Award No. 11342
Docket No. DC-13316

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Arthur Stark, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF SLEEPING CAR PORTERS

CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY

STATEMENT OF CLAIM: . . . for and in behalf of C. E. Mackey, who was formerly employed by the Chicago, Burlington and Quincy Railroad Company in its Dining Car Department, operating as a porter between Chicago, Illinois and Denver, Colorado.

Because the Chicago, Burlington and Quincy Railroad Company took disciplinary action against Mr. Mackey by dismissing him from the service in the Dining Car Department in a letter from Superintendent P. M. Scott under date of October 2, 1961.

And further, because the charges upon which the dismissal was based were unproved in a subsequent hearing; and further, because Mr. Mackey did not have a fair and impartial hearing for the following reasons:

(a) The people who were to testify against Mr. Mackey were allowed to remain in the hearing room and hear each other's testimony after the Organization's representatives requested that they be removed from the room and not allowed to come in until they were ready to testify.

(b) The evidence of record is all hearsay, and there is no testimony submitted in the record from anybody who had any actual knowledge of the facts in this case.

(c) The passenger who made the complaint was not present at the hearing or investigation and did not testify.

(d) Statements were read into the record which neither Mr. Mackey nor his representative saw, and it was not known whether the statements were bonafide or not; when Mr. Grisinger was questioned about these statements, he replied with a wisecrack as follows: "Keep your shirt on."

(e) Such evidence as was presented as coming from the party who made the complaint was allegedly written, and since the original complaint was not present, neither Mr. Mackey nor his representative had an opportunity to face and cross examine the person giving evidence against him.

(f) The train conductor's evidence only contained information that he said he got from the complaining passenger.

(g) The special agent's testimony was not from anything that he had knowledge of, but from a statement he is alleged to have secured from the complaining passenger.

And further, because the action in dismissing Mr. Mackey from the service was arbitrary, unjust, unreasonable, and in abuse of the Company's discretion.

And further, for the record of Mr. Mackey to be cleared of the charge in this case, and for him to be reinstated to his former position in the Dining Car Department of the Chicago, Burlington and Quincy Railroad Company with seniority rights and vacation rights unimpaired and with pay for all time lost as a result of this unjust and arbitrary action.

OPINION OF BOARD: Claimant Clemon E. Mackey was hired by the Carrier in 1943 as a waiter. He had been working for many years as a coach porter on the California Zephyr when, in October 1961, at the age of 66, he was dismissed.

In the early hours of the morning on September 8, 1961 Conductor R. R. Grimm on the eastbound Zephyr was approached by Miss Beulah Anderson, an 18-year old college student, who said that the chair car porter had molested her in dome coach 21. When Conductor Grimm called the two train porters, Miss Anderson identified the man she had seen as the older one, with gray hair and light skin, in his middle or late 60's. (A. F. Burnett, the other porter, is younger and slimmer.)

Upon his arrival at Omaha, Conductor Grimm reported the incident. On September 12, Special Agent A. G. Hartman interviewed Miss Anderson at college and obtained a signed statement concerning the events of September 8. The critical part of her story is stated in this manner:

> ". . . I went and sat in the second seat from the front on the left side and went to sleep. . . . My feet were toward the aisle and I was laying partially on my left side. I was awakened by someone feeling around in my lap with their hand. I jumped up and slapped his left arm that he had in my lap and said 'Get out of here you crazy old fool.' He, then, quickly turned and ran down the steps. I screamed, then, ran down the steps, after I got over the shock. . . . This man was the light skinned porter with gray hair, and I pointed him out to the Conductor. I would guess him to be in his middle or late 60's. . . . I was not harmed by this man; but was very shocked and humiliated."

Miss Anderson advised Agent Hartman that she did not wish to appear at any formal investigation.

