Award No. 7140
Docket No. PM-7108

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

H. Raymond Cluster, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF SLEEPING CAR PORTERS

THE PULLMAN COMPANY

STATEMENT OF CLAIM: * * * for and in behalf of H. L. Beale, who is now, and for some years past has been, employed by The Pullman Company as a porter operating out of the Chicago Western District.

Because The Pullman Company did, under date of November 20, 1953, take disciplinary action against Porter Beale by penalizing him with an actual suspension of 12 days; and because the disciplinary action taken against Porter Beale was based upon charges which had not been proven beyond a reasonable doubt as provided for in the Agreement between The Pullman Company and its Porters, Attendants, Maids and Bus Boys, represented by the Brotherhood of Sleeping Car Porters, Revised, Effective January 1, 1953, and therefore such action was unjust, unreasonable, and in abuse of the Company's discretion.

And further, for the record of Porter Beale to be cleared of the charges in the instant case, and for him to be reimbursed for the 12 days' pay lost as a result of this unreasonable action.

OPINION OF BOARD: Porter Beale was suspended for one round trip in his regular assignment, an actual suspension of 11½ days, after a hearing on the following charge against him relating to his assignment on November 2, 1953:

> "You swore at and assaulted Conductor William Lawery of the San Francisco Dist., who was assigned to CB&Q Train No. 17, scheduled to depart from Chicago at about 3:30 P. M."

The claim is for Porter Beale to be cleared of the charge and to be reimbursed for pay lost as a result of his suspension. The basis of the claim as set forth in the submission is that the charge against Beale was not proved beyond a reasonable doubt as required by Rule 49 of the Agreement, and that therefore Carrier's action in disciplining him was unjust, unreasonable and in abuse of Carrier's discretion. At the argument before the referee, the additional ground was raised that no specific rule is alleged to have been violated by Beale.

This latter contention was raised and disposed of in Award 7139 and we follow the reasoning of that opinion here in holding that it is inherent in Beale's position that he is not to swear at or assault a conductor. The fact that no specific rule is alleged by the Carrier to have been violated provides no basis for setting aside discipline based upon these charges if they are properly sustained.

The question to which the greatest emphasis was applied both in the parties' submissions and their arguments to the Board is the meaning and effect of the second paragraph of Rule 49 of the current Agreement between the parties. This paragraph reads as follows:

> "Discipline shall be imposed only when the evidence produced proves beyond a reasonable doubt that the employe is guilty of the charges made against him."

This language first appeared in the current agreement between the parties, effective January 1, 1953. The prior agreement had no standard of proof set forth, but provided, as do the great majority of agreements between carriers and labor organizations, simply for a fair and impartial hearing.

Claimant contends that the effect of the new rule is to require this Board in each case before it under the rule to apply the test of whether the charge has been proved beyond a reasonable doubt; and not merely the test of whether there is substantial evidence to support the charge.

Carrier contends that this new language does not change the degree of proof previously considered sufficient by this Board in reviewing discipline cases coming before it under the more common rules, which provide merely for a fair and impartial hearing and have no language similar to that of the new rule now before us relating to proof beyond a reasonable doubt.

In order to resolve these conflicting contentions, it is necessary to give some consideration to the historic development of the rules and procedures governing the imposition of discipline upon employes by their Carrier employers. It is clear beyond question that absent an agreement to the contrary, an employer has complete authority to discipline his employes as he sees fit, including the right of discharge without cause. He loses this right only to the extent that he contracts it away. In the railroad industry, through the medium of collective bargaining, agreements have become prevalent which require that before an employe covered by such agreements can be disciplined, he must be accorded certain procedural rights, including a fair and impartial hearing. These contracts are largely silent as to the degree of proof required to be produced at such hearings in order to justify the imposition of discipline, but over the years, in cases before this Division, these provisions for a fair hearing have been interpreted consistently to require that there be "substantial" evidence to support a charge upon which discipline is based.

A concise and representative statement of the Division's review function under contracts calling for a fair hearing without any express provision as to degree of proof is found in Award No. 2766:

> "Once again we are impelled to say it is not our function to pass upon the credibility of witnesses or weigh the evidence and to reaffirm the doctrine, now well established by this Division, that if the evidence is substantial and supports the charges we will not substitute our judgment for that of the Carrier or disturb its findings unless it is apparent its action is so clearly wrong as to amount to an abuse of discretion."

And in Award No. 4840, the following statement is found:

> "Prior to the advent of collective agreements, management could hire and fire, or otherwise discipline employes, without reason and without cause. This prerogative has been limited by contract and it is the enforcement of these limiting contractual provisions with which we are here concerned. In other words, the Carrier must show that it acted upon evidence that warranted the application of discipline or, stated inversely, it must show that it did not act unreasonably or arbitrarily."

