Award No. 11105
Docket No. PM-11588

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Raymond E. McGrath, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF SLEEPING CAR PORTERS

THE PULLMAN COMPANY

STATEMENT OF CLAIM: " * * * for and in behalf of J. Scott 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 July 18, 1959, through Superintendent C. W. Kelley, take disciplinary action against Porter Scott by giving him an actual suspension of 12½ days from his regular assignment.

And further, because the charge upon which Porter Scott was disciplined was not proved beyond a reasonable doubt as is provided for in the rules of 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, effective January 1, 1953.

And further, that the record of Porter Scott be cleared of the charge in this case and that he be reimbursed for the 12½ days time that he lost as a result of this unjust action.

OPINION OF BOARD: This claim is brought on behalf of J. Scott, 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. The Pullman Company took disciplinary action against Porter Scott by giving him a suspension of twelve and one-half days from his regular assignment. The charge on which Porter Scott was disciplined was that he was insolent and challenged the authority of his supervising conductor. It is claimed that the charge was not proved, by the evidence at the hearing, beyond a reasonable doubt, as is provided for in the rules. It is requested that the record of Porter Scott be cleared of the charge in this case and that he be reimbursed for the twelve and one-half days time that he lost.

The principle issue in this dispute is whether or not the Company properly

imposed the twelve and one-half day suspension upon the Claimant for his actions of March 27 and 28, 1959.

The record discloses that the petitioner was assigned as Pullman porter in regular service on a train leaving Chicago March 27, 1959. Mr. C. E. Wood, the conductor on the train, in a letter addressed to Superintendent H. C. Lincoln, under date of March 29, 1959, set forth a complaint against Porter Scott, the substance of which was that Porter Scott was insolent to Mr. Woods, and that Porter Scott challenged the authority of the Pullman conductor assigned to tran 17 on this trip. An examination of the record discloses that there is a serious conflict in the evidence between the statement of Mr. C. E. Wood, the conductor, and the statements and the evidence, of Porter Scott. It will not be necessary to review all of the facts as submitted at the hearing, for the reason that the decision of the Board in this case will be determined by following several well-defined rules of law as laid down by this Board in previous similar cases.

Rule 49 of the effective Agreement between the parties hereto, dated January 1, 1953, reads as follows:

> "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 Carrier prepared regulations set forth in a book of instructions and issued them to all car service employes. In these regulations the Pullman conductor has jurisdiction over all car service employes on cars in his charge and is responsible for their performance and for coordination and harmony between all members of the crew. Also in the instructions to the porters it is specifically stated that the porter must cooperate with the conductor in the transfer of coach passengers and their belongings to Pullman accommodations and in the transfer of Pullman passengers to other accommodations. Disloyalty, dishonesty, immorality, insubordination, incompetency, insolence or discourtesy to passengers or others, and carelessness are set forth as the derelictions which will subject the employe to discipline or dismissal.

The facts set forth in the report of Pullman Conductor Wood to the Superintendent, if believed, would be sufficient to subject the employe to disciplinary action.

Our courts have held that a reasonable doubt is an actual, substantial doubt, arising from the evidence or want of evidence in the case. If, after a careful and impartial examination and consideration of all of the evidence in the case, a person can say that he or she feels an abiding conviction of the guilt of the defendant and is fully satisfied to a moral certainty of the truth of the charge made against him, then that person is satisfied beyond a reasonable doubt.

The term "reasonable doubt" as herein used, does not mean a mere caprice, or conjectural possibility. It is an actual, substantial doubt based on a reason arising from either the evidence or lack of evidence in the case, and sufficient to cause one to hesitate and refuse to act.

The following are pertinent opinions in some of the cases that have been brought before this Board on this question of reasonable doubt:

In **Award 7072** (Carter):

* * * "It is only when the evidence clearly indicates that the Carrier acted arbitrarily, in bad faith, or without just cause under all the circumstances, that the intervention of this Board is permissible. Such a situation does not here exist and consequently we find no reason to interfere with the action of the Carrier."

In **Award 9422** (Bernstein)

"As an original proposition it might strike the Board that the claimant's breach of duty to the Carrier occurred only once and was small in amount and that in view of his long service and fairly advanced years he should be given another chance.

"But we are not the Carrier. If there is a finding of wrongdoing which is not arbitrary, the Carrier has a right to impose the discipline it thinks necessary to maintain the standards of duty and service deemed desirable even though the sanction chosen may be greater than that which the Board might choose."

In **Award 6924** (Rader):

"Rule 49 is an unusual rule in a collective bargaining agreement. Undoubtedly it means something more in the matter of proof than the previous rule. **However, we do not believe that the degree of proof changes the concept of the function of this Board with reference to our previous awards on the proposition that our duty here in a review of such cases confers any additional power on this Board in a consideration of like and similar cases.** We have said many times that the decision made on the property should not be disturbed unless it is clearly shown that there has been an abuse of the right exercised, or in other words, that Carrier has acted in an arbitrary, capricious or unfair manner in the conduct of the hearing or in the extent of disciplinary action taken." (Emphasis ours.)

In **Award 10374** (McDermott):

* * * "The Board is of the opinion that the evidence in the record is sufficient to support a finding by the Company that the claimant was guilty of the charge against him beyond a reasonable doubt. Under such circumstances, it is not our function to upset that finding."

In **Award 10071** (Weston):

* * * "While it is true that Rule 49 requires a greater degree of proof than is customarily necessary under collective bargaining agreements, there is sufficient credible and competent evidence in the record, viewed as a whole and making all due allowance for claimant's testimony, to establish beyond a reasonable doubt that claimant was guilty of the charges levelled against him.

The suspension does not appear to be unreasonable under the circumstances and we are satisfied that, in processing the claim, proper regard was had for the requirements of the applicable Agreement."

In **Award 10595** (Hall):

> "The Carrier has an absolute responsibility to furnish the utmost protection to the traveling public. In the performance of that duty it has a right to exclude the unfit from the railroad service if it becomes necessary. Historically, it has been uniformly recognized that an employer may discipline employes if it becomes necessary to a proper conduct of the service. Of course that right, or a portion of it, may be bargained away. In conformity with its right to discipline employes the Carrier in the instant case issued a book of instructions, a portion of which has been hereinbefore cited, and is the basis for the charge made against claimant Langford."

The question raised by the Claimant that the conductor was not called as a witness, is discussed in the following awards.

In **Award 6185** (Wenke)

> "Statements of several persons were received in evidence. Objection thereto was made because these parties were not produced at the hearing so they could be cross-examined. There is nothing in the parties' effective Agreement which sets out the type of evidence which may or may not be adduced. This division has many times correctly ruled that under such circumstances no obligation rests on Carrier to produce the author of such a letter or statement at the hearing."

See also **Award 4976** (Boyd) and many others.

As stated in some of the above Awards, Rule 49 does not change the concept of the function of this Board in discipline cases; appeal to this Board is not to be considered as requiring a hearing "de novo" or a new trial on the part of this Board. We cannot substitute our judgment for that of the Carrier; to the Carrier is reserved the right to pass on the credibility of the witnesses and the weight it will attach to testimony. After a careful review of the record herein this Board hereby determines that the conduct of the Carrier in reaching the conclusion that it has in this case has not been arbitrary, capricious, unfair or unreasonable.

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 not violated.

AWARD

The claim is denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 1st day of February, 1963.