

Award No. 7657
Docket No. PM-7927

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

James P. Carey, Jr., Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF SLEEPING CAR PORTERS

THE PULLMAN COMPANY

STATEMENT OF CLAIM: * * * for and in behalf of J. J. Potter, who was formerly employed by The Pullman Company as a porter operating out of the Pennsylvania Terminal District.

Because The Pullman Company did, under date of May 25, 1955, discharge Mr. Potter from his former position as a porter with The Pullman Company, said discharge being based upon charges unproved and was unjust, unreasonable, arbitrary, and in abuse of the Company's discretion.

And further, because the charge against this employe was not proved beyond a reasonable doubt as is provided for in the rules of the Agreement between The Pullman Company and Porters, Attendants, Maids and Bus Boys employed by The Pullman Company in the United States of America and Canada, represented by the Brotherhood of Sleeping Car Porters, Revised, Effective January 1, 1953.

And further, for Mr. Potter to be returned to his former position as a porter in the Pennsylvania Terminal District with seniority rights and vacation rights unimpaired and with pay for all time lost as a result of this unjust action.

OPINION OF BOARD: Claimant was charged with having invaded the privacy of a bedroom and searching the clothing of a passenger. After a hearing he was dismissed from service May 25, 1955. He claims that the charge was not proved beyond a reasonable doubt as required by Rule 49 of the applicable Agreement, and that his dismissal was unjust and arbitrary.

Claimant Potter was in charge of Car SR-33, New York City to Raleigh, N. C., P.R.R. Train 151—So. Ry. 29, leaving New York the evening of January 19, 1955. Between 11:30 P.M., January 19, and 2:30 A.M. January 20, he was guarding his car and adjoining Car SR-32. The incident occurred while the train was at Charlottesville, Va., Station, where it arrived 1:40 A.M. and departed 1:50 A.M.

Mr. and Mrs. Cudd occupied Bedroom E in Car-SR-32. They retired about 8:30 P.M., with the night light left on. Apparently they neglected to lock the bedroom door. Mr. Cudd occupied the lower berth. About 1:50 A.M. he turned over in bed and observed a light colored man in a white coat about 6'2" tall, going through the pockets of his pants, which he had left on a

wall hook. Mr. Cudd attempted to grapple with the intruder, who ran out toward the head end of the car. Cudd did not obtain a full view of his face, but from a side view of his face and neck saw that he was a light colored man. After chasing the man for a few feet Cudd immediately returned to his room and rang the porter bell. About two minutes later a light colored man about 6'2", wearing a white coat, came from the direction in which the intruder had escaped. Cudd said the man was approximately Potter's size and asked that he call the conductor.

Porter Brown, in charge of Car SR-31 immediately ahead of Car SR-32, was on duty between 11:30 A. M. and 2:30 A. M. He also guarded Car 60 immediately ahead. When the train stopped at Charlottesville at 1:40 A. M., Brown went to the head end of Car SR-31, opened the vestibule door and looked out, remaining there about five minutes. He saw no one walking around the station platform, looked toward the rear and saw no passengers, and the only activity he observed was baggage loading at the head end of the train. On arrival at Charlottesville, the cars were in the following order from the head end of the train to the rear: SR-60, SR-31, SR-32, SR-33, SR-34, SR-35, SR-36, SR-37, and three special military cars. Each car is equipped with a single vestibule and the cars were so lined up that the vestibule was at the head end. After closing his vestibule door, Brown returned to the linen locker in the center of Car 31 and, while checking his call card, observed Claimant Potter walk past toward the head end very much in a hurry. Potter did not answer his greeting, but returned in about a minute while the train was still standing at the station and said there were some passengers for Car 37 who went the wrong way. That was the extent of their conversation.

Porter Holmes guarded Cars 36 and 37. When the train stopped at Charlottesville, he opened the vestibule end of Car 36 and stood on the station platform for about 10 minutes. He saw no one around the station platform. When the flagman called "All aboard", Holmes went aboard, closed the vestibule door and went into Car 36 and looked around. He then went back into Car 37 where he found two young men who said they had to get on the train at the rear car where the flagman was. Holmes told them he had stood on the station platform for ten minutes and did not see them at any time. These were the only passengers who boarded the train at Charlottesville.

Potter testified that when the train stopped at Charlottesville, he opened the vestibule door of Car 32, looked out for a few minutes and saw two men about two cars up front trying to board the train. Potter says he hurried forward through the train to assist them; that when he opened a vestibule door and learned they wanted Car 37, he told them it was four or five cars back; and that although he asked if they desired to board the train there, they said they preferred to walk back on the station platform. Potter then returned to his station and as he was passing through Car 32 the door to bedroom E was open and Mr. Cudd asked him to get the Pullman Conductor. When Potter came back with the conductor, Cudd said the intruder was a tall man in a white coat but did not otherwise identify him.

