Award No. 12538
Docket No. PM-14329

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Louis Yagoda, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF SLEEPING CAR PORTERS

THE PULLMAN COMPANY

STATEMENT OF CLAIM: . . . for and in behalf of T. S. Taft, who is presently employed by The Pullman Company as a porter operating out of Los Angeles, California.

Because The Pullman Company did, through Superintendent R. W. Schulte, of Los Angeles, California, under date of March 22, 1963, take disciplinary action against T. S. Taft as a result of charges that had been preferred against him, wherein Mr. Taft was suspended from the service for a period of ninety (90) days. Which action was based upon charges that had not been proved beyond a reasonable doubt as is provided for in the rules of the Agreement governing the class of employes of which T. S. Taft is a part, and said action, therefore, was arbitrary, unjust, unreasonable and in abuse of the Company's discretion.

And further, for the record of Mr. Taft to be cleared of the charge in this case, and for him to be reimbursed for the ninety (90) days lost as a result of this unjust and unreasonable action.

OPINION OF BOARD: The Claimant, a Porter-in-Charge at the time of the incidents which are the subject of this claim, was employed by the Carrier since May 12, 1957.

A lady passenger, hereinafter referred to as the Complainant, who had occupied an upper berth in the car serviced by the Claimant wrote a letter dated December 28, 1962, to the Superintendent of the Southern Pacific Company, stating that on December 26th while lying in her berth, she had undergone the following experiences:

At about 12:30 A. M., she felt a hand being run along her leg under the blankets. She moved and the hand was withdrawn, but immediately thereafter the movement was repeated. She then turned and raised up on her elbows and heard a voice outside the berth say, "Honey child, if we're late I'll get you up half an hour before Martinez."

The letter further states: "I did not see this person, but there was no doubt in my mind that it was the Porter of this car and the same Porter that had sold me this berth in the automat car and with whom I had visited there approximately 30 minutes in the automat car together with the brakeman and other people."

The passenger further states in this letter that prior to arrival at Oakland in the morning, "the Porter opened up the curtains of my berth and said, 'You have slept long enough now'."

The letter from the passenger was transmitted by Superintendent Kilborn of Southern Pacific, Portland to Superintendent Vanderlaag, Pullman Company, Portland with covering letter of same date.

Under date of January 24, 1963, the Complainant wrote a supplementary letter covering the same incidents.

The Carrier subsequently undertook an investigation of the incidents in the course of which it secured a statement from the Claimant and from others. It then notified the Claimant by letter dated February 2, 1963 that a formal hearing was to be accorded him on the following charge:

> "You molested the woman passenger occupying upper 11, in your car, placed your hand under the blankets in her berth and ran your hand along her leg; and when calling this passenger prior to arrival at Oakland, you improperly opened the berth curtains and stuck your head into her berth."

In line with the well-established principles laid down in previous awards, we regard our task here that of determining whether the Carrier has abused its right to exercise its discretion for making a disciplinary judgment within certain broad boundaries.

These established criteria were derived from (1) the fact that Agreements — as does the one before us — imposed certain procedural rights, — notification of charges, opportunity to respond, fair and impartial hearing, limitations on use of employe records, the right of representation; (2) usual silence in past Agreements as to degree of proof required; (3) the necessary limitations imposed on an appellate reviewing body such as ours in attempting to make judgments as to credibility or to resolve conflicts in testimony. Such evaluations have been left to the Carrier, subject to the indicia of a fair and impartial hearing, and absent a showing of a bad faith failure to act within broad recognizable standards of reasonable and fair judgment in arriving at the decision or in fixing the penalty, i.e. the necessity for the Carrier not to "abuse its discretion".

These criteria have been well stated by us in Awards 2633, 2766, 3127, 5861 and many others.

Following the incorporation into the Agreement between the subject parties of the statement in Rule 49, requiring the criterion of proof "beyond a reasonable doubt", our awards have reflected a somewhat more demanding standard for determining whether management's actions are within the limits of permissible discretion.

