

Award No. 3985
Docket No. PM-3907

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Fred L. Fox, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF SLEEPING CAR PORTERS

THE PULLMAN COMPANY

STATEMENT OF CLAIM: * * * for and in behalf of C. L. McDavid who was formerly employed by The Pullman Company as a porter operating out of the District of Kansas City, Missouri.

Because The Pullman Company did, under date of March 10, 1947, dismiss Mr. McDavid from his former position as a porter in the Kansas City, Missouri, District on charges unproved; which action was unjust, unreasonable, arbitrary, and in abuse of the Company's discretion.

And further, for Mr. C. L. McDavid to be returned to his former position as a porter in the Kansas City, Missouri, District with seniority unimpaired and with pay for time lost as a result of this unjust and unreasonable action.

OPINION OF BOARD: On December 5, 1946, the claimant, C. L. McDavid, a Pullman Porter, in the employ of the Carrier, and regularly assigned for service on Car No. 229, operated by it between Oakland, California, and Kansas City, Missouri, was charged with molesting a woman passenger traveling on said car, and while en route. The exact charge was: "You molested a woman passenger who occupied lower 2 in your car." On this charge McDavid was given a hearing, the result of which was his dismissal from service, by the District Superintendent, on March 10, 1947, and approved by Carrier's Assistant Vice President, on May 24, 1947. The petitioner alleges that claimant was so dismissed "on charges unproved; which action was unjust, unreasonable, arbitrary, and in abuse of the Company's discretion"; and asks that he be returned to his former position, with seniority unimpaired, and with pay for time lost. As in all cases of this type, our decision must rest on the facts developed at the hearing, and on which the Carrier acted.

Three young women, named Creasy, Darden and McIntire, whose ages were 20 and 21 years, were traveling together, and separately occupied lower berths Nos. 1, 2 and 3 in the said car. They were accompanied by an older woman, who occupied lower berth No. 9, but who is in no wise involved herein. Miss Creasy occupied Lower 2, Miss Darden Lower 1, and Miss McIntire Lower 3. As noted above, the charge was that the woman molested occupied Lower 2, who was Miss Creasy, and, therefore, it is important to determine just what her statement is concerning what occurred on the evening or night of December 5, 1946. The docket is a heavy one, and we cannot, within the limited scope of opinions of this Division, undertake to state all that was said by all the parties who testified at the hearing, or made signed statements which were submitted at such hearing, and considered in

making the decision complained of, but we will attempt to state the substance thereof.

According to the signed statement of Miss Creasy, taken by an Agent of the Carrier on the day following the occurrence, the first incident bearing thereon occurred in the afternoon of December 5, when, awakening from a nap, the claimant, standing near, said to her, "You won't be able to sleep tonight." Later in the evening, about 9:15, when the claimant was making her berth, he said to her, "Would you get mad if I said sweet words to you," and that when she replied, "I don't know what you mean," he said, "You know what I mean." She then says she went to the dressing room and on her return retired to her berth, where she wrote a letter, and began reading a book. That "Suddenly the porter of my car was in bed along side of me" and said, "Move over," and that she said, "I'm not going to do it," and he said, "Don't act like that," to which she replied that, "I should and I shall." That she repeated, "Get out of here," to which he replied, "I can't there is some one passing in the aisle," but that on her further insistence he did leave her berth. She said that she was frightened but did not cry out or ring the bell. She said nothing to any one about the occurrence at that time, nor in fact until the next morning, under circumstances hereinafter referred to. Next morning, when confronted with the claimant, she positively identified him as the person who was in her berth the night before, and her identification is corroborated to some extent by her statement of the type of suspenders worn by the person who was in her berth, which statement in respect thereto conformed to the type actually worn by the claimant. Her statement is not too definite as to the hour she was molested, but other points of her statement, and the statements of others, indicate that it could not have been later than 10:30 or 11:00 p. m. Pullman Conductor, W. R. Fox, in his signed statement, says that when on December 6, he was investigating a complaint of the same nature made by Misses Darden and McIntire, he was told by Miss Creasy that on the night before, between 12 midnight and 1:00 a. m. of the morning of December 6, a person wearing a white coat and dark trousers, and who was colored, had entered her berth and was in bed with her. This statement to the Conductor is claimed to contradict the written statement made by Miss Creasy, as to the time when, as she states, someone entered her berth.