Porter Martin was in charge of Car 32, but was relieved by Potter between 11:30 P. M. and 2:30 A. M. Potter did not mention the incident to Martin when he called him after his rest period or when Martin called Potter at 5:30 A. M. On the return trip to New York, Martin saw Potter on the train and asked him why he had not mentioned the incident, and Potter replied that he had notified the conductor, and as the passenger had not reported any loss, he thought no more about it.

A description of the Porters who were on duty between 11:30 P. M. and 2:30 A. M. is as follows:

Brown was guarding Cars 60 and 31. He is 5'11", weighs 190 lbs., and is of dark brown complexion.

Potter was guarding the next two cars, 32 and 33. He is 6'1", weighs about 200 lbs., and is considered real light.

Robinson was guarding Cars 34 and 35. He is 5'8" but his coloring is not shown.

Holmes was guarding Cars 36 and 37. He is 5'8", weighs about 190 lbs. and is considered medium brown.

It is urged that the complaining witness' second letter and Martin's supplemental statement are of questionable value because of the circumstances under which they were received. We find no merit in this contention.

We think the carrier was warranted in finding that the charge was proven beyond a reasonable doubt. The fact that the evidence is circumstantial does not make it less convincing. Considering the evidence as a whole, we are unable to say there is substantial doubt of claimant's identity as the intruder. See Award 6924. His own testimony established the fact that no other porter passed through Car 32 at or about the time Bedroom E was invaded. The record precludes any reasonable probability that the offense was committed by any one other than a porter on the train. Porters Brown, Potter, Robinson and Holmes were the only ones on duty at the time. Potter is the only one who ideally fits the passenger's description of the culprit. There is evidence by Brown of Potter's great haste in going toward the head of the train in circumstances which were obviously unusual. Such action of Potter's suggests flight to avoid detection. Even standing alone, the improbability of Potter's explanation is apparent. Against the unchallenged testimony of Porters Brown and Holmes, it holds little to justify belief. During the train's entire stay at Charlottesville, Holmes was on the station platform at the head end of Car 36 and saw no passengers. He was four car lengths back of the vestibule of Car 32. Porter Brown stood in the open vestibule door of Car 31 for about five minutes immediately after arrival and saw no passengers or anyone else moving about. The evidence does not indicate whether or not he observed Porter Holmes on the station platform five cars to the rear. If the testimony of these witnesses was accurate, then Potter's explanation of his reason for leaving his post and going hurriedly forward was not worthy of belief. The record contains no substantial reason for doubting the veracity of Holmes and Brown.

Potter gave no reasonable explanation for deserting his own post at 1:40 A. M. and trespassing on the post of another porter, whom Potter knew was on duty at the time. Potter admits that he spoke to Brown in Car 31 as he went forward to ostensibly assist two passengers. Brown was in charge of Cars 31 and 60, but Potter gave no reason for not telling Brown about the passengers and permitting Brown to handle them. It was also strange that when Potter allegedly opened some forward vestibule door and spoke to these passengers who were supposed to be trying to board the train near the head at that time of night, they are supposed to have said they preferred to walk back six or seven car lengths along the station platform. Brown's statement indicates that there were coaches ahead of the sleepers and it would seem likely, if passengers were attempting to board the train where Potter claimed they were, they should have been able to do so through the coaches if the sleeper vestibule doors were not open. If these passengers were at the head end as Potter claims, and they then walked back along the station platform to Car 37, there is no reasonable explanation for Holmes' failure to see them. When Holmes saw them in Car 37 shortly after departure from Charlottesville, they stated they came aboard at the rear end where the flagman was stationed. That was four car lengths back of the vestibule end of Car 36 where Holmes was standing.

We conclude that the carrier's finding that the charge was proven beyond a reasonable doubt as provided in Rule 49, is supported by the record and a sustaining award is therefore not justified. We find nothing in our prior awards in which Rule 49 of the Agreement was considered, such as Awards

7193, 7148, 7140 and 6924, which can be said to call for any other determination of the issues presented in this docket. In both civil and criminal cases issues may be determined on the basis of circumstantial evidence—that is, by way of inference from proven circumstances. In many instances facts can be proved only by circumstantial evidence, and in some instances even though there is direct testimony, the circumstantial evidence given may outweigh or be more convincing than direct or positive testimony. Circumstances may so contradict the positive testimony of a witness as to warrant the trier of the facts in disregarding it. Circumstances altogether inconclusive, if separately considered, may, by their number and joint operation, be sufficient to constitute conclusive proof. See 20 American Jurisprudence, Sec. 1189.

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 carrier's decision will not be disturbed.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 15th day of February, 1957.