Award No. 10507
Docket No. PM-10281

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Charles W. Webster, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF SLEEPING CAR PORTERS
(For and in Behalf of W. R. James)

THE PULLMAN COMPANY

STATEMENT OF CLAIM: * * * for and in behalf of W. R. James, who is now, and for some time past has been, employed by The Pullman Company as an attendant operating out of the Chicago Commissary District.

Because The Pullman Company did, under date of November 22, 1957, through Chicago Commissary P. A. Leonard, take disciplinary action against Attendant James by assessing his record with a "Warning."

And further, because the charge upon which Attendant James was disciplined was not proved beyond a reasonable doubt as is provided for in 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 the record of Attendant James 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: This is a discipline case. The Claimant herein was employed as an Attendant by the Pullman Company. As a result of a letter received from one of its customers the Company conducted an investigation and determined that the Claimant was guilty and assessed his record with a "warning." The Claimant, through his Organization has processed this case to this Division claiming that the warning should be expunged from his record in that the charge was not proven beyond a reasonable doubt as provided for in the Agreement.

The notice of the hearing stated the following charge.

> "You told a passenger to take his seat and get out of your way when he asked you when he might enter the diner and, further, when asked by a woman passenger what kind of Scotch whiskey you had for sale, you threw the menu at her and told her to read it herself."

The letter from the customer which was the basis for the above charge read in part as follows:

> "On July 30th I boarded the City of Miami, coming North to Chicago, along with my wife and nephew, at Carbondale, Illinois, and

occupied Bedroom "G", in Car CM-32. As you know, the St. Louis division and the Chicago division of the City of Miami split up in Carbondale, and briefly here is my complaint:

"Attendant W. R. James, in Car CM-33, on two occasions, reflected insolence to me personally, and later to my wife and nephew. At Carbondale I desired to get a sandwich, and in the making up of the St. Louis division and the Chicago division of the City of Miami the gate was closed between Car CM-33 and the diner. I was standing back at the door and your Mr. James walked back to where I was standing. Not knowing who he was I asked several questions, namely, when the gates would be open so that I might enter the diner. I was very curtly told by him that I should take my seat and get out of his way and he would open it up then. This attitude, to me, does not measure up to the courtesy I have been accustomed to over a long period of years as a patron of the Pullman Company.

"About an hour and a half later my wife and nephew were sitting at the table playing cards in Car CM-33, which has a small bar. They decided that they desired a drink. There was no menu on the table so my wife asked him what kind of Scotch he had. He turned around to the bar and secured a menu and literally threw it at them, saying 'read it yourself.'

"If this is the policy of the Pullman Company, to allow such insolence, arrogance and insults to be practiced by employes, then I think it is high time that people like myself, who regularly use Pullman service should know."

At the hearing, the Claimant denied that he had been insolent to the writer of the letter and also denied that he had thrown the menu at the writer's wife as alleged in the letter to the Company.

This claim is based on the wording of Rule 49 of the Agreement between the parties. This Rule provides in part:

"RULE 49. Hearings. An employe shall not be disciplined, suspended or discharged without a fair and impartial hearing.

"Discipline shall be imposed only when the evidence produced proves beyond a reasonable doubt that the employe is guilty of the charges made against him."

The above quoted rule is not found in most of the Agreements appearing before this Division and there has been some diversity of opinion as to the scope of our review under Rule 49. Some Awards taking the position that our function was not changed by the requirement of proof beyond a reasonable doubt (See Award 6924 where this was first articulated,) while other awards have held differently. A summarization of the various awards is found in Award 7140 wherein Referee Cluster stated:

"The prior decisions of this Division on the language of the rule under consideration here cannot be said to have placed a consistent interpretation upon that language; the question therefore is open to our further consideration. On the basis of the analysis and discussion set forth above, it is our conclusion that when a discipline case is brought before the Division under Rule 49 of this Agreement, it is our function to consider it in the light of the degree of proof provided by the parties therein rather than under the doctrine of 'substantial evidence,' and if the evidence in the record fails to justify a finding by

the carrier that the charges were proved beyond a reasonable doubt, the discipline assessed must be set aside. In this connection, it should be noted that while the phrase 'reasonable doubt' is subject to many interpretations and defies exact definition, this is true of the phrases 'substantial evidence,' 'abuse of discretion' and 'arbitrary and capricious,' which have been applied by the Board for many years."

