

Award No. 10234

Docket No. PM-10580

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

James P. Carey, Jr., Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF SLEEPING CAR PORTERS

THE PULLMAN COMPANY

STATEMENT OF CLAIM: “* * * for and in behalf of E. D. Moten, who is now, and for some years past has been, employed by The Pullman Company as a porter operating out of Kansas City, Missouri.

Because The Pullman Company did, through Superintendent J. R. Beavin at Kansas City take disciplinary action against Porter Moten on March 10, 1958, by suspending him from the service for one round trip in his regular assignment, Line 655, commencing March 18, 1958.

And further, because said disciplinary action was based upon charges which were not proved beyond a reasonable doubt as provided for in the rules of the Agreement governing the class of employes of which Porter, E. D. Moten is a part; therefore, said action was unjust, arbitrary, and in abuse of the Company's discretion.

And further, for the record of Porter Moten to be cleared of the charges in this case, and for him to be reimbursed for the pay he lost as a result of having been unjustly disciplined.

OPINION OF BOARD: Pullman Porter Moten was suspended for 12 days following a hearing on the charge that while in service in Line 655, car 92, Kansas City — Oakland, California, trip leaving Kansas City November 6, 1957, Union Pacific Railroad train No. 9, he was insolent to passengers Mr. and Mrs. E. M. Austin. The Brotherhood contends that such disciplinary action was based on charges not proven beyond a reasonable doubt, and was unjust and arbitrary. Removal of the discipline is sought with pay for all time lost.

The evidence is conflicting. The Complaint is a letter from Mr. Austin whose oral testimony was not available at the hearing. Moten testified.

The pertinent Rule 49 of the Agreement is that “Discipline shall be imposed only when the evidence produced proves beyond a reasonable doubt that the Employee is guilty of the charges made against him.”

It is also noted that in "Instructions to Porters" etc., issued by the Company, the Employes are admonished that the importance of politeness and courtesy must not be overlooked, and that insolence or discourtesy to passengers or others may subject the Employe to discipline.

The essential question presented is, was the charge that Porter Moten was insolent and discourteous to passengers Mr. and Mrs. Austin on the occasions in question established beyond a reasonable doubt?

Rule 49 requires a greater degree of proof than in the case of the customary rule requirement that discipline shall not be imposed except for just cause. This increased burden on the Carrier does not, however, imply that absent other evidence, a passenger's written complaint, which is denied by the accused, will necessarily prevent a finding of guilt beyond reasonable doubt. Consideration must be given to the nature of the complainant's evidence and the proper inferences to be reasonably drawn therefrom, together with all of the surrounding facts and circumstances as shown by the evidence.

The gist of Mr. Austin's complaint was that Porter Moten was "surly and unpleasant"; that he "accused" Mr. Austin of "having turned up the heat myself"; that he "insisted that I find the indicator and turn it to the proper position—all in an unsulted air"; that "he rebuked us for not having let him know we were leaving the room so he could have fixed it in our absence"; that as he was carrying luggage in the corridor, Mrs. Austin was standing in the corridor and "instead of asking her, he instructed her abruptly to get out of the hall."

The respondent Moten denied all of these charges. He explained the incident involving the heat control by stating that when called to the room occupied by the Austins, Mrs. Austin was in bed and consequently he did not enter the room but pointed to the thermostat and explained how the temperature in the room could be regulated. With reference to the matter of Mrs. Austin standing in the corridor as the train was nearing Denver, he stated that he was engaged in the business of carrying passengers' luggage to the vestibule, and that on four or five successive occasions he excused himself as he attempted to pass by her, and finally he suggested to her that she could sit in a nearby vacant room. In connection with the alleged "rebuke" to the Austins for not having rang for him to make up the beds while they were at breakfast, he stated that they had closed the door to their room and he did not know their room was ready to be made up until he saw them sitting on the bed.

No witness testified at the hearing in support of the charges. The Carrier's evidence was entirely documentary. Porter Moten testified that the Pullman Conductor was standing in the corridor with Mrs. Austin for at least some of the time Moten was alleged to have told her in an abrupt manner to get out of the hall. According to the written statement of the Conductor, he was not in the car during any of the incidents reported by Mr. Austin. The Conductor was not called as a witness. Direct and cross examination of him might have produced some light on the subject.

Mr. Austin's complaint was written in response to the request of the Company's Assistant Superintendent at Denver. According to his statement Mrs. Austin was present on all of the occasions complained of. The record contains no evidence from her nor any explanation for her silence. Presumably she could have been a corroborating witness to the complaint.

Finally, the charges levelled by Mr. Austin are, in the main, subjective in nature and we are in effect called on to resort to conjecture. His use of such terms as "surly and unpleasant"; "an insulted air"; "rebuked"; "instructed her abruptly"; in describing the respondent's actions, imposed on the hearing officer and on this Board the duty of deciding that what the Complainant meant by these terms is exactly what the Company Superintendent and a majority of this Board understood them to mean. That is more than the record in this case warrants this Board doing, particularly in the face of a discipline rule which requires proof of misconduct beyond a reasonable doubt. For these reasons, coupled with the fact that the respondent has served fifteen years as a sleeping car porter with a reasonably satisfactory record, we hold that on the facts and circumstances of record, the charges against Porter Moten have not been proved beyond a reasonable doubt as required by the rule.

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 Employee involved in this dispute are respectively Carrier and Employee 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 Agreement was violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 11th day of December, 1961.