Award No. 10101

Docket No. PC-12031

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Martin I. Rose, 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 L. A. Miller, Penn Terminal District, that:

1. The Pullman Company failed to comply with the Agreement between The Pullman Company and its Conductors in making charges against Conductor Miller.

2. We hold that the action of the Company in dismissing Conductor Miller from the service of The Pullman Company was arbitrary and capricious; also, that the charges were not proven beyond a reasonable doubt, and further, the Company used hearsay evidence to support its position.

3. We now ask that Conductor Miller be restored to service with all rights, and compensated for all time lost in accordance with the Memorandum of Understanding Concerning Compensation for Wage Loss, found on page 99 of the current Agreement.

OPINION OF BOARD: By letter dated October 30, 1959, the Company wrote the Claimant as follows:

> "You were conductor assigned to service in line 6524, PRR Train #30, St. Louis, Missouri to New York City, August 30-31, 1959.
>
> "A hearing will be accorded you . . . at . . . on the charge that:
>
> > "While in service in the above described assignment, you made improper remarks to a woman passenger and offered to furnish her Pullman accommodations without collection of proper rate . . ."

After hearing held on December 1, 1959 and January 15, 1960, the Claimant was discharged from service, effective February 11, 1960, on the basis that the "transcript of the hearing is replete with evidence sustaining the charge."

This appeal was taken upon final denial of the claim on the property. The claim is predicated upon the contention of the Petitioner that the Company's action in discharging the Claimant violated Rule 49 of the applicable Agreement in that the charge made against him was no specific as required by the Rule, that hearsay evidence was relied on by the Company to sustain the discharge, that the uncorroborated state of the complaining passenger did not prove the charge as required by the Rule.

The Company contends that Rule 49 was satisfied in all respects, that the evidence introduced at the hearing on the charge considered with the Claimant's letter to the Superintendent dated September 20, 1959, and his failure to appear at the hearing furnishes ample support for its finding that Claimant was guilty of the charge, and that in view thereof and the Claimant's service record, the disciplinary action taken against him was proper.

Rule 49(i) reads, in part, as follows:

> "A decision to discipline shall be made only upon evidence in the record which establishes guilt beyond a reasonable doubt."

We recognize that the Company bears the legal and moral responsibility for the proper behavior of its employes toward passengers and that those who engage in misconduct in this regard must be removed from the service in the interests of satisfying these responsibilities and maintaining the Company's business. Nevertheless, in view of the contentions of the parties, and the Agreement between them, and aside from the question whether the charge was specific within the meaning of the Rule, it is our duty to determine whether there is evidence in the record to support the Company's finding that the Claimant was guilty as charged beyond a reasonable doubt.

As evidence of his guilt, the Company refers to the Claimant's letter to the Superintendent dated September 20, 1959, which reads as follows:

> "I was the regular assigned conductor on PRR #30 leaving St. Louis August 30, 1959
>
> "In answer to your letter of 9-14-59
>
> "It would be impossible to assign space to any passenger on PRR without the proper transportation.
>
> "My conversation with the passenger in the diner was a matter of business.
>
> "I did not at any time have a drink."

In considering this letter, we are not construing a pleading in a court of law; and we are not confronted by any requirements as to the language or form in which a denial of wrongdoing must be made. While the letter indicates that the Claimant recalls the passenger and his conversation with her, no inference of an admission of wrongdoing may be drawn therefrom.

By stating in his letter that "it would be impossible to assign space to any passenger on PRR without the proper transportation," Claimant indicated that he could not have offered the complaining passenger accommodations without collection of the proper rate. Thereby, Claimant indicated that he did not engage in such conduct. By stating that "My conversation with the passenger in the

diner was a matter of business," Claimant indicated that his conversation with and remarks to the complaining passenger were proper, and thereby he denied that he made improper remarks to her. There is nothing in the letter to suggest that the "matter of business" was not proper business. By stating that "I did not at any time have a drink," Claimant denied that he was drinking on the occasion involved.

For these reasons, we must conclude that Claimant's letter is more consistent with a denial rather than an admission of guilt.

