# Award No. 5104
# Docket No. PM-4929

## 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 George Macklin, who for some 18 years was employed by The Pullman Company as a porter operating out of the Chicago Western District.

Because The Pullman Company did, under date of July 27, 1949, dismiss George Macklin from his position as a porter in the aforementioned district wrongfully, unjustly, unreasonably, and in abuse of its discretion.

And further, because the incidents contained in the alleged charges, upon which this dismissal was based, were incidents over which The Pullman Company had absolutely no jurisdiction, the alleged occurrences having happened at a time when George Macklin was off duty in his home town, and they were in no way connected with him as an employe of The Pullman Company in his performance of service in connection with Pullman sleeping, parlor, buffet, and club cars or composite cars owned and operated by The Pullman Company.

And further, for George Macklin to be returned to his position as a porter in the Chicago Western District with seniority and vacation rights unimpaired, and for him to be reimbursed for all pay lost as a result of this wrongful, unjust, and unreasonable action on the part of The Pullman Company.

OPINION OF BOARD: On December 2 and 3, 1948, George W. Macklin, held a regular assignment as a Pullman Porter in Line 423, a 13 man operation, on Chicago, Minneapolis, St. Paul and Pacific Railroad Trains Nos. 17 and 18, between Chicago and Tacoma, Washington. He had been in the service of the Pullman Company for some 18 years. He lived in Chicago and on the dates above mentioned was in that city on layover.

July 7, 1949, Macklin was accorded a hearing, at which he appeared in company with his representatives and participated, on the following charge:

> "Your improper conduct and actions on December 2-3, 1948, when you ran a gambling game in your home, wilfully and illegally armed yourself and engaged in a shooting affray in which a man was shot and killed, indicate your unfitness to serve the traveling public as a porter on the cars of The Pullman Company."

At the commencement of such hearing Mr. M. P. Webster, First International Vice President of the Brotherhood of Sleeping Car Porters who, along with Mr. Leo Segal of the legal staff of that organization, was representing Macklin, announced he desired to make a statement. Granted that privilege, he demanded that the charge be dismissed without any hearing whatsoever

on the ground that under rules of the current Agreement the Company had no jurisdiction over Macklin when he left its cars and therefore had no right to make the charge against him or discharge him at the close of the hearing even if evidence there adduced sustained the charge as made. This objection was overruled by the Company and the hearing proceeded.

During the course of the hearing the Company produced a witness Moore, also a Pullman Porter. Summarized the testimony of this witness, who was cross-examined at length by Macklin's representatives, was to the effect: That he was present at Macklin's home when a stud poker game, at which the accused dealt the cards and took a cut for every pot, was in progress from 9:00 P.M. on December 2, to 6:45 A.M. on December 3, 1948; that as the game progressed all players, except Macklin and a man by the name of Gibson dropped out; that sometime around 6:00 A.M. on the morning of the 3rd Gibson, a man by the name of McAdams, and a lady companion then left the Macklin home on foot ahead of Moore who departed a moment later and followed them up the street; that when he left the accused was in his home; that shortly thereafter Macklin came up on the run with a pistol in his hand and as he neared Gibson pointed the weapon at that individual and demanded that he give him back his money; that Gibson put up his hands and Macklin fired a shot after which the witness saw Gibson fall to the ground; that he later ascertained he was dead and that his death resulted from a bullet wound.

After Moore had given his testimony representatives of the Company attempted to interrogate Macklin regarding the events transpiring on the two dates in question. On advice of his representatives he refused to answer any questions whatsoever or explain his version of the affair although he was given repeated opportunities to do so. Thereafter the Company presented a certified copy of an indictment showing Macklin had been indicted for the murder of Gibson also a certified copy of the record of proceedings had in the Criminal Court of Cook County, Illinois, where he was tried on the charge of having murdered Gibson and acquitted by a jury. This transcript of the record, consisting of approximately 300 pages, and containing the verbatim testimony of all witnesses who testified at the murder trial, need not be detailed. It suffices to say it corroborates Moore's testimony and supports allegations of the charge relating to Macklin's conduct and action on the dates in question.