Another event of that night, though not bearing directly on the charge against claimant, deserves mention for what it may be worth. Miss McIntire, who occupied Lower 3 of the car, says that she retired about 9:30 p. m. of the night of December 5th, and read until 10:30 p. m., when she went to sleep. That she was awakened a short time later by someone shaking her, and that she saw a face directly over hers, which appeared to her to be the face of a negro. That he had his head and shoulders inside the curtain, and was wearing a white coat. He said, "I want to ask you something," to which she replied, "What do you want," and that he finally said, "Would you mind if I came in and slept with you a while," and when she replied that he could not, and told him to go away, he did so. She then opened the curtain of her berth, looked out and saw two porters in section 6, one with his back to her and the other wearing glasses. She says the person who molested her did not wear glasses. She says she was frightened, but did not ring the bell or scream, but did call Miss Darden, who was in Lower 1, who came to Lower 3 and remained with her through the remainder of night. That it was 10:50 p. m. when Miss Darden came to her berth, which she ascertained by looking at her watch. That they then decided to report the matter to the conductor, and when they began their search for him they met the porter of Car 808, one Norwood, who asked them if they needed a porter, and that they told him they were having porter trouble, and when told that they were in Car 229 he said, "That porter is supposed to be in bed." That they told him he wasn't, and that he then said, "I will see that he gets in bed and keeps straight." That they then went to their berth, and the porter came to them and said, "He isn't in bed, but I will find him," and then in about five minutes returned and said the porter was in bed, and told them not to worry. They were unable to report the matter to the conductor that night, but did so about 8:45 a. m. the next morning. Miss McIntire was unable to identify the

person who molested her, though she said she felt sure he was a negro, and his voice was a good deal like that of the porter on her car. Miss McIntire is corroborated in her statement by that of Miss Darden. It should be stated here that it was when Misses McIntire and Darden were being interviewed by Conductor Fox, on the morning of December 6, that Miss Creasy first reported her experience of the night before.

As indicated above, the experience had by Miss McIntire does not prove that Miss Creasy had the same experience, on the same night; but it does tend to prove that some person, a negro, was molesting women that night, and it is not at all probable that more than one such person was involved. To this extent, therefore, the two statements support each other, and may properly be considered together.

McDavid, the claimant, denies any connection with either of the incidents related above. He says he went off duty at 10:00 p. m. on the night of December 5, retired to upper berth 1, in his car; that some time later he was awakened by Norwood, the porter in Car 808, who asked him if he had heard any screaming or unusual noise, and who told him that two women passengers claimed that "the porter was disturbing them"; that he told Norwood that he had been in bed since five or ten minutes after 10:00 p. m. had been asleep and had heard nothing, and that he then went back to sleep. Norwood, the porter in Car 808, says that about 11:00 p. m., on the night of December 5, two women passed the door of the smoking room in his car, and asked him where the conductor was, and on being told where he was working went away, but in a few minutes returned and then one of them told him that, "The porter is disturbing me", that he told them that he would ride in that car to see what was going on, which he did. He says he sat in section 6, then went to the men's room and found nothing unusual except a porter's coat hanging there. That he then thought he would call the porter in that car, No. 229, and says he found the porter asleep, and when awakened said he had heard nothing, and that he continued to guard Car 229 until 2:00 a. m. at which time it appears the claimant returned to duty. A Mr. Anders, who occupied Lower 5 in Car 229, says that he did not hear any noise of any kind in the car. To the same effect is the statement of a Mr. Buckley who occupied Lower 16 in the same car. Both these men expressed the opinion that the claimant was not guilty of the charge against him. Claimant prior to his employment by the Carrier, some five years previous, had been in the employ of a Baking Company in Kansas City and certain officials of that company, and numerous people who had traveled with claimant on his car, gave written, but undated, testimonials of his courtesy and efficiency. Claimant's service record with the Carrier was good.