The record shows that the allegations of the incident of misconduct in the unsworn written statement dated October 22, 1959, of the complaining passenger were uncorroborated. The statements of PRR Passenger Manager Dorrance and of Inspector Bowman cannot be regarded as corroboration. Manager Dorrance received his information from a report of a PRR Public Relations Representative based on statements made by the complaining passenger's brother who was not on the train. Inspector Bowman's statements were based on what was related to him by the complaining passenger.

The crucial question to be determined is whether the uncorroborated written statement of the complaining passenger is sufficient on the record of the hearing considered as a whole to support the finding that Claimant was guilty of the alleged misconduct beyond a reasonable doubt in accordance with the Rule. The record discloses that the written statement of another witness posed contradictions of allegations contained in the statement of the complaining passenger with respect to substantial and material aspects of the alleged incident of misconduct. As an integral part of such incident, the statement of the complaining passenger asserts that on the occasion of the improper remarks made by the Claimant in the diner, he ordered "ice tea" but was served an "alcoholic drink" and that in her opinion "he had definitely been drinking." On the other hand, the statement of J. H. Jones, the car Porter, asserts that he "had various conversations with my conductor about conditions and space and did not observe or detect the odor of intoxicants on his person or observe anything unusual about his actions." The statement of the complaining passenger indicates that she paid her transportation to the Train Conductor and the Claimant on separate occasions and that she paid the latter while he sat in her roomette and made improper remarks. The Porter's statement indicates that although he could not specifically recall them stopping at the roomette referred to, the Train Conductor and the Claimant made their collections together. It is noteworthy that there is no evidence that the complaining passenger complained about Claiman't behavior to anyone on the train.

At the hearing, representatives of the Claimant took the position that he was not required to appear because the charge was not specific as required by Rule 49, and Claimant did not appear. The contention that the charge did not meet the specificity requirements of the Rule is urged here but we need not pass on it for the reason that our conclusion rests on other grounds. Nevertheless, we are not satisfied on the record in this case that the failure of the Claimant to appear is adequate in itself in the contradictory posture of the record to sustain the "beyond reasonable doubt" finding required by Rule.

We hold that under the circumstances presented by the record in this case, the uncorroborated written statement of the complaining passenger which is contradicted in substantial and material respects by the written statement of another witness does not sufficiently support the Company's finding that Claimant was guilty of the alleged misconduct beyond a reasonable doubt

within the meaning of Rule 49. See Awards 4230, 7774, First Division Award 19525.

Our conclusion does not mean that guilt under the Rule may not be established by an uncorroborated written statement in appropriate circumstances.

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

That the parties waived oral hearing;

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

That the Agreement was violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 6th day of October, 1961.

DISSENT TO AWARD NO. 10101, DOCKET NO. PC-12031

Award 10101 is in error in sustaining the claim herein. It is inimical to the public interest and is based upon unsound conclusions concerning the evidence of record.

Carriers have a legal and moral responsibility to the public to discipline, and to exclude the unfit from their service.

M. St. Paul and S.S.M. Ry. Co. v. Rock 297 U.S. 410:

"The Carriers owe a duty to their patrons as well as those engaged in the operation of their railroads to take care to employ only those who are careful and competent to do the work assigned to them and to exclude the unfit from their service."

O. R. C., et al. v. Pullman Co., (DC Wisc. 1948):

"The Pullman Company, even to a greater degree than a railway, must impose discipline on its employes who willfully violate its rules."

In Award 10112, this Division held as follows:

"Railroads—if they are to pursue their business efficiently and profitably must have the earned confidence and support of the public.

Such confidence is earned not by tracks, trains, cars, bridges, signals or stations but by PEOPLE. People—employed, trained and directed by the Railroads to execute their assignments properly and efficiently. People—who will rigidly follow the necessary and important railroad rules set forth for their guidance and direction. People—who will strive to earn the confidence and active support of the public by the manner in which they perform their jobs."

Also see recent Awards 8755 and 8567, among many others, in which this Division held that the public interest is paramount.