On September 13, Agent Hartman obtained a signed statement from Mr. and Mrs. Wilke Leners who had been passengers in dome car 21 on September 8. They reported seeing the "light-complexioned" porter coming down the steps and:

> "Then the young girl who had been seated just behind us came down out of the dome, she was very excited and said to the dark complexioned porter who was walking through the car, that a man had attempted to attack her in the dome. . . ."

On September 15, in an interview with Manager P. M. Scott, Claimant Mackey denied molesting Miss Anderson.

On October 2 Mackey was dismissed for violation of Rules "R" and 42 by conducting himself in "an immoral manner and molesting a woman passenger in dome of Coach No. 21 on Train No. 18 at about 4:00 A. M. near Hastings, Nebraska."

On October 16 a formal investigation was held at Claimant's request. On October 28 Carrier notified Mackey that the investigation sustained its previous decision. On November 2 the Organization submitted a claim which Carrier denied on November 9. A November 10 appeal was turned down on November 15. Another appeal, on November 21, was rejected on December 11, 1961 by General Manager J. W. Terrill. In the final paragraph of this letter Mr. Terrill wrote:

> "As you know, this declination does not preclude discussion of this case in conference in my office at some mutually convenient date if you desire to do so."

In replying to this letter on December 20, 1961, First International Vice President M. P. Webster wrote in part:

> ". . . This is notice to you that the Brotherhood of Sleeping Car Porters, as the duly authorized representative of Mr. Mackey will file the case with the appropriate Division of the National Railroad Adjustment Board within the time limit specified in the Agreement governing the class of employes of which Mr. Mackey is a part.
>
> However, it is noted in the last paragraph of your letter that you made some reference to my discussing this case in conference. In light of the decision you have made in this case, I do not see what effect the holding of a conference on this matter will have on the case. However, if you are inclined to reconsider the decision in discharging this employe, then I will be glad to discuss it with you at any time that can be mutually arranged. If I do not hear from you on this matter, I will proceed as above set forth to file this matter with the National Railroad Adjustment Board."

Following a discussion between Messrs. Terrill and Webster on January 29, 1962, the General Manager reviewed the case in a letter sent the same day, concluding:

> "In view of this, your claim that Mr. Mackey be reinstated with seniority rights and vacation rights unimpaired and with pay for the time that he had lost and will lose as a result of dismissal from our company is again declined."

On February 1, 1962 Vice President Webster replied:

> "This will acknowledge receipt of your letter of January 29, 1962, in which you have declined the Organization's contention for the reinstatement of C. E. Mackey to his former position with the Chicago, Burlington & Quincy Railroad.
>
> This is to advise that the Brotherhood of Sleeping Car Porters will file this case with the appropriate Division of the National Railroad Adjustment Board."

On February 13, 1962 General Manager Terrill advised Webster:

"Please refer to your letter of February 1, 1961, regarding claim for reinstatement with pay for all time lost on behalf of C. E. Mackey, former Zephyr Coach Porter.

Since no action has been taken to progress this claim to the Adjustment Board within the sixty (60) day period following my declination for December 11, 1961, this case is subject to Paragraph (b) of Rule 25 of the Dining Car Employes Agreement, which reads —

'If no such procedure is invoked within sixty (60) days after decision of the highest officer of the Carrier designated to handle claims and grievances, it is agreed by the parties hereto that the subject made the basis of controversy shall be disposed of and closed.'

I am, therefore, closing my file in this dispute."

On March 12, 1962 Webster responded:

"You probably overlooked the fact that a conference was held in connection with case at your request or insistence, and you rendered a final decision in this matter under date of January 29, 1962. Therefore, it is the position of the Organization that the sixty days will date from January 29, 1962, and we will proceed on that premise."

The Organization's claim, which is now before us, was submitted to this Division on March 29, 1962.

Is the Organization's claim timely? Under the provisions of Rule 25(b) it had sixty days from the "decision of the highest officer of the Carrier" within which to appeal to the Adjustment Board. The question here is whether that period commenced on December 11, 1961, as the Carrier states, or on January 29, 1962, as the Organization affirms.