In the contract clause before us for interpretation, in language clear and unambiguous, the Carrier has agreed to a further limitation on its

authority to impose discipline. Whereas before, the Agreement provided only for a fair and impartial hearing, and was silent as to any specific requirement of proof, the new Agreement says that discipline shall be imposed **only** when the evidence produced **proves beyond a reasonable doubt** that the employe is guilty of the charges made against him. To paraphrase the language of Award No. 4840, cited above, it is the enforcement of this new limiting contractual provision with which we are here concerned, not the provisions which were the subject of the many awards setting forth the doctrine of "substantial evidence."

We turn then to an examination of the Awards of this Division which have considered the precise language before us—a total of eight in all—to see if that language has been clearly interpreted and defined. The first of these cases was Award No. 6924, which discussed the new rule at length and concluded as follows:

> "Rule 49 is an unusual rule in a collective bargaining agreement. Undoubtedly it means something more in the matter of proof than the previous rule. However, we do not believe that the degree of proof changes the concept of the function of this Board with reference to our previous awards on the proposition that our duty here in a review of such cases confers any additional power on this Board in a consideration of like and similar cases. We have said many times that the decision made on the property should not be disturbed unless it is clearly shown that there has been an abuse of the right exercised, or, in other words, that Carrier has acted in an arbitrary, capricious or unfair manner in the conduct of the hearing or in the extent of disciplinary action taken.
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> This rule may make for more careful consideration of evidence in hearings on the property but we do not believe, as far as review is concerned, on a tribunal such as this Board is constituted, that it changed our concept of our consideration of this case, or other similar cases, in our method of review and consideration of the same. Suffice to say in consideration of such cases on the property that there are many definitions of 'reasonable doubt' and of 'proof beyond a reasonable doubt' and Rule 49 may make for a more careful analysis of evidence on the property by the hearing officer. . . ."

Award No. 6924 was one of a group of five awards in a row involving the application of this rule. The claim in Award 6924 was denied. In Award No. 6925, the reasoning in Award No. 6924 as to the new rule is referred to as being applicable, but the claim is sustained with the use of the following language: "In view of the Claimant's past good record, his many years of seniority standing and conflicts in the evidence, we believe that **he should have been given the benefit of the doubt** in this case." (Emphasis added.) In Award No. 6926, the reasoning of Award No. 6924 is again referred to and the claim is denied. In Award No. 6927, the new rule is not referred to at all and the claim is denied. And in Award No. 6928, the new rule is not referred to, but there is a sustaining award containing the following language: "We consider from the evidence that this is a case in which honest minds might differ and believe **there is a reasonable doubt as to Claimant's conduct which should inure to his benefit.**" (Emphasis added).

Thus, although in discussing the rule in Award No. 6924, the Board stated that the standard of "supported by substantial evidence" should remain its yardstick of review, nevertheless in Award No. 6928 it clearly applied the yardstick of "proof beyond a reasonable doubt," and apparently also did so in Award No. 6925.

Following these five cases were a group of three others decided three months later. In the first of these cases, Award No. 7004, the new language of the rule is quoted, but there is no discussion as to whether it changed the scope of the Board's review. However, the entire discussion of the evidence is within the framework of whether or not the charge was proved beyond a reasonable doubt, and the concluding sentence of the opinion (in which the

claim was denied) reads: "In this posture of the record we are unable to say that the Carrier acted unreasonably in concluding that the record established the charge beyond a reasonable doubt." The Board in this case clearly adopted as the proper standard of review of the Carrier's action, the standard of "proof beyond a reasonable doubt" as provided in the contract. Awards 7005 and 7006 involved the same facts and reached the same result.

The prior decisions of this Division on the language of the rule under consideration here cannot be said to have placed a consistent interpretation upon that language; the question therefore is open to our further consideration. On the basis of the analysis and discussion set forth above, it is our conclusion that when a discipline case is brought before the Division under Rule 49 of this Agreement, it is our function to consider it in the light of the degree of proof provided by the parties therein rather than under the doctrine of "substantial evidence," and if the evidence in the record fails to justify a finding by the carrier that the charges were proved beyond a reasonable doubt, the discipline assessed must be set aside. In this connection, it should be noted that while the phrase "reasonable doubt" is subject to many interpretations and defies exact definition, this is also true of the phrases "substantial evidence," "abuse of discretion" and "arbitrary and capricious," which have been applied by the Board for many years.

The remaining question is whether the evidence in this case supports a finding that Beale was proved guilty of the charges against him beyond a reasonable doubt. Conductor Lawery's statement that Beale swore at him and struck him is supported in all material details by the statement of Zephyrette Stribling, who witnessed the occurrence. The fact that Stribling witnessed the altercation, and the fact that the altercation occurred, are both supported by the statements of Police Sergeant Malloy and Ticket Examiner Corley that Stribling asked them to arrest Beale at the time of the incident. This evidence, despite Beale's denial, is of sufficient weight to support a conclusion by the Carrier that Beale's guilt was established beyond a reasonable doubt.

The Carrier chose to present no witnesses at the hearing, but submitted all evidence in the form of written statements; Claimant upon advice of his representative refused to answer questions addressed to him by Carrier's representative. Neither of these practices is designed to accomplish the purpose of the hearing which is to develop all the facts. The Board has commented unfavorably on these practices in the past and takes this occasion to do so again.

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

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.