In Award 4771 this Division held:

"* * * Upon the management rests the obligation of safe operation of the railroad, the courteous treatment of its patrons and working conditions of its employes. To maintain that obligation it is necessary that Carrier have the right for proper cause to discipline and to discharge. * * *"

The record shows that, in the instant case, Carrier had proper grounds to discharge the claimant herein. It shows that, on August 31, 1959 Mr. George S. Halleran, Public Relations Representative of the Pennsylvania Railroad, received a telephone call from the brother of Miss Vivia Locke, Director of Speech at the University of Oklahoma, relative to improper conduct towards her by Claimant while she was a passenger on the train on which Claimant was conductor on August 30, 1959. Upon being furnished by the Pennsylvania Railroad with information concerning this incident, The Pullman Company obtained statements from Miss Locke and members of the crew, including the Claimant herein. The complaining passenger's statement was as follows:

"The Pullman Company
Chicago
Illinois

"Gentlemen:

"On August 30, 1959 I was in St. Louis enroute to New York. I had decided to change my coach ticket to that of a first-class ticket with roomette accommodations.

"On arriving at the Pennsylvania train number 30, I approached the Pullman conductor and inquired if I might have Pullman accommodations. He looked at my ticket and directed me to roomette 6 in car 302. The porter carried my luggage to the roomette.

"Later, after the train departed, the Pullman conductor came to my roomette and suggested that there was no need of my paying Pullman fare from St. Louis to New York. He intimated that Indianapolis would be a reasonable place to start such accommodations. He further suggested that I might sit in bedroom D, (from which he said he worked) until arriving in Indianapolis. I suggested that this would be dishonest. He did not at this time tell me what the increase in the fare was, so I did not pay him.

"I later went to the diner for lunch. I sat at a table by myself. The Pullman conductor came and without my inviting him, he sat down opposite me. He proceeded with the same idea as stated above. He

seemed dedicated to the idea of saving me money. He suggested that upon finishing my lunch that I go to sit in bedroom D—relax and rest. I said to him 'this is ridiculous.' While it might seem the logical thing to get up and leave at this point, I didn't do so, either from confusion, or a desire on my part to avoid attracting attention.

"He ordered 'ice tea'. When it was served it was obviously an alcoholic drink as it definitely had an alcoholic odor. In fact, in my opinion he had definitely been drinking.

"In the course of conversation I mentioned that it had stormed the previous night. I remarked concerning the beauty of the storm whereupon he said, 'I get my kicks out of women!'

"I had poison ivy on my hand. It was covered with a calomine lotion. I spoke of my discomfort he then said, 'I am not bothered with such, but I can't go in a men's room that (a word I did not understand) doesn't just jump right off on me.' This of course, did not make sense to me. I left the diner and returned to the roomette. As soon as the train conductor came to my roomette I paid him the increase in fare.

"Later the Pullman conductor came to my roomette, and sat down on the commode seat. I told him I had paid the fare to the train conductor. He said 'Did he ask you for that?' I said, 'No, I wanted to pay him and quickly.' He then took the money for the roomette and said 'You school teachers know all the answers. If you don't want to save any money why should I care.' He then left and I did not see him until the following morning.

"I identified him by the cap and buttons with the word Pullman on them. He appeared to be about fifty years old and he wore glasses. I did not want to run the risk of seeing this man again. I therefore came back to my home by plane.

Sincerely yours,

/s/ Vivia Locke
Vivia Locke

VL:ba"

In such a situation, the following from Award 2945 is pertinent:

"It must be remembered that acts of this kind are difficult of proof because they usually occur when there are no witnesses about."

Claimant's statement was as follows:

"I was the regular assigned conductor on PRR #30 leaving St. Louis Aug. 30, 1959.

"In answer to your letter of 9-14-59

"It would be impossible to assign space to any passenger on PRR without the proper transportation.

"My conversation with the passenger in the diner was a matter of business.

"I did not at any time have a drink."

Under date of October 30, 1959, Carrier wrote Claimant as follows:

"You were conductor assigned to service in line 6524, PRR Train #30, St. Louis, Missouri to New York City, August 30-31, 1959.

"A hearing will be accorded you in my office, Room 173, Pennsylvania Station, New York 1, New York, commencing at 10:30 A. M., November 17, 1959 on the charge that:

> While in service in the above described assignment, you made improper remarks to a woman passenger and offered to furnish her Pullman accommodations without collection of proper rate.

"In this hearing consideration will be given to your service record, a brief transcript of which is attached.

"Please arrange to be present at this hearing."

