

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Francis J. Robertson, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF SLEEPING CAR PORTERS

THE PULLMAN COMPANY

STATEMENT OF CLAIM: * * * for and in behalf of Frank Deggs, who was formerly employed by The Pullman Company as a porter operating out of the District of San Francisco, California.

Because The Pullman Company did, under date of July 10, 1947, discharge Mr. Deggs from his position as a porter in the above mentioned district on charges unapproved; which action was unjust, unreasonable, arbitrary, and in abuse of the Company's discretion.

And further, for Mr. Deggs to be restored to his former position as a porter in the San Francisco District with seniority and vacation rights unimpaired, and with pay for all time lost as a result of this unjust and unreasonable action.

OPINION OF BOARD: This is a discipline case in which the claimant was charged with violation of the privacy of a lady passenger occupying Lower Berth No. 6 in Car Madrid, after she had retired for the night by unbuttoning the curtains of her berth at a time when she was under mental distress as a result of a previous intrusion of her berth and molestation of her berth and molestation of her person. Reduced to essentials, the facts giving rise to the charge are substantially these. A Mrs. Schoenfeld was traveling with her son, aged 7, and occupied Lower 6, Car 211, Southern Pacific from Salt Lake City to Oakland, California, from March 11-12, 1947. At about 8:15 P. M., on the 11th, she retired for the night and fastened the buttons on the berth curtains. At about 1:15 A. M., she was awakened by a man's hand on her body. When she turned, he pulled his hand away and ran. After that incident, she got dressed and sat at the foot of the berth with the lights off when she saw someone fumbling with her berth curtains. According to her statement, she believed that it was the porter of the car in back of the Madrid, who was the claimant Deggs.

In considering this claim, it must be made clear that we dismiss from our deliberations any consideration of guilt of the claimant of molesting this lady passenger's person. There is not any tangible evidence whatsoever that the claimant was involved in any way with that phase of the charge and hence we devote ourselves to a consideration of the question as to whether or not the claimant was denied a fair and impartial hearing on the invasion of privacy charge and whether or not the Carrier has been capricious or arbitrary in finding guilt and assessing punishment.

Some indication with respect to the impartiality of the Carrier's approach to this matter is the language of the charge; it seeks to create an

impression that Deggs was involved in the molestation of this passenger's person, but does not specifically charge him therewith. That phase standing alone would not necessarily indicate a partial approach if there were some indication or evidence that Deggs had had knowledge of the personal molestation, regardless of by whom committed. It does indicate in some degree, however, that there was a biased view of the invasion of privacy charge prior to the actual hearing thereupon.

Cases of this type are notoriously difficult of proof by extraneous evidence. We recognize, of course, that there is no burden upon the Carrier in this matter as there might be in some criminal cases of like ilk where the guilt of the accused must be proven beyond a reasonable doubt and some corroborative testimony other than that of the complainant is required. We recognize further that it is not necessary that the guilt of the accused be proven by a fair preponderance of the evidence as is required of an asserting party in a civil suit. All that is required is that there be real substantial evidence to sustain the charge. We will not attempt to weigh the evidence or resolve the conflicts therein if there is positive evidence of probative force to establish the guilt of the accused.

Is there positive evidence of probative force or real substantial evidence to sustain the charge? There are many statements in the record referring to Degg's connection with the violation of privacy, all of which stem from the lady passenger's version of the incident. We quote from four of them:

- (1) **The lady's own statement.** "I got up dressed and sat there a few minutes debating what to do with the lights off when I saw someone unbutton the curtain again, when all three buttons were opened. I put my head out and the Porter was standing there beside my berth and he started pushing at the upper berth. The aisle lights were on and made the car light enough I could see the porter as he hurried away to the men's room at the other end of the train.

I believe it was the porter of the car in back of us, our porter was a much shorter and old man, and when I retired the night before the younger one was in our train and I thought he was our porter told me to call me 45 minutes before reaching Oakland. I had no conversation with any porter on the train except for asking to be called. At no time on the trip did I ring for a porter."

- (2) **Carrier's Claim Agent.** "Not knowing what to do, she dressed, and was sitting at the foot of the berth when a man outside of her berth unbuttoned her berth curtains again at 1:40 A. M., and as he spread them apart, she put her head forward and he immediately started arranging things around in the upper berth, which was vacant. The passageway lights at both ends of car were on, as were also the aisle lights, and she got a good view of the man, who was a Porter, whom she stated was younger and taller than the Porter on her car, and she recognized him as the Porter who belonged in the Observation Car, the next car to the rear of Car 211. He left right away, going toward the men's room."

- (3) **Conductor.** "A man of slight stature with reddish complexion and a sandy mustache rushed to me and said. 'I want the porter of this car (211) taken to the station and have him arrested.' I was surprised so I inquired as to what the trouble was. This man claimed that as he met his wife at the 16th, Street Station, she had informed him that the porter of this car put his hand in her berth during the night and scared her so that she was unable to sleep for the balance of the night. I inquired if she rang the bell? He remarked, why should she with black son-of-a- in the car to do more harm. My next inquiry was that, was his wife positively sure that it was the

porter of her car that disturbed her? He was not so sure of that."

- (4) **Day Agent.** "At 1:40 A. M. she saw someone fumbling with the curtains and unbuttoned them and then she stuck her head out to see who it was. She saw some porter, wearing a white coat, standing right at her berth, pretending to be working on one of the upper berths. She said this porter was a little taller than the porter on her car, and she thought it was the porter on the rear car. After that she said she dressed and was not bothered again. She did not make report of this to anyone on the train, making report of it to Mr. Schoenfeld, who met her at 16th St. Station."