The Company rested its case against the accused Porter on the foregoing evidence. He was then offered an opportunity to produce evidence in refutation of the charge but declined to do so.

On July 27, 1949, the Company's District Superintendent advised Macklin by letter that after consideration of the evidence and testimony adduced at the hearing it had decided the charge made against him had been fully substantiated and that, effective with the date of such letter, he was dismissed from the Company's service. Thereafter, the Superintendent's decision was appealed to the highest reviewing authority of the Company. In due time that official notified the Brotherhood, as Macklin's representative, the decision of the Superintendent was justified and would not be disturbed. Subsequently, the Brotherhood took steps resulting in the instant proceeding.

Before giving consideration to the cause on its merits it should be pointed out that on the property, as we have heretofore indicated, and in the claim itself, the Brotherhood based its position Macklin should be returned to his position with full reparation for time lost as a result of his discharge upon the premise the Company had no jurisdiction or power to discharge him under existing rules of the current Agreement because the events relied on as warranting that action occurred at a time when he was off duty in his home town and were in no way connected with the performance of his duties as a Pullman Porter. It should, likewise, be noted this was the basic premise relied on to support its claim in its ex parte submission, its supplementary submission, and its answer, filed on April 7, 1950, to the submission filed by the Company at the hearing on the claim held by this Division of the Board

on March 9, 1950. That this is so is evidenced by a statement to be found in its supplementary submission where it states "The only issue involved in this case is did this Company have the right to prefer these charges against this employe and dismiss him from the service, and that is all." It is also demonstrated by statements appearing in its answer of April 7, 1950, which reads:

> "The Petitioner hasn't questioned the right of the Company to conduct an investigation, it simply set forth that the Company had no right to prefer these charges against this employe for acts allegedly committed without the scope of the employment of this individual on Pullman Cars.
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> "The only right this Company has in this connection is when these alleged acts occur while the employe is on the job.
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> "Certainly if the Company had no right to bring this charge against this employe, then the employe was not obligated to answer any of the charges."

Notwithstanding what has been just related the Brotherhood, at the hearing before this Board, on March 9, 1950, and at the hearing on October 23, 1950, with the author of this Opinion sitting as Referee, based its right to a sustaining award on additional and entirely new grounds to the effect (1) the certified copy of the transcript of the record in the cause of The People of the State of Illinois v. George Macklin, to which we have heretofore referred, was incompetent evidence and that its admission as such at the hearing precluded the Company from discharging Macklin, and (2) that the evidence adduced at such hearing was wholly insufficient to establish the charge made against him.

There is, we believe, ample precedent for holding that under the foregoing conditions and circumstances the two grounds last mentioned, and now relied on by the Petitioner, are not properly here, and hence are not entitled to consideration. Be that as it may, under the confronting facts, application of the rule is not mandatory and we are disinclined to dispose of Petitioner's contentions with respect thereto in such a summary manner.

Without unduly laboring the point we have little difficulty in concluding the Petitioner's position the certified transcript of the record in the case of The People of the State of Illinois v. George Macklin was improperly admitted as evidence at the hearing cannot be upheld. One of the purposes responsible for the enactment of the Railway Labor Act was to provide a simple and inexpensive method for the disposition of disputes between Carriers and Employes, including those similar to the one here involved. For that reason it has come to be generally recognized that in the conduct of the hearings and investigations neither technical nor legalistic rules of evidence are binding and we have repeatedly held, that where—as here—the contract does not specify the type of evidence that can be submitted at such hearings or investigations, statements of witnesses with reference to the facts pertinent to the dispute, even though unverified, are competent and therefore properly received as evidence. (See Awards Nos. 1989, 2746, 2770, 2772, 3985, 4142, 4154 and 4251). If, as we have seen, statements of the character referred to are competent analogous reasoning compels the conclusion that certified transcripts of judicial proceedings, containing testimony given by witnesses under oath and relating to matters involved at such hearings and investigations, are likewise competent.