It is our judgment that the position taken in Award 7140 is sound and its position is herein adopted. The term "beyond a reasonable doubt" has long been in the vocabulary of the criminal law and has a meaning of its own in contradiction to the language of the civil law which has established the quantum of proof as being one of preponderance of the evidence. The parties, by their own Agreement, have established the quantum of proof necessary for disciplinary action. It is our sole function to determine whether the parties have complied with the Agreement and when they have agreed that proof must be beyond a reasonable doubt, this Division sitting as an Appellate Tribunal must determine whether the charges have been so proved.

In the case at hand, there is no question that the Company has the right to demand that its employes be courteous to its customers, because the Company's reputation is to a great extent dependent upon the type of service rendered by its employes. While the above is axiomatic, it nevertheless remains that an employe also has the right to expect loyalty from his employer, and that there be proper proof before disciplinary action be taken. In this case the sole evidence as to discourtesy is contained in a letter from a customer to the Company. While we have sustained disciplinary actions taken on the basis of hearsay statements this case goes beyond a mere hearsay statement from a customer complaining about discourtesies. In this case we are faced with disciplinary action based upon hearsay on hearsay. The letter from the customer complains about discourteous action towards his wife, this action taking place out of his presence. No case has been brought to our attention in which this Division has allowed a Company to base disciplinary action on a report which does not purport to be the writers personal observation but rather is his characterization of conduct which took place outside his presence. The closest case is 7774 but in that case the statements at the hearing by the employee provided some corroboration. Award 7774 is therefore distinguishable. In light of the above, it is the judgment of this Division that there was no evidence of probative value before the Company to sustain a finding that the Claimant was discourteous to the wife of the letter writer. This being so, the charge was not proven beyond a reasonable doubt.

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 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 4th day of April 1962.

DISSENT TO AWARD NO. 10507, DOCKET NO. PM-10281

Award 10507 is based upon speculation and a misunderstanding of the facts of record. The Referee states as follows:

> " * * * While we have sustained disciplinary actions taken on the basis of hearsay statements this case goes beyond a mere hearsay statement from a customer complaining about discourtesies. In this case we are faced with disciplinary action based upon hearsay on hearsay. The letter from the customer complains about discourteous action towards his wife, this action taking place out of his presence. * * * In light of the above, it is the judgment of this Division that there was no evidence of probative value before the Company to sustain a finding that the Claimant was discourteous to the wife of the letter writer. This being so, the charge was not proven beyond a reasonable doubt."

Nowhere in the handling of this case on the property was any issue raised, by inference or otherwise, that any of the evidence against Claimant was hearsay. The record does not show that any of Claimant's actions was taken out of the complaining passenger's presence. This is purely speculation on the Referee's part and not having been raised on the property should not have been considered here.

Furthermore, in sustaining the claim solely upon speculation concerning one particular phase of the charge, the Referee ignores what the passenger described in another letter as his "prime complaint", viz., Claimant's insolence to him personally in curtly telling him that he should take his seat and get out of his way.

In addition, Claimant's representative refused to permit Claimant to answer Carrier's questions at the investigation in attempting to develop facts germane to the charge. In Award 7215, involving the same parties and rules as here, the same Referee (Cluster) as in Award 7140 denied the claim therein holding as follows:

> " * * * We can only repeat what we have said many times before: Employes in these investigations are required to answer all questions pertinent to the offense with which they are charged; and a refusal to answer subjects them to inferences that the replies if made would have been unfavorable to them. In view of the evidence outlined above, and Claimant's refusal to answer questions and explain certain conflicts, we find that the Carrier was justified in finding that the charge, * * * was proved beyond a reasonable doubt. * * * "

Award 10507 obviously is in error and we dissent.

/s/ W. H. Castle
/s/ P. C. Carter
/s/ R. A. Carroll
/s/ D. S. Dugan
/s/ T. F. Strunck