

Award No. 11016

Docket No. PM-12583

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

David Dolnick, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF SLEEPING CAR PORTERS

THE PULLMAN COMPANY

STATEMENT OF CLAIM: " * * * for and in behalf of F. Davis, who is now, and for some years past has been, employed by the Pullman Company as a porter operating out of the District of Toronto, Canada.

"Because the Pullman Company did, under date of December 21, 1960, take disciplinary action against Porter Davis by giving him an actual suspension of approximately fifteen (15) days, which disciplinary action was based upon charges which were not proved beyond a reasonable doubt as is provided for in the Agreement between the Pullman Company, Porters, Attendants, Maids and Bus Boys in the service of the Pullman Company in the United States of America and Canada, represented by the Brotherhood of Sleeping Car Porters; therefore, said penalty is arbitrary, unreasonable, capricious and in abuse of the Company's discretion.

"And further, for the record of Mr. Davis to be cleared of the charge in this case, and for him to be reimbursed for the fifteen (15) days pay lost as a result of this unjust and unreasonable action."

OPINION OF BOARD: Claimant was suspended for about fifteen (15) days on a charge that said:

"You were under the influence of intoxicants."

At the hearing held on December 2, 1960, the Carrier introduced the statement of Pullman Conductor, J. A. Burdett which, in part, reads:

"Porter Davis seemed to be in a daze and when I was speaking to him I detected the odor of sweet alcohol on his breath also the train conductor stated to me that he believed the porter had partaken of some intoxicating beverages. I also noted that Porter Davis seemed to be rather unsteady on his feet and as stated above I remained in Porter Davis' car until I went off duty, observing his actions very closely. At the time I had checked my train at Toronto I had not noticed anything unusual or out of the way with this porter's actions or manner."

The statement of Superintendent, J. E. Crowley, has no evidentiary value. It is all hearsay. He did not observe Claimant at the time of the alleged offense. He states only what Conductor Carnes had told him.

A letter from a passenger, D. F. McCarthy, states that he rang for the Claimant to make up the berths in his bedroom for 45 minutes and then informed a trainman about it. This letter, which was introduced in evidence at the hearing, also says that when Claimant made up the berths: "I could detect the odor of liquor on his breath."

The statement of Porter, H. A. Rogers, says:

"I was Porter on car 8903 on the dates in question. I had two or more occasions to observe Porter Davis during the trip. However, I saw nothing that would indicate he was not able to perform his work. I was given the first watch and instructed to guard Davis's car. I went to bed at 9:30 and so would not have any knowledge of anything that happened thereafter.

* * * * *

"During my contacts with Porter Davis I did not observe anything out of the ordinary with him. In the statement of Conductor Burdett he states that when he went off duty he instructed me to watch the actions of Porter Davis. I do not recall Conductor Burdett making this statement to me, however, in the morning after I called Conductor Burdett he did state to me that the passenger that had Bedroom D in Porter Davis's car had been ringing for about 45 minutes while Davis was on duty and the calls were not answered. I was off duty from 9:30 P.M. to 1:30 A.M."

The statement of Porter, J. H. Banks, lends no support to either party. He went to bed as soon as the train left Buffalo. No one spoke to him about Claimant.

The statement of the Claimant is clear and comprehensive. He stated that "at no time did the indicator note a call from Bedroom D". All beds in his car were made up before leaving Toronto. "It was only necessary to pull "them down upon request" which he did when so requested. When the train left Niagara Falls, Claimant was sitting in Roomette 1 drinking a bottle of Coca Cola which he purchased from the Diner. The Train Conductor passed by. He said nothing about any passenger ringing for Claimant. Pullman Conductor, Burdett, found Claimant in Roomette 1. When Burdett told him that the passenger in Bedroom D had been ringing for service, Claimant replied that he "had no previous information that Bedroom 'D' was ready to retire." The occupants of Bedroom D made no mention to Claimant that they had been trying to reach him.

In a second statement of Claimant he said:

"For your information, I can positively state that at no time prior to, during the trip nor after completing the assignment did I partake of anything of intoxicating beverage."

Claimant admitted that he had a copy and was familiar with the contents of Carrier's book of **Instructions** which, in part, says:

"Any of the following derelictions will subject the employe to discipline or dismissal.

Transporting, using, or having possession of intoxicants or narcotics of any kind while in service or deadheading, or while on Company or railroad property. An employe reporting for duty, whether the assignment is to service with passengers or for a deadhead movement on car or on pass, with the odor of intoxicants on his breath or under the influence of intoxicants or narcotics will be considered in violation of this regulation."

The Organization contends that the charge was not proved beyond a reasonable doubt as required by Rule 49 of the Agreement. This Rule, in part, says:

"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 degree of evidence required to sustain a charge of discipline under this Rule is more than by "substantial evidence." Awards 7193 (Wyckoff), 7140 (Cluster) and 6924 (Rader). What is more than substantial depends upon the evidence in each case.

This Board said in Award 6924 (Rader):

"As good a definition of a 'reasonable doubt' is that in considering and weighing the evidence in its entirety if there is a doubt of substantial nature or character remaining after such a consideration then it is a doubt of which the benefit should be given to the individual whose conduct is being considered in a discipline case."

In the instant case there is such a reasonable doubt. The only Carrier evidence purporting to justify the charge that the Claimant was "under the influence of intoxicants" is the statement of Conductor J. A. Burdett who said that: "Porter Davis seemed to be in a daze and when I was speaking to him I detected the odor of sweet alcohol on his breath . . ." He also stated that Claimant was rather unsteady on his feet.

There is no evidence corroborating Burdett's statement. The evidence of Superintendent, J. E. Crowley, has no value. It is only hearsay evidence; he had no opportunity to observe the Claimant. His statement reports only what Conductor Carnes told him. No statement by Conductor Carnes is in the record.

Passenger D. F. McCarthy's statement says only that: "I could detect the odor of liquor on his breath." He did not say that Claimant was in a daze or that he was unsteady on his feet.

In behalf of Claimant, Conductor, F. J. Begel, and Flagman, Lyman E. Barr filed the following statement:

"To Whom It May Concern:

Porter F. Davis made trip on Car Oak City #8901 from Depew to Bethlehem October 1/2-1960. He was in good condition and at

no time did I observe anything that would indicate that he had partaken of, or was under the influence of alcoholic beverages."

Mr. Richard N. Otto was a passenger on the train on the date in question. He had space in Car 8901 serviced by Claimant. Mr. Otto voluntarily filed a statement in the record which said that Claimant "conducted his duties in a manner most befitting to The Pullman Company and did not appear to be under the influence of alcohol in any manner what-so-ever." Mr. Otto's statement also says that Claimant "was not intoxicated on the night in question."

Claimant's denial of intoxication is corroborated by a disinterested passenger and by a Conductor and Flagman, all of whom had an opportunity to observe him. Furthermore, Conductor Burdett made no effort to verify whether the call indicator was in working order when Claimant denied that the indicator noted a call from Bedroom D.

It is also significant that Claimant had a record of 34 years of service with The Pullman Company. There is no evidence in the record showing that Claimant was at any time previously reprimanded or disciplined. We must assume that he was at all times a satisfactory employe and that he had complied with all of the work Rules.

There is reasonable doubt that the Claimant was "under the influence of intoxicants" as charged. In view of his previous good record and because of all of the evidence in the record, the benefit of such doubt must be given to Claimant. This position is not inconsistent with the Awards cited by the Carrier.

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 Carrier violated the Agreement.

AWARD

Claim is sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 26th day of December 1962.