We think it has been clearly shown that someone was disturbing women passengers on Car 229, and everything indicates that it was a porter. This is not only established by the statements of Misses Creasy, McIntire and Darden, but the fact of such conduct on the part of someone is, as a practical matter, admitted by the two porters involved, when each of them states that complaint was made by two of them about 11:00 p. m. of the night of December 5. There is nothing in the docket which indicates that either of these young women were of the type who would make a baseless charge of this character. True, neither of them cried out, but one of them, Miss McIntire, did seek to report the disturbance to the conductor. The fact that Miss Creasy did not report her experience until next morning, and then in connection with the McIntire report, is, in our view, of little importance. It is not unusual for women to shrink from a disclosure of such an incident. That others in the car heard no noise, is not controlling or even of great importance. Admittedly, there was no screaming or crying out, and if what was said was spoken in a low voice, which was probable, a person in a berth near by would not be likely to hear. The incident as to Miss McIntire was reported to Porter Norwood that night, and by Miss Creasy to the conductor the next morning. Therefore, these women were either molested by someone that night, or they are guilty of a willful and deliberate falsehood, and

we cannot bring ourselves to believe that the Carrier should have been required to hold that either was guilty of such a falsehood.

This being true, is the evidence sufficient to connect McDavid, the claimant, with the molesting of Miss Creasy? We think she was molested. She positively identified the claimant as the person who molested. The claimant denies that he was the person, and therefore, we have one statement against the other. But someone was guilty, and, if not the claimant, who was? It was not Norwood, because he wore glasses, and the person who molested Miss Creasy did not wear glasses; the surmise that one of the men from another car, shown to have been in the company of the young women during the day, may have been the culprit has no basis of fact to support it; and we think the direct and positive statement of Miss Creasy, coupled with corroborating circumstances, and aided by a process of elimination of any other persons who could reasonably be suspected, leads to the conclusion that the claimant was guilty of the charge laid against him.

But even if there was some doubt of claimant's guilt, the action of the Carrier in dismissing him from its service was justified. We are not dealing with a case where a person is charged with crime, where a presumption of innocence exists, and when a defendant can only be convicted when the evidence establishes his guilt beyond all reasonable doubt. Here the Carrier, in performing a service patronized by the public, should not be required to keep in its employ a person reasonably believed to have a tendency to molest women passengers. Of course, if charged with such an offense, he is entitled to a fair hearing, which claimant has had in this case; but if, at the end of such hearing, there is a reasonable basis for the belief that guilt has been proved, the right, and even duty, of the carrier was to dismiss from its service the person charged with such offense. In acting in such a case the Carrier must act in good faith, but it has a wide discretion in such matters, both in its own interest, and that of the public.

The policy of this Division, in dealing with discipline cases, is tersely and correctly stated in its Award No. 2769, wherein it was said:

"In its consideration of claims involving discipline, this Division * * * (1) Where there is positive evidence of probative force will not weigh such evidence or resolve conflicts therein, (2) When there is real substantial evidence to sustain charges the findings based thereon will not be disturbed; (3) if the Carrier has not acted arbitrarily, without just cause, or in bad faith its action will not be set aside; and (4) unless prejudice or bias is disclosed by facts or circumstances of record it will not substitute its judgment for that of the Carrier."

That award was based on many earlier awards of this Division, among which are Awards Nos. 71, 135, 1848, 1996, 2216 and 2632. It has been upheld by Awards Nos. 3178, 3411 and 3618, and by other and more recent Awards. Awards of this Division, covering the particular offense charged herein, are Nos. 2219, 2473, 2945, 3207 and 3827.

Applying to this case the principles stated in Award No. 2769, we are unable to see any correct basis on which the action of the Carrier in this case can be disturbed. There was sufficient evidence to support the charge; this Division will not resolve conflicts in evidence; there was no arbitrary action; nor any lack of just cause, evidence of bad faith, or bias such as would justify our substituting our judgment for that of the Carrier. The claim must 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 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

That there was no violation of the Agreement.

AWARD

Claims (1 and 2) denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 15th day of July, 1948.