Award No. 8300
Docket No. PC-8521

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Norris C. Bakke, 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 J. F. Capp, Chicago East District, that:

1. The decision of Superintendent J. B. Kenner, Chicago East District, dated August 29, 1955, discharging Conductor J. F. Capp, Chicago East District, from the service is arbitrary and capricious.

2. The decision of Appeals Officer W. W. Dodds dated January 31, 1956, sustaining Superintendent Kenner's decision is unsatisfactory.

3. Appeal is taken from this unsatisfactory decision under the provision of Rule 49, ninth paragraph, of the Agreement between the Company and its Conductors, effective January 1, 1951.

4. Conductor Capp be restored to the service and compensated for all time lost including vacation rights, as a result of this improper action by the Company.

OPINION OF BOARD: As has been noted from a reading of the claim, Claimant seeks re-instatement to employment after being dismissed from service following a hearing in which the Carrier found that Claimant had "acted improperly toward the 8 year old daughter of the woman passenger who occupied Drawing Room D, Car 1246." The alleged misconduct took place on the Santa Fe "Grand Canyon Limited" on June 20, 1955 while the train was en route to Chicago on June 20, 1955.

If the little girl's story, as related to her mother is true, the employes concede that Claimant's discharge from the service was proper.

Employes further concede

"Procedural questions have not been raised, * * *" but contend "(a) Many comparable cases are on record wherein charges similar to those herein have been, upon competent investigation found to be baseless; (b) the charge against Claimant Capp had not been competently investigated; (c) the evidence of record indicates an

unjust accusal, and (d) the Claimant's record does not support the charge."

It will be noted that none of these contentions urge that the charge against Claimant was not proven, but we will consider them briefly nevertheless.

(a) During the oral argument your referee asked specifically if there were many comparable cases on record, and was advised by both sides that there were not, and among the two dozen or more awards submitted by the Organization not one award says that the charges "are found to be baseless."

(b) As to the contention that the charge against Claimant had not been completely investigated we are at a loss just what the Organization means by that, but in any event it is completely refuted by Employes' own statement that the essential facts and arguments in this issue have been fully and fairly presented at the hearing accorded Conductor Capp." In addition, at the oral hearing, before us, representatives of the Organization paid tribute to the fairness of the official who conducted the investigation. What new facts further investigation might disclose are not suggested.

(c) As to whether there has been an unjust accusal, that is the question we have to decide and that depends on the sufficiency of the proof which we will come to later.

(d) That "claimant's record does not support the charge." This may be conceded and even stated positively that his record belies the charge but this is the kind of a thing, that usually happens only once in a lifetime, and is well described in Exhibit A in the docket TE-8747 where it states "I then had an urge come over me that I was unable to control * * *." Hardly a day goes by but what the papers carry a story about "an ideal citizen of his community" in whose moral structure there was a weak spot that all of a sudden appeared and wrecked an otherwise perfect, apparently, record.

So much for the a, b, c, d of the Organization's argument.

Now let us take a look at the record and see what we have, and we will confine ourselves preliminarily to what the Claimant himself actually admitted and a few undenied and undeniable facts, exclusive of the written statement of the girl's mother.

In the first place Claimant admits being in the compartment alone with the girl at the time the alleged incident took place. He said he touched her above the knee cap, that she said "Ouch that tickles."

Immediately following the alleged incident a wet towel was found in the room. He and his wife were separated. Report of the medical examination says in part

"Redness around & over labia. Hyminal Ring not injured—No evidence of injury except considerable redness from above cliterus well down on perineum."

The little girl was still crying when about to detrain.

Now these isolated facts in themselves would not support a finding of guilt, but taken in connection with the Mother's report of what happened as related to her by the little girl immediately after the alleged incident does justify the conclusion reached by the Carrier.

Was the mother's report admissible? We think it was. While objected as hearsay, there are many exceptions to the hearsay rule, one of which is admissibility as part of the "res gesta" i.e., so closely related to the incident

itself as to be a part thereof, being a spontaneous description of the actual event. But be that as it may, after all we are not bound by the strict rules of evidence applicable to formal trials, and there is nothing in this record to indicate (except suppositions) that the girl's mother was not telling the truth.

No criticism can be directed at the Carrier for the girl and her mother not being present at the hearing, subject to cross-examination. Rule 49 says in part "The right to hear and cross-examine any witness **who is present at the hearing** and testifies shall be accorded Management, the conductor, and/or his representative." (Emphasis ours.) The girl and her mother were not there. There was no way to compel their attendance as the Organization discovered (if it did not already know) when it sought by letter to get the mother to come, but in replying to that letter the mother did say she had nothing to add or detract from the statement she had submitted.

So much for the evidence. Now we shall consider the two awards which are most analogous to the case before us. They are 7774 and 7832 both by the same referee, (Livingston Smith) 7774 being a denial award involving the same respondent as in our case, and 7832 a partly sustaining award on the Delaware and Hudson.

The Organization relies almost entirely on Award 7832, and your referee was given the Master File in that case to study in connection with the present docket. Your referee has carefully studied the docket and has given particular attention to the award and is thoroughly convinced that if it had not been for Claimant's acquittal in the criminal case in which he stood trial, that the referee would have reached the same conclusion he did in Award 7774. We, of course, are aware of the rule of presumption of innocence and conviction only in case guilt is established beyond a reasonable doubt extant in trial of criminal cases, and it is quite apparent that the referee in 7832 felt that this Board could not substitute its opinion for that of the jury.

We make no comment on proof beyond "a reasonable doubt" because that language is not in the agreement before us and is not argued by either side.

Anent the number of letters received from Claimant's many friends and co-workers, we are reminded of "The faults of our brothers we write upon the sands, their virtues on the tablets of love and memory." A noble ideal and practice to be sure, but hardly germane to the isssue here.

Our conclusion is that the record supports the Carrier and 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 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 no reason of record appears to disturb the discipline imposed.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By ORDER of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 3rd day of April, 1958.