At the Local Chairman's request, hearing was postponed until December 1, 1959, and when convened on that date Claimant was not present so Carrier recessed same. Hearing was reconvened on January 15, 1960, and again Claimant did not appear. His representative thereat took the position that the charge was not specific notwithstanding Carrier had furnished Claimant with copies of all of the evidence in its possession. The hearing continued in Claimant's absence and his written statement hereinbefore reproduced constitutes the sole defense offered by him in the record against the charge.

The majority in Award 10101 erroneously concludes as follows:

> "By stating in his letter that 'it would be impossible to assign space to any passenger on PRR without the proper transportation,' Claimant indicated that he could not have offered the complaining passenger accommodations without collection of the proper rate. Thereby, Claimant indicated that he did not engage in such conduct. * * *"

The majority's conclusion in this respect is unsound for the following reasons:

> Claimant herein does not deny that he offered to assign space to the complaining passenger from Indianapolis instead of from St. Louis. Furthermore, proper transportation for assigned space from Indianapolis would not have excused Claimant from any failure to collect the proper rate therefor from St. Louis where the passenger initially boarded the train.
>
> Claimant does not deny that he suggested that the complaining passenger sit in Bedroom D in which he worked until arrival of train at Indianapolis.
>
> Claimant does not deny that, when he finally took the money for the roomette, he remarked to the complaining passenger "You school teachers know all the answers. If you don't want to save any money why should I care."

In Award 10101 the majority also erroneously concludes as follows:

> "* * * By stating that 'My conversation with the passenger in the diner was a matter of business,' Claimant indicated that his conversation with and remarks to the complaining passenger were proper, and thereby he denied that he made improper remarks to her. There is nothing in the letter to suggest that the 'matter of business' was not proper business. * * *" (Emphasis ours)

The majority's conclusion in this respect stretches its credulity beyond any bounds of reason. Obviously, while admitting to a conversation with the passenger in the diner, Claimant does not deny stating to her that 'I get my kicks out of women' and what happens to him when he goes to the men's room. Furthermore, he does not deny what is stated to have occurred outside the diner.

In Award 10101, the majority also erroneously states as follows:

> "* * * The record discloses that the written statement of another witness posed contradictions of allegations contained in the statement of the complaining passenger with respect to substantial and material aspects of the alleged incident of misconduct. * * *"

The written statement here referred to is that of Pullman Porter Jones, and involves the question of whether or not Claimant had been drinking which was not a part of Carrier's charge against Claimant and hence actually is irrelevant thereto. Porter Jones' statement, in pertinent part, is as follows:

> "I was porter assigned to car 302, Octorara Rapids, Line 6524, on PRR Train 30, St. Louis to New York August 30-31, 1959.
>
> "I recall while receiving on the station platform at St. Louis my conductor was standing by; a lady approached and requested space to New York, stating at the time that she had a coach ticket but wanted to buy Pullman. Conductor after checking his diagram assigned the lady to Roomette 6 in my car, 302. I took her baggage and escorted her to her space.
>
> "* * * * *
>
> "I did not observe this lady who had roomette 6 in Bedroom 'D' of my car where my conductor was working at any time. I did not see him talking to the lady in Roomette 6 or in her room at any time.
>
> "I had various conversations with my conductor about conditions and space and did not observe or detect the odor of intoxicants on his person or observe anything unusual about his actions. He made no mention to me at any time about any contact or conversation he had with the lady who occupied Roomette 6."

It is significant that, while Jones' statement confirms the complaining passenger's statement of what occurred at the time she boarded the train at St. Louis, it is negative with respect to any question concerning Claimant's drinking and his contact with the complaining passenger because Jones simply states he had observed nothing in these respects. In any event, Claimant was not charged with drinking.

In this state of the record Claimant's failure to attend the hearing is of paramount importance because the record contains no denial by Claimant of any part of the actual charges against him.

In Award 3342 we held:

"The finding of guilt or innocence of the charge must be based upon the facts developed at the investigation and the evidence there disclosed controls. See Award 3322. * * * An investigation must be held, evidence taken therein, the investigation concluded, and any other procedure connected with it progressed as the rules provide.

"In approaching a determination of this case the duty of this Board is to review the record of the investigation subject to the established rule that 'it is not the function of this Board to weigh conflicting evidence in a discipline case and if the evidence is such that, if believed, it will support the findings of the carrier, the judgment of the carrier will not be disturbed.' See Award 3321."

