Award No. 8987
Docket No. PC-10853

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Howard A. Johnson, Referee

PARTIES TO DISPUTE:

ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN, PULLMAN SYSTEM

THE PULLMAN COMPANY

STATEMENT OF CLAIM: The Order of Railway Conductors and Brakemen, Pullman System, claims for and in behalf of Conductor T. I. Myers, Chicago West District, that the Company failed to comply with the terms of Rule 49 of the Agreement between The Pullman Company and its Conductors when holding hearing on charges preferred against him on August 1, 1958; that such action by the Company resulted in Conductor Myers not being accorded a fair and impartial hearing as required by Rule 49.

We now ask that Conductor Myers' record be cleared and that he be restored to service and given all rights, including vacation rights, and paid for all lost time; that such lost time be paid as set forth in the Memorandum of Understanding concerning Compensation for Wage Loss as shown on page 99 of the current Agreement.

OPINION OF BOARD: The contention is that Claimant was not given a fair and impartial hearing because four employes of the Pullman Company whose statements were introduced in evidence at the hearing were not personally present.

At the outset Claimant's representative demanded that four employes named be present, objected to the hearing proceeding without them, and asked that it be recessed until they were brought in. The hearing proceeded, the statements of eight employes including those four, were introduced, and on that and other evidence, Claimant was discharged from the service.

The Rule relied upon by the Employes is 49(h) of the Agreement adopted September 6, 1957 and effective September 21, 1957.

Rule 49 is the discipline rule. Among other things it provides by separate paragraphs (a) that after his probationary period a conductor "shall not be disciplined, suspended or discharged without a fair and impartial hearing"

unless waived by him; (b) that he shall be furnished a full and exact copy of the original letter of complaint with certain limitations; (e) that "names and addresses of all other witnesses contacted during the investigation, also full and exact copies of statements * * * to be used at the hearing, shall be exchanged by the parties" in advance of the hearing; and (g) that both parties shall have "the right to hear and cross-examine any witness who is present at a hearing.

Rule 49(h) reads as follows:

> "When the primary accuser of the conductor is an employe of The Pullman Company, he or she shall be present as a witness in the hearing, together with any employes of The Pullman Company who have made statements or who have knowledge of the facts and are immediately available."

It is contended, not that any of the four witnesses whose presence was demanded was the primary accuser or was immediately available, but that nevertheless their presence was required under Rule 49(h) as "employes of The Pullman Company who have made statements or who have knowledge of the facts and are immediately available".

The basis for this contention is an interpretation made on September 10, 1957, after the new agreement had been adopted by the parties (September 6th) and before it went into effect (September 21), by Referee Emmett Ferguson who had redrafted Rule 49.

The contention is not that there was an understanding, prior to the adoption of the rule, that certain words would not be given effect, so that it might be inequitable to apply them; for the interpretation came after their adoption.

The argument is that since a witness cannot be cross-examined unless present the reference to cross-examination constituted an interpretation of the words "employes * * * who have made statements or who have knowledge of the facts and are immediately available" as somehow requiring their presence even if not immediately available; in other words, that the interpretation removed the express and unambiguous limitation agreed upon by the parties.

It is helpful to consider the history of Rule 49, the Discipline Rule. In the preceding Agreement it was not divided into sections identified by letter, but the provision which the new section (h) superseded was as follows:

> "When the primary accuser of the conductor is an employe of The Pullman Company, he or she shall be present as a witness in the hearing".

Due to the widespread operations of the Pullman Company and the expense and difficulty of bringing in witnesses from throughout its system, as well as the want of subpoena power by either party to bring in witnesses not in the Company's employ, it has long been the agreed procedure to use witnesses' statements at hearings except for the primary accuser. That established procedure is shown by the above quoted references in Rule 49 to (e) "statements to be used in the hearing"; and (g) the right to cross-examine, not all witnesses, but "any witness who is present at the hearing".

In the negotiations for the new 1957 Agreement, as shown by Employes' Ex Parte Statement, the Organization proposed that this part of the rules be made to read as follows:

> "(g) All employes of The Pullman Company who have made statements shall be present at the hearing. In cases where written testimony against those charged is made by persons other than employes of The Pullman Company and such persons fail to appear at the hearing to confirm their signature and allow their cross-examination thereat, the hearing will proceed under the provisions hereof, with the understanding that in cases where the guilt of the accused is not proven beyond a reasonable doubt by other witnesses present at the hearing, no discipline will be assessed. However, if his guilt is proven beyond a reasonable doubt by other testimony given at the hearing, discipline may be assessed".

This provision would have required all witnesses who are employes of The Pullman Company to be present in person; and while it would have permitted written statements by outside witnesses, it would have required the guilt of the accused to be proven beyond a reasonable doubt by witnesses actually present at the hearing. In other words, it would practically have eliminated the efficacy of written statements.