Were it not for the final paragraph of Carrier's December 11, 1961 letter it would be clear that the sixty day period started on this date since (1) General Manager Terrill was Management's highest officer for the purposes of handling grievances, and (2) Mackey's claim was declined. What purpose did this paragraph serve? Carrier states that there are many awards which make a conference of the nature requested by it a prerequisite to a proper appeal of any claim. We do not know which awards it has reference to, but it appears to have in mind these provisions of the Railway Labor Act, Title I, Section 2:

"All disputes between a Carrier or Carriers and its or their employes shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the Carrier or Carriers and by the employes thereof interested in the dispute."

However, there is no persuasive evidence here that had the Organization accepted Terrill's December 11 declination as the Carrier's final word it could not have properly processed the claim to the Adjustment Board without further conferences. (In fact, this was the Organization's plan, as noted in its December 20 response.) Under the circumstances, it was not unreasonable for the Organization to conclude that Carrier, in effect, was reconsidering, or offer-

ing to reconsider, its decision. Why else should the Carrier propose further discussion?

This conclusion concerning Management's intention was buttressed by subsequent developments. On December 20 Organization's Vice President Webster wrote Terrill that (1) he would be glad to discuss the matter if Terrill was "inclined to reconsider the decision"; (2) if he heard no further he would file with the Adjustment Board. Thereafter a meeting was held, following which Mackey's claim was "again declined."

While there was no mention of time limits by either Terrill or Webster, Management's December 11 proposal, accepted by the Organization, served to stay the commencement of the sixty day period, in our judgment. The Organization could easily have filed before February 11, 1962, but withheld action pending the outcome of discussion initiated by the Carrier which, in turn, could have rested on its "final" declination had it so desired. Under the circumstances, we find that Management's final denial, for purposes of this case, was rendered on January 29, 1962 and the claim is therefore timely. This finding does not alter or modify the principles enunciated in many cases (most of which involve an Organization's request to conduct discussions or hold conferences subsequent to a Carrier's final decision) that conferences or requests for conferences do not normally constitute waiver or agreement to extend the limitation periods for appeal (Awards 10347, 7135, 10688, 10933 and others).

What, then, of Mackey's dismissal? The Organization protests on various grounds which will be considered below.

1. **Separation of Witnesses.** In its Statement of Claim the Organization asserts "The people who were to testify against Mr. Mackey were allowed to remain in the hearing room and hear each other's testimony after the Organization's representatives requested that they be removed from the room and not allowed to come in until they were ready to testify." This, the Organization argues, is evidence that Mackey did not receive a fair and impartial hearing. The transcript of hearing reveals that the following persons were present: J. C. Grisinger, Superintendent and presiding officer; J. B. Bowman, Assistant Superintendent; A. G. Hartman, Special Agent; J. R. Hughes, Assistant Manager, Dining Car Department; R. R. Grimm, Conductor; L. J. Shackelford, Jr., International Field Representative of the Organization, Claimant Mackey, and Stenographer R. G. Stutzman. Messrs. Grimm, Hartman and Mackey appeared as witnesses.

Near the outset of the hearing the following colloquy occurred:

Shackelford:

"I would like to know if all of these gentlemen present are going to be witnesses."

Grisinger:

"I want no more interruptions from you, Mr. Shackelford. Are you conducting this investigation or am I?"

Shackelford:

"I am conducting the investigation from my side of the table."

This is the only conversation at the hearing regarding the presence of witnesses. Obviously there was no request that they be removed from the room as the Organization asserts. While Grisinger's reply to a perfectly proper question was unresponsive and uncalled for, it had nothing to do with the exclusion of witnesses.

2. **Access to Evidence.** In its Statement of Claim the Organization contends: "Statements were read into the record which neither Mr. Mackey nor his representative saw, and it was not known whether the statements were bonafide or not. . . ."