In Award 3732 we held:

"* * * He (Claimant) was not justified in declining the offered investigation. It necessarily follows that he was not justified in refusing to participate in the investigation which the Carrier and the Organization agreed to hold on August 14th, 1946.

"Considering all of the record of this case, we cannot escape the conclusion that Claimant did not actually desire an investigation."

In Award 4066 we held:

"* * * His action in willfully refusing to participate in the investigation constitutes a waiver of all the objections here raised. His obligation was to proceed with the investigation and if it appeared that he was deprived of a fair and impartial hearing by prejudicial rulings of Carrier's investigating officer, the record could have been progressed on appeal and appropriate action taken before this Board. But one may not willfully refuse to participate in an investigation and then assert that he has been deprived of a fair and impartial hearing. Award 2654. No basis for an affirmative award exists."

In Award 6120 we held:

"Claimant, on advice of his representative, refused to answer questions at the hearing scheduled for April 27, 1950. He and his representatives walked out of the hearing scheduled for May 12, 1950 and declined to accept the Carrier's offer of June 16, 1950 to conduct another hearing. Under such circumstances the claim is without merit."

There is no merit to Petitioner's contention at the investigation that the charge was not specific, particularly considering that Carrier had furnished Claimant with all of the evidence in its possession concerning this incident prior to the hearing. In Award 4855 we held:

"* * * The information contained in this charge was adequate to inform Claimant of the act alleged to warrant disciplinary action. It is not required that a charge be in the form of a criminal complaint or that the details of the offense be set forth. It is sufficient if the charge

reasonably advises the employe of the act for the doing of which he is to be tried. It is not required that the evidence to be used be set forth or that the information in the possession of the Carrier be revealed. If it advises the employe sufficiently so that he may have the opportunity to call witnesses and produce evidence on the issues to be tried, the purposes and requirements of the rule have been met."

It is clear from the record in this case that the majority in Award 10101 erred in sustaining the instant claim on its holding that the charge was not proven beyond a reasonable doubt. The following excerpt from our Award 7774, involving this same Carrier and a comparable rule, and from our Award 8754, involving the same parties, agreement and rules as in the instant case, are pertinent.

Award 7774

"This Carrier owes the traveling public unlimited assurance that it will not be exposed to such possibilities as are here alleged to have happened."

Award 8754

"Considerable emphasis was placed on the contention that because of the nature of his work, the testimony of Operator Clary was suspect; that because it was not corroborated, it was therefore of no probative value. There is no significance to this complaint. The testimony of one witness, if believed, is sufficient."

For the reasons assigned herein, among others, we dissent.

/s/ W. H. Castle
/s/ P. C. Carter
/s/ R. A. Carroll
/s/ D. S. Dugan
/s/ J. F. Mullen

LABOR MEMBER'S ANSWER TO CARRIER MEMBERS' DISSENT TO AWARD 10101 — DOCKET PC 12031

It is crystal clear from reading the dissent, that Carrier Members are attempting to confuse the record with irrelevant, extraneous and immaterial matter. Quotations out of context of Court Decisions and Awards of this Board will not relieve the Carrier of its burden of proving Claimant guilty of its charges under the clear and definite terms of Rule 49 (i), reading in part as follows:

"* * * a decision to discipline shall be made only upon evidence in the record which establishes guilt beyond a reasonable doubt."

Rule 49 specifically places the burden of proving the accused guilty beyond a reasonable doubt before any discipline shall be made. This the Carrier failed to do. It found the Claimant guilty upon the uncorroborated written statement of one complaining passenger who was not present at the hearing for cross examination; the balance of the testimony introduced at the hearing was hearsay and so recognized by Superintendent Worley when he testified that—

"I think that my conversation would be considered hearsay, Mr. Chancey; after all, any charge that would be preferred would be based on her (passenger's) statement."

In other words, we have a situation where Carrier relied entirely upon the uncorroborated statement of a lady passenger who did not attend the hearing, nor submit herself to cross examination by the accused or his representative. In this state of affairs the dissenters have jumped to wild and untenable conclusions that Claimant was guilty because—

"The Carriers owe a duty to their patrons * * * to exclude the unfit from their service (M.St.P. & SS M. Ry v. Rock);"

that Carrier—

"must impose discipline on its Employes who wilfully violate its rules (ORC et al v. Pullman Co.)"

regardless of whether the employe is guilty or not, even though they violate the collective bargaining Agreement in doing so.