The Employes' Ex Parte Statement says:

> "The Company and the Organization were unable to agree upon the discipline rule, as well as several other rules that were proposed by the Organization. It was agreed to refer the issues that we were unable to agree on to a special board of adjustment.
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> "The National Mediation Board appointed Mr. Emmett Ferguson as the Referee for Special Board No. 199, and Mr. Ferguson, to a large extent, wrote the Discipline Rule, and this Rule became effective September 21, 1957.
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> "Prior to the time the Discipline Rule became effective on September 21, 1957, Referee Ferguson requested the parties to meet with him. On September 10, 1957 representatives of the Company, and the undersigned, met with Mr. Ferguson and at that time a discussion was had concerning paragraph (h) of Rule 49.
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> "On the same date that the conference was held Mr. F. J. Boeckelman, Manager, Employe Relations, The Pullman Company, addressed a communication to General Chairman A. G. Wise, of his understanding of Mr. Ferguson's interpretation of paragraph (h) of Rule 49, which reads as follows:
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> 'Dear Sir:
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> 'In connection with conference held with Mr. Ferguson this morning and the discussion had in regard to paragraph (h) of Rule 49. **Discipline.** Mr. Ferguson made the following statement as his explanation of the words "together with any employes of The Pullman Company who have made statements or who have knowledge of the facts and are immediately available:

'If a person interviewed is not to offer anything to the hearing officer who is making the determination, it shall not be expected that his name shall be supplied or that his statement shall be offered or that he shall be dragged into the hearing. If he has anything consequential enough to call to the attention of the hearing officer, then the rule should be applied so that the accused may know who the witnesses are and cross-examine them.

Yours very truly,

/s/ F. J. Boeckelman'

"From this letter it will be noted that if a Pullman employe who has made a statement or has knowledge of the facts concerning the incident such an employe will be present at the hearing as a witness so that he may be cross-examined."

The Brotherhood states that the Company and the Organization were unable to agree upon the discipline rule, in which the latter wanted to require all material evidence to be given by witnesses in person at the trial; and that Mr. Ferguson rewrote the Discipline Rule, which as above noted provides for (e) **statements to be used at the hearing;** (g) the right to hear and cross-examine **any witness who is present at a hearing;** and (h) the requirement for the presence of **witnesses who are immediately available.**

Yet the Brotherhood contends that by the interpretation the Referee accomplished something to which the Company refused to agree and which he himself did not provide in the discipline rule drafted by him for the parties, and which the parties did not include in the new Agreement. Such a contention would reverse the legal truth that a contract is a meeting of the minds.

It would also mean that completely unambiguous words can be so interpreted as to eliminate them entirely, and thus effect not an interpretation but a repeal. Yet it is well established that this Board has no power to enact, amend or repeal adopted rules; and certainly Referee Ferguson has no greater power, even under the guise of an interpretation.

Furthermore, it is apparent that he had no such intention. While reference in the first paragraph was to the quoted words of paragraph (h), the question answered was not the meaning of the unambiguous words "immediately available". Nor was it limited to paragraph (h) of the rule. The question was whether, regardless of the immateriality of his information, a person's name shall be supplied, as required by paragraph (e) or his statement shall be used at the hearing as contemplated by paragraph (e) or his presence required at the hearing if he is immediately available, as provided by paragraph (h). For the answer was that if his information was immaterial "it shall not be expected" (1) that his name shall be supplied or (2) that his statement shall be offered or (3) that he shall be dragged into the hearing; but that if he has something consequential to offer "then **the rule** shall be applied so that the accused may know who the witnesses are and cross-examine them". Obviously it is paragraph (e) of the rule, and not paragraph (h) which entitles him to the names and statements of the witnesses; paragraph (h) of the rule entitles him to have the witnesses present for cross-examination, but only if they are "immediately available". No interpretation can change the words used in the Agreement, and obviously Referee Ferguson had

no such intention. His reference to cross-examination was certainly not intended to amend the rule so as to require the attendance of witnesses not immediately available.

The same contention was made in Award No. 2770 of this Division, not as a question of interpretation, but as a question of assertedly conflicting or ambiguous rules. In that case it was argued that the Carrier's refusal to produce certain witnesses for cross-examination violated the rules. This Division (Referee Parker) said:

> "* * * 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. * * *
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> "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. * * *"

Thus in the absence of a rule barring written statements, a reference in the rules to cross-examination of witnesses was held in Award 2770 not to bar such statements.

In the present case the rules specifically permit the use of statements, specifically require the presence of only employes "immediately available", and specifically authorize the cross-examination of only a "witness who is present at the hearing".

No provision of the Agreement conflicts with those express provisions adopted by the parties. In the absence of conflict or ambiguity no interpretation is permissible; and certainly an interpretation cannot supply an ambiguity and then proceed to solve it by striking out the parties' unambiguous words.

FINDINGS: The Third Division of the Adjustment Board upon the whole record and all the evidence, finds and holds:

That the parties waived hearing on this dispute; and

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 rules were not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: F. P. Morse
Acting Secretary

Dated at Chicago, Illinois, this 21st day of September, 1959.