The transcript proceedings reveal the following:

(a) After Presiding Officer Grisinger questioned Special Agent Hartman regarding statements Hartman had secured from Beulah Anderson and two other passengers, Organization Representative Shackelford stated:

> "I want the records to show that I object to the way this investigation is being conducted. You mention statements that Mr. Hartman has and they have not been read. Mr. Mackey is not able to question Mr. Hartman because he doesn't know what these statements contain. Under Rule 26 of the Discipline and Investigations section of the Agreement between the Chicago, Burlington & Quincy Railroad Company and its Dining Car Employees I would like to quote the portion of Rule 26 on Page 17 which reads: 'He will be permitted to hear all evidence presented against him and question all witnesses and/or statements submitted against him.'"

(b) Mackey was queried about his signed statement of September 15, 1961 which was entered into the transcript, following which Shackelford asked: "Will all statements be entered as a part of the record?" Grisinger replied, "Just be patient. Mr. Shackelford, I have asked you numerous times not to be interrupting during the investigation and that you would be given an opportunity for questioning or make any statements you wish to make after I finish my interrogation. Insofar as the introduction of statements at this investigation, all that I have will be presented in due time. The investigation has not yet been concluded. Do you have any questions at this time? If not, I will proceed."

(c) Special Agent Hartman read into the record a statement signed in his present by Beulah Anderson on September 12, 1961 and a statement secured from Mr. and Mrs. Wilke Leners on September 13, 1961. No questions were asked following this recital.

(d) At the conclusion of the hearing, when asked whether the investigation had been conducted in a fair and impartial manner, Shackelford replied:

> "In our estimation, it has not been conducted in a fair and impartial manner, our reasons being that there were several statements evidently referred to but not read into the records and as a result, Mr. Mackey did not have an opportunity to question the witnesses."

Grisinger:

> "Would you please state for the record what statements were not read into the investigation?"

Shackelford:

"I don't know because you had them all in front of you. You had several statements that you referred to."

Grisinger:

"All statements referred to have been read into the record."

While the Presiding Officer's admonition to Shackelford to be patient (rather than responding to the question) indicates considerable impatience on his own part, we do not believe that Mackey or his representative were denied access to written statements which were used as evidence. As noted above, the affidavits of Anderson and the Leners were read into the record by Hartman, the man who secured them. They appear in the transcript of proceedings. At no time did the Organization ask to examine these documents in order to interrogate Hartman. As for Shackelford's final comment, there is no evidence to support his assertion that several statements were referred to but not read into the record. No witness testified about a statement not entered in the record and there is no reason to believe that Carrier's ultimate decision was based on information not revealed at the hearing.

3. Hearsay. The Organization believes that Mackey was not fairly judged since most of the evidence against him was hearsay. It notes that the complaining passenger did not appear or testify and she was the only person with knowledge of the incident. Carrier witnesses know only what they had been told. In view of the gravity of the charge against Mackey, the Organization argues, he was entitled to the protection of all constitutional safeguards, including the right to confront and cross examine the person giving evidence against him. It quotes approvingly from Award 1989:

> "Some of these reasons were in the minds of our ancestors when they founded this country, and the right to personally confront the witnesses against them was one of the things they fought for. It may be said that this is not a criminal trial, but it certainly partakes of that character and even in civil trials no deposition can be admitted in any court without the opposing party having been given the right either in person or by counsel to confront the witness and cross examine him."

The Organization also contends that when statements are to be used at a hearing they should be furnished the employe in advance to give him or his representative an opportunity to secure amplifying or explanatory statements from the affiant. In this case no such opportunity was afforded Mackey.

