Award No. 9814

Docket No. PM-9600

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Joseph E. Fleming, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF SLEEPING CAR PORTERS

THE PULLMAN COMPANY

STATEMENT OF CLAIM: * * * for and in behalf of L. McLendon, who is now, and for some time past has been, employed by The Pullman Company as a porter operating out of the Chicago Western District.

Because The Pullman Company did, under date of January 7, 1957, take disciplinary action against Porter McLendon by assessing his record with a "Warning"; said disciplinary action being based upon charges which were unproved.

And further, because the charges made against Porter McLendon were not proved beyond a reasonable doubt as provided for in the rules of the Agreement between The Pullman Company and the 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, then and now in effect.

And further, for the record of Porter McLendon to be cleared of the charge in this case, and for the disciplinary action (a warning) to be expunged from his service record.

OPINION OF BOARD: Porter F. McLendon was assigned as porter to Line 119 Car Silver Larch, C. B. & Q., Chicago to Oakland, California, leaving Chicago August 10, 1956.

On August 23, 1956 a lady passenger wrote to Mr. W. E. Baptist, Superintendent stating, among other things as follows:

> "I was, at that point, leaning out of the upper berth talking softly to the porter so as not to awaken any of the other passengers. My hair must have brushed against the forehead of the porter for then he said, 'My, your hair sure is soft against my skin—do it again, will you'?"

On November 14, 1956 Carrier wrote to Claimant notifying him of the charge against him.

"Mr. L. McLendon
906 East 131st St.,
Chicago, Illinois.

Dear Sir:

"You were the Porter assigned in regular service in Line 119, Car SILVER LARCH, loading No. CZ-12, Chicago to Oakland and return, trip leaving Chicago August 10, 1956.

"A hearing will be accorded you in my office, Room 390, Union Station, Chicago, Illinois, commencing at 10:00 A. M., November 23, 1956, on the charge that while in service in the above described assignment:

You made an improper remark to a woman passenger who occupied Berth Upper 3 in Car SILVER LARCH.

"Please arrange to be present at this hearing.

Yours truly,

(signed) C. W. Kelley
C. W. Kelley
Superintendent"

The hearing scheduled on November 23, 1956 was postponed until December 19, 1956.

At the hearing the Organization representative refused to allow Porter McLendon to make a statement and refused to allow the Company representative to question him. This Board has been consistent in holding that the Company has a right to question the accused and that a refusal on the part of the accused to answer questions might well leave an inference that the replies, if made, would have been favorable to the Carrier (5104). Carrier has a right to question accused. "Truth and not technicality should be the controlling factor in making decisions of this kind". (5974) This is not a criminal Investigation.

A photostatic copy of the lady passenger's letter was introduced and is in the record over the objection of Mr. Webster, the Organization Representative. The name of the lady was withheld and properly so under the Memorandum of Understanding concerning molestation cases signed November 25, 1952. It has been consistently held that documents, even though hearsay, may be introduced and considered as evidence. In this case a photostatic copy of the document which is the basis of the charge herein was introduced and the Organization Representative questioned its authenticity. When asked if it was a bona fide photostat Mr. Gardner, the Company Representative, answered, "The statement was received in the office of the District Superintendent in Denver, Colorado. You will just have to take my word for it."

While it is generally accepted that this Board should not disturb the action of the Management unless the evidence clearly indicates that the

management has acted arbitrarily, without sufficient evidence or just cause, or in bad faith and that Management has a right to question the accused these principles do not apply until Management has laid a proper foundation for the charge. Management's "word" that a document is proper evidence does not make it so. This is proving hearsay by hearsay. As said in Award 8713 "By a process of constant whittling down these hearings could be rendered meaningless".

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 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 Carrier violated the Agreement.

AWARD

Claim allowed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 7th day of February, 1961.