Award 6924, issued soon after Rule 49 was amended by the Agreement between the subject parties, took note of the principle of contract law that a statement is inserted in an Agreement for a reason; it should be regarded as having meaning. "Undoubtedly", we said in that Award, "it means something more in the matter of proof than the previous rule". We reiterated in that Award our earlier guide-lines, but presumed that "Rule 49 may make for a more careful analysis on the property by the hearing officer. . . ." Significantly, in reaching our conclusion (for the Carrier), we did pass our

own judgment on the weight of evidence revealed in the record, possibly with a view to determining whether the more demanding quantum of proof had appeared to be responded to. We found:

> "In the instant case we think on the record made, that Claimant's conduct on the occasion was such as to warrant discharge. . . ."

In Award 6925, which immediately followed, we went further in invoking the new wording of the rule. The claim is sustained therein with the statement: "In view of the Claimant's past good record, his many years of seniority standing and conflicts in the evidence, we believe that he should have been given the benefit of the doubt in this case." In Award 6928, there appears a statement of principle which may be fairly said to respond to the influence of the new Rule 49, although the latter is not referred to, viz:

> "We consider from the evidence that this is a case in which honest minds might differ and believe there is a reasonable doubt as to Claimant's conduct which should innure to his benefit."

Between these awards and in some which follow, there are some which persist in treating the new rule as if it makes no difference, and some go to some pains to say so, but even in a few of these there may nevertheless be detected conclusions which reveal re-examination by the criterion of Rule 49, of the scale held in the hand of the Carrier hearing officer. Thus, in Award 9493, we prefaced our statement that "no interference by the Division is warranted in this case", by the explanation ". . . we find that the record contains substantial, credible and competent evidence to support Carrier's action . . ."

In Award 10716, we say "It is not our function to weigh the testimony"— but, nevertheless add, "and as there is substantial evidence in the record to sustain Carrier's finding that Claimant had been imbibing alcoholic beverage to excess and was unfit for service, we are unable to say that Carrier was arbitrary or capricious. . . ."

In many Awards, however, since 6924 and 6928, we have responded explicitly and directly to the newer quantum of proof stated in Rule 49 and found for the Claimant when it was our determination that the Carrier had not satisfied the weight demanded by that Rule.

In Award 7193, we stated:

> "It may well be that under the old Rule, this record would have required a denial of the claim.
>
> The amendment of the Rule has not changed the authority of this Board. It is still true that we should not disturb determinations of the Carrier in discipline cases unless the action taken is so arbitrary, capricious or unreasonable as to amount to an abuse of discretion.
>
> But, while under the old Rule any 'substantial evidence' would sustain disciplinary action, the new Rule requires proof 'beyond a reasonable doubt' (Awards 7140, 6928, 6924 and 7004)."

The findings in this case refer directly to Rule 49, viz:

"Rule 49 of the Agreement was violated by the Carrier and the disciplinary action should not be sustained."

In the matter before us, the only evidence of probative value are two statements of complaint by the lady passenger who alleged that she had experienced molestation by the Claimant. The record shows also, a report of an interview of the Complainant by Superintendent Vanderlaag. All three — the two letters and the statement quoted of the interview, state basically the same facts. But, they necessarily suffer from the absence of adversary questioning and confrontation, and there appear some differences in details between the statements which could be best resolved by being "tested in the crucible of cross-examination" (Award No. 12252). We do not regard written statements as inadmissible or as absent of probative value, but they must necessarily suffer when weighed against conflicting testimony, subject to questioning and cross-questioning in the presence of the accused and the other parties at interest.

In assigning values of evidentiary worth, it should be noted that the Claimant was not present at the oral interview of the Complainant by the management, nor notified in advance of its being held.

