

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

H. Raymond Cluster, Referee

**PARTIES TO DISPUTE:**

**ORDER OF RAILWAY CONDUCTORS, PULLMAN SYSTEM**

**THE PULLMAN COMPANY**

**STATEMENT OF CLAIM:** The Order of Railway Conductors, Pullman System, claims for and in behalf of Conductor G. S. Naish, Birmingham District, that:

1. The Pullman Company acted arbitrarily and capriciously in violation of Rule 49 of the Agreement between The Pullman Company and its Conductors when on November 13, 1953, it rendered a decision that charges preferred against Conductor G. S. Naish, Birmingham District, had been substantiated.
2. Rule 49 of the Agreement was violated by R. C. McCarthy, Field Representative, The Pullman Company, at the Hearing accorded Conductor Naish in Birmingham, October 15, 1953.
3. We now ask that the decision of the Company announced in a letter dated November 13, 1953, addressed by J. N. Seabury, Superintendent, Birmingham District, The Pullman Company, to Conductor Naish be rescinded and that Conductor Naish be compensated for all time lost as a result of this erroneous decision.

**OPINION OF BOARD:** Pullman Conductor Naish was suspended for three round trips in his regular assignment—the equivalent of 13½ days—after a hearing on the following charge against him concerning the trip of July 24, 1953:

"You had the odor of intoxicants on your breath and further, you were discourteous to the passenger occupying lower 6 in Car S-77 from Washington, D.C. to Knoxville, Tennessee."

It is the position of Claimant in his submission first, that he was not accorded a fair and impartial hearing as required by Rule 49 of the Agreement in that Mr. R. C. McCarthy, Field Representative of the Pullman Company, usurped the function of District Superintendent Seabury who was designated to hold the hearing under the rule, and also engaged in other conduct at the hearing alleged to be prejudicial; and second, that the charge was not supported by the evidence and the assessment of any discipline by the Carrier was therefore arbitrary and capricious.

A third objection was raised for the first time in the argument and brief to the referee, namely that no specific rule is alleged to have been

violated, and that the breach of some rule or regulation is basic and essential to the imposition of discipline by the Carrier.

Addressing ourselves first to the latter contention, we find, despite Carrier Member's argument to the contrary, that it is properly before the Board for consideration. However, we find no merit in the contention. The charge was clear and the lack of a rule citation did not prejudice Claimant in the preparation of his defense. As for the proposition that a rule violation must be shown as a prerequisite to the imposition of discipline, we follow the reasoning in Award No. 6171, wherein it is stated:

"The complaint, as made, contained no specific references to any rule, instruction or practice, either written or oral, as having been violated. This fact is not necessarily controlling for all the responsibilities of an employe do not necessarily arise therefrom. They can and do arise out of the performance of the duties of the position to which they are assigned. . . ."

Sobriety while on the job and courtesy to passengers are duties inherent in the position of Pullman conductor.

Turning to the argument as to the conduct of Field Representative McCarthy, a careful reading of the lengthy transcript of the hearing leads to the conclusion that it was not conducted in full accordance with the spirit of the rule. District Superintendent Seabury, the hearing officer under the rule, took practically no part in the proceedings, failing time after time to make any ruling upon objections by Claimant's attorney to questions asked by McCarthy. He deferred to McCarthy in all respects, leaving it to him to set the course and tone of the hearing. It appears from the record that McCarthy took the role of prosecutor rather than of investigator throughout the course of the hearing; in particular, during a long and grueling cross-examination of Claimant, his manner seemed overly aggressive.

However, although the spirit of the rule may not have prevailed at the hearing, the letter of the rule did. Claimant was represented by his private attorney and was allowed to present all his evidence, and to ask such questions of those present as he wished. While the conduct of the hearing fell somewhat short of the standard to be desired in such proceedings, it cannot be said that Claimant was prejudiced thereby or that there was a violation of Rule 49.

The evidence adduced at the hearing consisted of a number of written statements submitted by each side, and the oral testimony of Conductor Naish. The primary evidence on which the charge was based is a letter from a Sergeant Elbert, who was assigned to accompany a military coffin to its place of interment. His letter states that because of the lateness of the train, he was concerned about whether he would make a connecting train, and sought the porter to find out. He found the porter in a compartment and while in the compartment making his inquiry, he was approached by the conductor, who requested his ticket. He went back to his berth, lower 6, accompanied by the conductor, and gave him the ticket. The conductor thereupon said: "What in hell were you doing in that room? You have a lower berth accommodation and as such you cannot ride in that room." Elbert also states that Claimant's attitude was aggressive and that there was a pronounced odor of whiskey on his breath. Elbert's statement is corroborated by that of the porter—McKamey—although there is a discrepancy in that the porter states that the offensive remark by Claimant was made in the drawing room before he and Elbert went to Elbert's lower berth.

Claimant denied making the statement attributed to him by Elbert and McKamey, and denied having taken a drink at any time. In that connection, he submitted statements of seven railroad employes and supervisors with whom he came in contact before, during and after his trip on the 24th, to the effect that they had not smelled alcohol on his breath or observed him acting in anything but a normal manner. He also testified that the porter

and Elbert were in close conversation on several occasions during the trip, that he had to tell McKamey more than once to leave the empty compartment and perform his duties properly, and that he had had occasion to reprimand him on previous trips. From this, he argued that the whole affair was a frame-up which could be traced to McKamey's bias against him.

While this is not all the evidence, it is the essence of it, and no useful purpose would be served in setting it forth in more detail here. Suffice to say that after a careful examination of the entire record, we are confronted with a clear conflict in the evidence presented. It is argued by Claimant that all the evidence against him is in written form, and that the Carrier had a duty to produce Porter McKamey and subject him to questioning as Naish was subjected. There is no doubt that this would have been the better practice and one much more designed to bring out the true facts in this controversy. However, the rule involved here does not require the porter's presence at the hearing, and this Board has held that evidence in the form of written statements is proper in hearings of this kind.

The evidence of Elbert and McKamey, if believed, provides substantial support for the Carrier's conclusion that the charge was sustained; and, as has been held many times, this is as far as the Board can go in looking into the evidence. It cannot resolve the conflicting statements, nor can it substitute its judgment for the judgment of the Carrier. Upon the basis of the evidence, it cannot be said that the Carrier was arbitrary or capricious in the discipline it assessed against the Claimant.

**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 Employees involved in this dispute are respectively carrier and employees 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

The Carrier did not violate the Agreement and the disciplinary action should stand.

#### AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon  
Secretary

Dated at Chicago, Illinois, this 27th day of September, 1955.