The controlling Rule in matters of discipline and investigations under this Agreement is Rule 26 which provides in paragraph (a) that, at a hearing, the employe "will be permitted to hear all evidence presented against him and question all witnesses and/or statements submitted against him." Significantly, this Rule does not require the Carrier to provide the employe with statements in advance of the hearing (as did the rule in Award 3288 which stated that the employe's "representatives shall be furnished such information on the matter as the Company may have, prior to the hearing"). Mackey's rights, therefore, were not abridged by Management's failure to give him copies of the passenger's affidavits before the hearing. Moreover, since no objection was voiced at the hearing to introduction of these statements, they form an integral part of the record before us.

The Organization's claim that Mackey was denied his Rule 26(a) right to question witnesses and statements submitted against him is without merit, in our judgment. True, the affiants were not present. But the record shows they declined to appear — and Management is without authority to compel such appearances. More importantly, there is no evidence that the Organization made any effort to interview these passengers in Mackey's behalf. For example, when confronted with the written statements, it could have requested an adjournment or continuance, (since it had no prior access to these affidavits,) for purposes of obtaining additional information. But it made no such request, and cannot now successfully protest that Rule 26(a) was abridged.

A similar situation was discussed in Award 4976 where the Board commented:

> ". . . When the hearing was held, if the employe desired a continuance for the purpose of interviewing those who made the statements and of procuring evidence in his own behalf, he should have made such request; and had it been denied, there would then be a basis of charging that the Carrier was arbitrary and unfair. No such request was made here."

In Award 1989, cited by the Organization, the situation was quite different from the one at hand. The Claimant in that case had been dismissed on the basis (partially, at least) of reports from the Company's Inspectors. These reports were unsigned; the Company refused to produce the Inspectors for cross examination at the hearing; the Organization was unable to obtain their names or addresses. The Board held: "Lacking the verification or identification of any known witness these Inspector's reports are no value at all; they should not have been considered and will be disregarded."

4. **Miscellaneous Objections.** The Organization contends that Mackey was denied a fair and impartial hearing since (1) Carrier failed to introduce the passengers' statements until after Mackey had testified;; (2) the Presiding Officer was belligerent and asked leading questions, indicating his own prejudice.

It is true that the passengers' statements were read into the record towards the end of the hearing. But Mackey was interrogated after, as well as before, these documents were introduced and the Organization was not denied the opportunity of questioning any of the witnesses about them. The order of presentation, in and of itself, was not prejudicial.

As for the Presiding Officer's attitude, we have already noted one or two occasions on which his conduct was injudicious. However, despite this criticism, we cannot find evidence in this transcript that Mackey's basic rights were denied or that he was restricted from putting into the record whatever information he desired. The "leading question" objection was not raised at the hearing, when it would have been timely, and we see no reason to consider it now.

In sum, we find no support for the Organization's procedural and due process objections to the conduct of the hearing or introduction of evidence. What, then, of its claim that the charges against Mackey were unproved and that Management's decision, therefore, was arbitrary, unjust, unreasonable and an abuse of discretion?

The seriousness of the charge, from Mackey's viewpoint, is matched by the gravity of the alleged offense from the Carrier's standpoint. The employe's

rights and job should be protected against abuse; likewise, the public must be protected against molestation as it rides the Carrier's trains. Management's two-fold obligation is often difficult to maintain. Unfortunately, decisions must occasionally be made on conflicting or relatively meager evidence. Such decisions are no easier for Management than for this Board. But it would not be helpful were we to overturn a decision based on credible evidence just because it is a "close one."

In this case Management had reasonable grounds for reaching the conclusion it did. Of course, without the statements of Passenger Anderson there would be no case. But no persuasive reason was offered to discredit her. She identified the Claimant right after the alleged incident and in a subsequent signed statement. There is corroborating testimony (again not discredited) which places Mackey in the dome car at the time of the incident. There is no basis in the record for challenging the testimony of Conductor Grimm who was present when Anderson identified the Claimant. Under these circumstances it cannot be said that Management's decision was arbitrary, without reference to the facts, or constituted an abuse of its discretion. The claim will therefore 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 action of the Carrier dismissing the Claimant did not violate the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 26th day of April 1963.