The only witness examined at the hearing was the Claimant. Signed statements were, however, submitted from others in addition to those of the Complainant lady passenger and Superintendent Vanderlaag's account of his interview with her. We have studied all these statements carefully and our conclusion is that they do not constitute convincing corroborative evidence. In none of these statements is there an eye-witness account of the incident alleged. In one, that of a 13 year old passenger, the Claimant is placed near the lady's berth and facing it. The affiant states that while lying in his berth, "I saw him [the porter] facing the No. 11 berth" at some time between 12:30 A. M. and 1:00 A. M. This statement further states, "About 1:00 A. M. I again heard someone walk in the aisle, and heard voices. These seemed to be whispers, and I believe it was a man and a woman, but this time I didn't look out."

The statement suggests many necessary unasked and unanswered questions for an objective ascertainment of its probative effect on the charges. These questions are taken note of by us — not with any view towards usurping the Carrier's right to a reasonable scope for making judgments of credibility, but in order to discharge our duty to determine whether the Carrier has defaulted in its obligation of diligent effort in inquiry and reasonableness in exercising its judgment, to the extent that it has abused its discretion. The signed statement just referred to, necessarily cannot be relied on as any significant part of a probative base on which the judgment against the Claimant was made.

The absence of corroborative evidence against the Claimant of significant probative worth, leaves the determination of this issue as a judgment between the statements of the accused and the accuser. The Claimant's good record for a period of 36 years makes him deserving of a reasonable element of credence, and causes the record to fall measurably short of substantial evidence in support of the charge. (Awards 2634, 6425, 6928 and 12435).

The imposition of this penalty by the Carrier must, therefore, be found to have been arbitrary and unjust and in abuse of its discretion and cannot be sustained.

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

The claim is sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 22nd day of May 1964.

DISSENT TO AWARD NO. 12538,
DOCKET NO. PM-14329

Award 12538 is in palpable error in sustaining the claim herein because it is based upon wholly untenable premises.

Firstly, it departs from its own recognition of what it holds to be "well stated" and "established criteria" under this Division's Awards in discipline cases when it questions the probative value of written statements of absent witnesses. It does this by completely ignoring Rule 51, which rule many recent Awards have analyzed, discussed and properly interpreted as expressly recognizing the probative value thereof as evidence. As illustrative in this respect, Awards 11008, 10596, 10595, 9494, 9493, 9311 and 9175 were cited to the Referee, all of which involved the same parties, agreement and rules as in the instant case.

Obviously, this Division cannot consider that the parties performed a vain and useless act in writing Rule 51, or consider that rule as surplusage. Nor can we construe Rule 49 as destroying Rule 51. On the contrary, we have consistently held that effect should be given to the entire language of the agreement and the different provisions reconciled so that they are consistent, harmonious and sensible.

Furthermore, no issue in this respect was raised in the handling of this dispute on the property, and, under well-reasoned awards cited to the Referee, it was barred from our consideration here.

Secondly, Award 12538 substitutes its judgment for Carrier's by attempting to resolve conflicts in the evidence, both of which functions this Division has consistently refused to do in Awards too numerous to mention. It does so herein ostensibly by disbelieving the statements made by other witnesses

and believing the statements made by Claimant, notwithstanding that the latter had impeached the credibility of his own statements by his admitting that he had testified falsely to certain salient facts. There is no evidence in the record, nor any reason to believe, that the passengers maliciously contrived an entirely false story to harm Claimant.

Thirdly, Award 12538 gives no consideration either to the circumstances surrounding the occurrence or to the evidence in the record showing a tendency on Claimant's part to open berth curtains in calling passengers, which latter comprised one of the charges against Claimant. The record showed that Claimant initially set the stage for all that occurred when he sold the lady passenger her space. Furthermore, in addition to Claimant's having been observed by another passenger standing and facing her berth at the time of the occurrence, the record showed that still another passenger stated that Claimant had opened the curtain of his berth in calling him that same morning.

For the foregoing reasons, among others, we dissent. Obviously, our Awards are sound which hold that, in rewriting Rule 49, the parties did not and could not change the functions of this Board.

W. H. Castle
D. S. Dugan
P. C. Carter
T. F. Strunck
G. C. White