repeated demand was made for their presence. Petitioner insists that Carrier's action in that respect rendered the hearing unfair and constitutes an abuse of discretion. Its effect is to charge a violation of Rule 51. We are not disposed here to go into an extended argument on the question of when and under what circumstances the privilege of "questioning all witnesses giving testimony in the case" as that language is found in that rule is applicable, nor to the subject of what evidence is properly admissible in discipline cases. This Division since its inception has had this problem to deal with. Many opinions have been written on both subjects, some of which on a cursory examination may seem to be difficult of reconciliation. However, examination discloses discrepancies come about more from application of the facts than from differences in views as to principle. For a few of these cases see Awards 1144, 2541, 2472, 2613, 1989. Many more could be cited.

In our approach of the problem it can be said that this Division is definitely committed to the proposition that there is nothing in the Agreement which specifies the type of evidence which may be submitted at a hearing (Award 1144), also to another, that there is no obligation resting on the Carrier to produce its witnesses in person at any hearing (Awards 2541, 2637). If, therefore, a discipline case may proceed to final decision based on evidence consisting of statements only, what is the meaning of the heretofore quoted language which appears in the Contract? Briefly stated our view is it means that when witnesses are present and produced at the hearing the accused shall have the privilege of questioning them. On the other hand when statements are relied on exclusively for probative purposes they are proper and the accused cannot, as a basis for a finding of unfairness stand upon the proposition the persons making them were not produced at the hearing on

his demand, if from all facts and circumstances surrounding the hearing the Division is convinced he had had a reasonable opportunity to go out and prepare his defense and has not been deprived of a fair hearing by some act of the Carrier. What reasonable opportunity is, until such time as the parties see fit to promulgate an agreement, the terms of which clearly and concisely cover the various phases of the point in question, must necessarily in each instance depend, when cases are brought here for review, on the conclusion we reach on the subject after consideration of all the facts and circumstances revealed from our examination of the particular case involved. What has been said is not intended to imply a person about to have a hearing is not to have an opportunity to confront the witnesses, as has been held in some of our decisions (See Awards 2613 and 1989), nor is it in conflict with what was there said on the subject. It simply means that if the record of proceedings affirmatively establishes that in some manner the accused has acquired information, and we care little about the source from which it came or when he acquired it so long as he had it, regarding the identity of the witnesses who are going to be used against him to prove the details which establish the specific dereliction of duty with which he is charged, he is deemed to have had opportunity to confront the witnesses and likewise deemed to have been accorded the privilege of questioning the witnesses giving testimony in the case.

What then is to be said for the Petitioner's contention when viewed in the light of the construction we place on the language according the privilege of questioning witnesses? We turn to the record. Included in the Petitioner's own submission and alleged to be a part of the record is a copy of a letter written by Bartholomew himself under date of July 9, 1943, and addressed to the Company's Superintendent in which appears the following statement:

> "The letter that conductor L. A. Scruggs and Military Police Carl L. Baxter wrote concerning the condition of my car on that date is absolutely false."

Thus it appears from an unimpeachable source that more than two months prior to the date of the hearing the accused in the instant case had personal knowledge of the names of the witnesses who were actually used to support the charges filed against him. That satisfies the requirement of Rule 51 to the extent we have indicated was necessary. Bartholomew had the information which afforded him a reasonable opportunity to prepare his defense under our decisions, and he cannot now under the conditions existing in this particular case be heard to say he did not have a fair hearing due to the fact witnesses were not produced at such hearing when demand was made by him.

It may occur to the parties, as it has to us, that Superintendent Gaddis is not mentioned in the letter to which we have just referred. That in itself does not result in an unfair hearing. His statement pertained to what the Military Policeman, Baxter, reported to him were the details of the incident on which the charge was based. It is not even suggested he had personal knowledge of them. The "reasonable opportunity" which we have heretofore discussed does not extend to every witness who makes a statement used at a hearing. Ordinarily its requirements are satisfied if the accused has information regarding the witnesses on whose testimony the Carrier relies in order to establish the essential factual situation on which charges are based. That situation prevails here. Moreover examination of the record of proceedings does not disclose a demand that this witness be produced for purposes of cross-examination. Under that circumstance there could be no sound basis for urging that failure to produce him violated the Agreement.

Since we have found nothing in the facts and circumstances of this case to justify a conclusion the hearing was unfair or that the sustaining of the charges amounted to an abuse of discretion the Company's action will not be disturbed.

**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 action taken by the Carrier in disciplining the employe was not improper.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 19th day of January, 1945.