Nor do we have trouble, in view of the factual situation here involved, in disposing of the Petitioner's contention the evidence adduced at the hearing did not sustain allegations of the charge to the effect that Porter Macklin ran a gambling game in his home, that he wilfully and illegally armed himself, and that he engaged in a shooting affray in which a man (Gibson) was shot and killed. We have held that at hearings of the kind here involved the Carrier (Company) may properly examine the accused concerning every point bearing upon his innocence or guilt, whether or not he testifies in his own

behalf, and that employes charged with Rule violations who refuse to answer, or avoid answers to, questions touching upon the claimed offense subject themselves to inferences that the replies if made would have been favorable to the Carrier (Company). See Awards Nos. 4749, 4704 and 2945. In the instant case Macklin refused to answer pertinent questions and he failed to take the stand in his own defense or offer any testimony whatsoever in refutation of the evidence adduced by the Company. In that situation, in the face of evidence such as was adduced, a contention the Company failed to establish the charge at the hearing by substantial competent evidence is wholly devoid of merit and cannot be upheld.

We can now turn to the primary ground on which the Brotherhood bases its right to a sustaining Award, i.e., that under the Agreement the Carrier had no right or power to make or bring the charge herein involved against Macklin.

Pertinent portions of Rule 49 of the current Agreement, on which the rights of the parties depend, reads:

> "The right of the management to discipline, suspend or discharge an employe for incompetency **or other just and sufficient reason, . . .**" (Emphasis supplied)

The first argument advanced by the Brotherhood in support of its position on the all decisive point in question is that even if the terms of the contract authorized the Company to give consideration to his conduct while off the job in determining whether just and sufficient reason existed for discharging him to so apply it would deprive him of a valuable property right without due process of law in violation of rights guaranteed him by the Federal Constitution. We do not agree. The guarantee of due process found in the 5th Amendment, and in the 14th Amendment, to the Federal Constitution, is intended to protect the individual against arbitrary exercise of governmental power and does not apply to actions between individuals or add anything to the rights of one citizen as against another (see 16 C.J.S. 1149 Sec. 568; 12 Am. Jur. 259 Sec. 567; Davidwo v. Lachman Bros. Inv. Co., 76 Fed. 2d. 186).

Next it is urged the provisions of Rule 49 preclude the Carrier from giving consideration to the conduct of Pullman Porters while off duty in determining whether there is just and sufficient reason for their discharge. We refuse to give the Rule any such construction. Management is responsible for the conduct of its Pullman Porters and duty bound to man its cars with individuals who merit the confidence and trust of the traveling public and can be depended upon to protect the safety and well being of individual passengers. In fact it would be derelict in the performance of its obligation to the traveling public if, convinced such employes no longer possess the attributes to which we have referred, it continues to retain them in its employ in that capacity. It follows that under a rule such as is here in question conduct of a Pullman Porter while off the job may constitute just and sufficient reason for his discharge and that action of the Carrier in discharging him on the ground that conduct is of such character as to make him unfit to continue to serve the traveling public should not be disturbed unless it can be said the evidence of record in the proceeding brought to challenge such action is wholly insufficient to warrant and uphold the factual finding upon which the order of discharge is based. This conclusion is in no sense to be construed as an indication that any and all conduct of an employe while off the job is subject to supervision by the Company. The conduct relied on as the basis for discharge must be such as to justify a conclusion, that consistent with the duty the Company owes the public, the accused employe has demonstrated his unfitness to longer serve the traveling public as a Pullman Porter.

Thus it appears the sole question remaining for decision here is whether the Carrier's action in dismissing Macklin on the ground his conduct was such as to indicate he was unfit to serve the traveling public as a Porter is sustained by the evidence. We are convinced that under all the facts and circumstances an affirmative answer is required. It follows the Carrier did

not violate the Agreement in discharging him from its service and that the claim must be denied.

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: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 27th day of November, 1950.