The question here was whether Claimant was guilty of misconduct—not that he failed to properly perform his "job", (Award 10112) nor was the question of "safe operation of railroad" (Award 4771) involved. Awards 8755 and 8567 involved an alleged violation of Scope Rules, which are not here involved.

This is the type of extraneous matter introduced by the dissenters every time they find that a Carrier has violated the Agreement with its employes.

I will now return to the pertinent issue and show that Award 10101 followed well established and fundamental principles relating to due process when it held that Carrier violated the Agreement by dismissing Claimant upon the **uncorroborated written statement of one passenger.** Referee Simmons summed up the controlling principles under similar circumstances in Award 3288, when he held:

"For two centuries in America it has been recognized that the right of testing the truth of any statement by cross examination is a vital feature of any investigation devoted to truth development. No safeguard for testing the value of human statements is comparable to that furnished by cross examination and no statement should be used as testimony until it has been subjected to that test or the test waived. It is a device for the discovery of all the truth. A witness on direct examination may disclose but a part of the necessary facts. The opposing party has the right to probe for the remainder. Qualifying, illuminating and often discrediting answers are secured by this process. Where statements are to be used and are furnished to the employe in advance of the hearing presumably he has the opportunity to secure explanatory, or amplifying statements, from the party making the statements. That process may in many instances satisfy the requirements of the rule. The rule is not satisfied where as here no opportunity to cross examine was furnished at any stage of the proceedings."

"To approve the procedure here followed is to give to these reports the untouchable sanctity of being the truth, the whole truth and nothing but the truth. If such were approved then all that these

investigations need be would be to present the inspector's report, and find the employe guilty as charged. The fundamentals of an investigation are to determine whether or not the statements are true, to throw light upon the circumstances and to deny or disprove. These rights of the employe are all subject to denial unless these statements or the witness making them are subject to the critical scrutiny and examination of the employe. Those right were denied here."

In an almost identical case—Referee Elkouri in Award 9517— quoted from the above Award with approval, and stated:

"It is true that in numerous cases this Board has accepted, as reliable, statements not subjected directly to cross examination. It should be noted, however, that in some of those cases the accused employe admitted at least some sort of misconduct (as in Awards 3109, 8300; also see 3775); or there was other evidence to support the charge (as appears to be the case in Awards 5667, 5861, 6103, 6866, 7139, 7866, 8334); or the statements came from separate and independent eyewitness sources, thus corroborating one another (as in Award 8504 and also apparently in 8503); or the accusing statements were made by special investigators (as in Award 7863); or the employe 'had been informed prior to the filing of the charge against him' of the passenger's letter (as in Award 3775); or the accused employe refused to exercise the opportunity given him, to confront the authors of the statement prior to the hearing (as in Award 7907); or the full name and address of the author of the statement was given to the accused employe by the Carrier at the hearing with a clear offer by the Carrier, which the employe did not choose to take advantage of, to adjourn the hearing long enough for the employ to contact the author (as in Award 8829, where there was also other evidence to support the charge); and other of those cases appear otherwise distinguishable from the present case (in some cases the Parties by their Agreement had expressly provided that in certain types of cases statements could be used without any right to confront their author). It is very significant, too, that in the Awards in which statements not subjected directly to cross examination were given probative weight, the Board rarely, if ever, stated unequivocally that the statements were the only evidence in apparent support of the charge; also, in those cases there was rarely any indication in the Award of vigorous and timely protest by the Organization at the hearing "against use of the only evidence against the accused employe without according him opportunity of cross examination. Moreover, it must be remembered that probably no two discipline cases are identical in all respects, and that in discipline cases probably more than in any other type, each case must be decided largely on its own."

For other Awards sustaining the same principle, see Awards 2162, 2613, 2614, 2634, 2797, 4295 and 4325.

In Award 2162, supra, Referee Blake held:

"It is essential to a fair and impartial hearing that the accused shall be present at the examination of the accusing witnesses and be afforded the right of cross examination. First Division Awards Nos. 3088, 3509, 4306, 4596**."

