Award No. 13464
Docket No. PC-14851

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Arnold Zack, Referee

PARTIES TO DISPUTE:

ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN, PULLMAN SYSTEM

THE PULLMAN COMPANY

STATEMENT OF CLAIM: The Order of Railway Conductors and Brakemen, Pullman System, claims for and in behalf of Conductor I. D. Owens, Kansas City District, that The Pullman Company acted arbitrarily and capriciously, and in violation of Rule 49 of the Agreement between The Pullman Company and its Conductors, when:

1. Under date of February 15, 1964, Conductor Owens was suspended from service for 10 days, commencing at 3:00 P. M., February 17, 1964, and terminating at 2:59 P. M., February 27, 1964.

We further claim that the Company's action was not based on the facts contained in the record that Conductor Owens was guilty beyond a reasonable doubt of the charge that he failed to sell available accommodations to a passenger.

2. We now ask that the charge be expunged from Conductor Owens' record, and that he be paid for the 10-day suspension under the applicable rules of the Agreement.

The Memorandum of Understanding Concerning Compensation for Wage Loss is also involved.

OPINION OF BOARD: On or before June 12, 1963, passenger E. M. Schirmer attempted to purchase Pullman accommodations on Train No. 16, on that date from Houston to Chicago. He had possession of a round trip first class ticket, but no Pullman assignment. He was assured that such a position would become available out of Fort Worth or Dallas. Schirmer remained in the club car after Dallas when, he contends, the Pullman Conductor gave newly available space to two railroad men who had boarded at Fort Worth. The Conductor stated to Schirmer that he would not know of space beyond Oklahoma City until they had left it. Schirmer replied that if space were not provided prior to Oklahoma City, he would leave the train at that point. This he did. The Pullman Conductor testified that he had offered Schirmer a Roomette, which he had refused, that Schirmer was intoxicated, and that Schirmer had insisted on a Bedroom or Compartment.

The Organization protests the Carrier's imposition of a ten day suspension upon the Conductor. It argues that the Claimant should not be disciplined on the basis of uncorroborated evidence written in by an irate passenger. Further, it points out that even after the passenger had made known his demands, there was no available space which could have been sold to him without making a duplicate sale. The only space to become available was after leaving Oklahoma City, and by this time the passenger had left the train.

The Carrier asserts that the discipline was proper. It argues that there had been a roomette which could have been offered to Schirmer but wasn't; that the Conductor failed to prove his allegations that Schirmer was intoxicated; and that the Claimant failed to provide the measure of service to the passenger required of his position.

There is no question that the Carrier may use written passengers' statements in considering the imposition of disciplinary penalties. However, in doing so it runs the risk of challenge if the passengers' statements are unsupported by other evidence, or if they fail in the light of testimony by witnesses at the disciplinary hearing.

Most of the Carrier's case in this instance rests upon the written presentation of the passenger. Other witnesses to the proceedings were available and could have been called to testify. There were many unanswered questions remaining after the hearing which justified further exploration, such as: The time and place where Schirmer first requested space; the type of space requested; his alleged intoxication; the observations of Agent Johnson and Lounge Car Attendant Day and other items of importance in seeking to determine the Claimant's guilt or innocence of the charge imposed.

The Carrier failed to provide sufficient corroborative evidence to support the allegations in Schirmer's letter. As a result, we must conclude that the Carrier has failed to sustain the burden of proof beyond a reasonable doubt that the Claimant was guilty as charged.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

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 14th day of April 1965.

CARRIER MEMBERS' DISSENT TO AWARD 13464, DOCKET PC-14851 (Referee Zack)

The Majority award, after properly recognizing "that the Carrier may use written passenger's statements in considering the imposition of disciplinary penalties," then concludes that "the Carrier failed to provide sufficient corroborative evidence to support the allegations in [the complaining passenger's] letter." Thus, the Majority usurps to itself the right to pass on the credibility of witnesses, the weight to be attached to testimony, the sufficiency of evidence — all being matters peculiarly within the province of the hearing officer to evaluate and functions which, by a vast body of awards, have been expressly reserved to the Carrier.

We do not argue that an employe should be disciplined without demonstrated cause or reason. We do argue, however, that when (as here) the evidence is such to persuade the hearing officer (and is not so destitute of substance as to shock a neutral observer's conscience), the action of the Carrier should not be lightly set aside.

Specifically, the record at the very least establishes: (1) that roomette space was available, (2) that on the day following the incident involved herein the complaining patron cancelled airline reservations to utilize roomette space then made available to him, (3) that the city passenger agent (of another Carrier) at Oklahoma City witnessed in writing his belief that the patron "would have accepted a roomette had one been offered," and (4) that the Claimant had been disciplined on three prior occasions for offenses similar to that involved herein and on three other occasions for improper treatment accorded patrons (this latter information lending credence to the testimony adduced against him). In short, the record supports the Carrier's conduct.

Finally, strenuous objection must be taken to the suggestion that the city passenger agent at Oklahoma City was available as a witness and should have been called. Overlooked completely is the fact that he is an employe of another Carrier working several hundred miles away from the site of the hearing. Similarly overlooked is an even more basic consideration — to-wit, recognition at the hearing by Claimant's representative that it was not possible "to get him up here because of the postponements . . .", which postponements, it might be added, were at the request of the Claimant and his representative. Overlooked is the statement made at the hearing that Claimant's representative wanted the agent "present just to answer two qustions" concerning the complaining patron's condition. But the record establishes that Claimant failed to sell available space to a patron — the condition of the patron would in no way alter that fact when Claimant's defense is based not on the patron's condition but rather on the alleged unavailability of space.

We dissent. The Claim should have been denied.

C. H. Manoogian
R. A. DeRossett
W. F. Euker
G. L. Naylor
W. M. Roberts