The earliest report in point of time of taking after the incident is that of the conductor since he was the first approached about it. The next is that of the Day Agent who took the passenger and her husband into his office on the arrival of the train. Next is Mrs. Schoenfeld's own statement which was taken by the Claim Agent on a visit to the Schoenfeld residence sometime later in the day. We mention this chronological order because we believe that the one closest in point of time would be more indicative of the true facts, that being when the passenger's recollection is freshest. Do these statements considered together furnish positive or substantial evidence of Deggs' connection with the invasion of privacy charge? We doubt it. It is clear from her husband's statement to the conductor that when Mrs. Schoenfeld related the incident to him she was uncertain as to the identity of the person involved. Later her statement to the Day Agent still indicates uncertainty and even further, unless there has been a grammatical mistake on the part of the Day Agent in writing up his report, the culprit was fumbling with the curtains and she unbuttoned them. Mrs. Schoenfeld's own statement in our view contains a halting identification of Deggs as the person who violated her privacy. We recognize Mrs. Schoenfeld's use of the expression "I believe" as the words of a person who in describing recollection is striving to be honest and we do not say that its use standing alone necessarily indicates a lack of assertiveness, but when coupled with earlier statements by Mrs. Schoenfeld, we attribute a certain degree of vacillation as to the definitiveness of the assertions following it. Hence, we do not consider that there has been real substantial evidence or positive evidence of probative force in the statements above mentioned to identify the porter outside lower 6 at the time of the occurrence complained of as Deggs.

Is there any extraneous evidence which would tend to involve Deggs? At the time about which Mrs. Schoenfeld states that the occurrence of unbuttoning the berth curtains took place, the statement of the Carrier's Conductor places Deggs in an adjoining car. Deggs in his statement says that he was in Car 211 at about 12:30 and sat down in Section 4 which was not made. The night being rather cool, he took a blanket from Upper 6 and put it around him while he sat in Section 4, and after waiting a few minutes, Compartment "B" rang and he made it down, then returned to the body of the Car, got the blanket he was using and put it back in Upper 6. While replacing the blanket he became conscious of a movement in the Lower by noticing the curtains moving. He says he thought the passenger was about to get out and he was just finishing with the blanket walked away and went to his car. Now, this explanation of Deggs is either the diabolically clever alibi of a guilty man or the guileless assertion of a clearly innocent one. We can expect flat denials of any knowledge of any connection with incidents of this kind, but this statement is most unusual. It provides the opportunity to identify him with the incident if its truth can be shaken in any particular. It does place him beside this woman's berth although at a different time than that mentioned by her and does show that he was pushing at the upper berth. We believe that an impartial trier of the facts trying to get at the truth of this matter would have attempted to reconcile the difference in the time fixed by Deggs and Mrs. Schoenfeld, for example, it would have been an easy matter to have determined how Mrs. Schoenfeld fixed the time of the occurrence and how Deggs fixed it. More attention could have been devoted to attempting to fix the temperature of the car at the time of the alleged occur-

rence. The Conductor's testimony as to the temperature is not helpful for he places Deggs in the other car at the time when he says the temperature was mild. The United States' weather reports might have been used for what help they could have provided. In bolstering Mrs. Schoenfeld's identification of Deggs, it would seem logical to have introduced evidence of the age of Tresville, its regular porter on 211, in view of her statement that the guilty porter was a younger man. Obviously, the reason for Deggs' going to Upper 6 for a blanket instead of some other section would have some bearing on the matter.

We do not wish to prolong what is already an overlong Opinion, but we have studied this record with meticulous care because we feel a tremendous responsibility in this case. We recognize the Carrier's, the Organization's, and our own duty to the traveling public, but we feel that we would be remiss if we were to permit ourselves to lose sight of the welfare of the individual involved. We cannot say a grave wrong has been committed and someone must pay the penalty regardless of the proof we have against him even though we may suspect he is the guilty party. Mere suspicions are not enough and that is about all that we can find in this case. Reduced to essentials, this is the proof upon which Deggs was found guilty by the Carrier; a woman's privacy was invaded by a porter whom she believed to be Deggs and Deggs was the porter charged with guarding the car in which this occurrence took place; the rest of the case against him is based upon suspicion and conjecture. It is clear that there was bias implicit in the charge against him and in the attempt to get at the truth of that part of the charge on which questionable proof was given. We think, in view of the seriousness of the charge, despite the elements of bias pointed out above, we would not be justified in directing Deggs' reinstatement and return to duty, but direct that he be reinstated with pay for time lost to date of this award, and thereafter be accorded a rehearing within thirty days after receipt of this award on the charge of invasion of privacy at which the factors mentioned in this decision and such others as may develop the truth about this unfortunate incident should be fully explored. Of course, if upon reconsideration the Carrier believes Deggs should be reinstated or if upon rehearing he is found innocent, his reinstatement should be complete with seniority and vacation rights unimpaired.

We recognize this as an unusual treatment of a discipline case and if some other type of offense were involved we would not have hesitated to direct full reinstatement. We feel, however, that consideration for the traveling public requires a fuller and more impartial investigation than that conducted in this instance.

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 Employees involved in this dispute are respectively carrier and employees 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 sustained as indicated in the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 3rd day of December, 1948.