Award No. 2769
Docket No. PM-2677

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Jay S. Parker, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF SLEEPING CAR PORTERS

THE PULLMAN COMPANY

STATEMENT OF CLAIM: * * * for and in behalf of W. L. Gilmore who is now, and for a number of years past has been employed by The Pullman Company as a porter operating out of the New York Central District, New York City, New York. Because The Pullman Company did, under date of October 10, 1943, take disciplinary action against Porter Gilmore by giving him an actual suspension of thirty days without pay on charges unproved; which action was unjust, unreasonable and in abuse of the company's discretion. And further, for the record of Porter Gilmore to be cleared of the charge placed against him and for him to be reimbursed for the thirty days pay lost as a result of this unjust and unreasonable disciplinary action taken.

OPINION OF BOARD: Preliminary to our consideration of the factual situation presented by the record we will briefly restate and reaffirm certain general and fundamental principles heretofore announced by this Division, each and all of which are pertinent and applicable in our determination of the merits of the instant claim and all others disciplinary in character. Summarizing, they can be stated thus: In its consideration of claims involving discipline, this Division of the National Railroad Adjustment Board (1) where there is positive evidence of probative force will not weigh such evidence or resolve conflicts therein, (2) when there is real substantial evidence to sustain charges the findings based thereon will not be disturbed; (3) if the Carrier has not acted arbitrarily, without just cause, or in bad faith its action will not be set aside; and (4) unless prejudice or bias is disclosed by facts or circumstances of record it will not substitute its judgment for that of the Carrier.

With general principles stated we turn directly to consideration of the factual situation.

No controversy exists with regard to the sufficiency of notice of hearing, to the competency of evidence offered there, or to privileges accorded the employe by Rule 51 of the current Agreement.

On the date of the hearing there was in force and effect a booklet of instructions issued by the Company, one of which had been furnished to the Porter and was in his possession at the time, which contained the following instruction: "The transporting or use of intoxicants or narcotics by employes is prohibited."

The charge was "that while you were assigned to duty on car Red Gravel Line 1527, Rochester, N. Y. C. No. 34, July 27-28, 1943, you were observed to have the odor of liquor on your breath."

After a hearing on the charge at which the accused was represented by the Brotherhood of Sleeping Car Porters, the decision of the Company was that the charge had been fully substantiated and the penalty imposed for its alleged commission was suspension from service for thirty (30) days during the period of October 12, 1943 to November 10, 1943, inclusive.

The claim was predicated on the proposition the charge was unproved, and that the penalty assessed was unjust, unreasonable and in abuse of the Company's discretion.

At the hearing some evidence was adduced relative to the claim of a lady passenger to the effect the Porter involved had locked her in the toilet of the Ladies' Dressing Room and a subsequent disturbance between such Porter and that lady's husband. We eliminate all testimony of that nature from our consideration, not because in the present state of the record it is not proper for consideration or had some probative value, but because (1) except for one statement relative to the action of the Porter in sitting in the Dressing Room with his head in his hands, which might under all the circumstances indicate a state of intoxication, all such evidence relates to matters foreign to the charge as filed, (2) it was all based on statements made to third parties which in judicial proceedings constitute what is commonly referred to as hear-say evidence, (3) it pertained to statements which appear to have been influenced by emotional stress and therefore subject to careful scrutiny and analysis if it was to be considered, and, (4) it was wholly immaterial and unnecessary to sustain the charges as preferred.

Evidence which we do consider consists of the statements of Conductor Beckett and Inspector Bacon with respect to what they saw and observed.

Conductor Beckett stated: ". . . I definitely smelled the odor of liquor on his breath." Inspector Bacon said: "I very plainly smelled alcoholic odor on the porter . . ."

In addition Bacon made the following statement: "Porter had the appearance of having taken enough alcoholic stimulant to make him drowsy. The excitement of the incident had partially sobered him, and he was able to partially perform his duties. The car was well loaded and I told conductor to remain on duty all night to watch this porter and to protect the situation."

In passing we pause to note that almost universally Courts throughout this land, when that question arises, have held that testimony to the effect one smelled intoxicating liquor on another's breath is admissable in consideration of the question of whether the accused has been indulging in the use of intoxicating liquors. We affirm that doctrine and regard it as applicable to the instant situation. It is urged that because the charge was "observed the odor of liquor" the Company was therefore limited in its evidence to observation of witnesses and that to permit a witness to say that he smelled liquor was so improper as to result in an unfair hearing. The claim is hypercritical and has no merit. Such evidence was proper and supports the charge as made.

Concluding, when pertinent general rules to which we have briefly referred are applied to the factual situation presented by the record, we hold there was ample evidence on which the Company could properly base its judgment of suspension. It necessarily follows from application of the same principles that its decision was not arbitrary, unjust and unreasonable or that in suspending Porter Gilmore it abused the discretion vested in the Management in matters of discipline.

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 action of the Company in suspending Porter Gilmore from service was proper under the provisions of the current Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 19th day of January, 1945.