The record here discloses that the accusing passenger did not submit her statement of the alleged incident until approximately seven weeks after her

trip, and then only after a Carrier representative had called upon her for her statement. Certainly, the accused or his representative could have been present at the time to question the passenger.

In Award 2634, supra, Referee Shake stated — here pertinent — that:

> "The foregoing expressions, made over the signature of the company's Supervisor of Industrial Relations, are highly persuasive that the charge was tried on a false theory as to the proper function of such a hearing. The passenger was not present at the hearing and there is no evidence in the record that he was or was not a business man, reputable or otherwise. Assuming that he was, we know of no principle that would require that more weight be given to his statements than to those of a trusted Pullman porter. Business success does not create any presumption of good reputation for truth and veracity; nor does the fact that a man occupies an humble station in life justify the conclusion that he is not to be believed."

> "It is apparent that the burden was imposed upon the claimant of disproving the complaint made by the passenger. This was improper, and we are forced to the conclusion that the claimant did not have a fair hearing."

In Award 2797 Referee Shake pointed out that . . .

> "The Carriers' representatives should familiarize themselves with the fundamental principles as to what constitutes evidence of rational probative value, and should see that these principles are observed at every hearing. These rules are not technical or difficult of comprehension. They are so engrained in our American conception of the rights of the individual that they may not be ignored."

It is apparent that the dissenters are attempting to transfer the Carrier's burden of proof to the accused. This is so untenable that it is not necessary to cite authorities in refutation. The Courts have held that seniority is a property right that cannot be taken away without due process. The due process provisions of the Constitution are incorporated in Rule 49 of the parties' Agreement here. The citation of Awards by the dissenters involving entirely different situations will not relieve Carrier of its obligation to prove Claimant was guilty of misconduct before it was privileged to dismiss him from service.

The fact that Claimant did not attend the hearing—although his representative did—in no way relieved Carrier of this duty. Rule 49 provides as a condition precedent to discipline, suspension or discharge of an employe, the accused shall be furnished a full and exact copy of the complaint within fifteen days after date of receipt; he shall be notified in writing of the precise charge, time and date of hearing, etc.; also, that guilt must be established "beyond a reasonable doubt." If any of these factors are missing Claimant has not been afforded a "fair and impartial" hearing. A review of the wild and unsupportable conclusions reached by the dissenters merely reflects the arbitrary and capricious action taken by the Carrier in dismissing Claimant from service on unproven charges. What the dissenters are actually saying is that Claimant should have submitted himself to this illegal hearing in order for him to prove Carrier's charges against him. In Award 4607 Referee Whiting held . . .

> "Since an employe is under the rule, entitled to notice of the precise charge against him prior to the hearing, such notice is a condition precedent and he is not obligated to attend or proceed with the hearing

until such condition has been met. Particularly so, as in this case, where proper objection to the charge is made at or prior to the opening of the hearing."

Also, see Award 3011.

A review of the Awards cited by the dissenters will prove that they are clearly distinguishable from the circumstances confronting the Board here. A good example is the quotations from Award 8754 where Operator Clary attended the hearing and testified. Here the complaining witness did not attend the hearing, nor was she made available for cross examination, as was the case in Award 8754. Surely, the dissenters are aware of the distinction. It should be remembered that there was no probative evidence that anyone was "exposed" to any misconduct on the part of Claimant.

The citation of an excerpt from Award 7774 is nothing more than a feeble attempt to bolster an entirely unfounded dissent.

Award 10101 correctly follows the keystone precepts in the American concept of justice, that the accused must be confronted by the complaining witness with the right of cross examination. This principle is so well established that the untenable dissent thereto will have no force or effect.

REPLY TO LABOR MEMBER'S ANSWER TO CARRIER MEMBERS' DISSENT TO AWARD NO. 10101, DOCKET NO. PC-12031

Considering, among other things, that the Agreement between the parties recognizes the propriety of written statements as evidence and that witnesses need not be present at investigations; that Claimant himself refused to appear at the investigation and defend himself, and that he did not deny the charges, irrefragably labels the Labor Member's answer, supra, to be irrelevant, extraneous and immaterial, and Award 10101 to be in error.

/s/ W. H. Castle

/s/ P. C. Carter

/s/ R. A. Carroll

/s/ D. S. Dugan

/s/ J. F. Mullen