Award No. 5034
Docket No. PC-5106

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Jay S. Parker, Referee

PARTIES TO DISPUTE:

ORDER OF RAILWAY CONDUCTORS, PULLMAN SYSTEM

THE PULLMAN COMPANY

STATEMENT OF CLAIM: The Order of Railway Conductors, Pullman System, claims for and in behalf of Conductor H. E. Dearie, New Orleans District, that:

1. Under date of March 21, 1949, The Pullman Company discharged Conductor Dearie from its service on charges unproved; further, that in discharging Conductor Dearie The Pullman Company acted unjustly and in abuse of its discretion and in violation of Rule 49 of the Agreement between The Pullman Company and its Conductors.

2. We now ask that Conductor Dearie be restored to his former position as conductor in the New Orleans District, with all rights unimpaired and that he shall be paid for all time lost by reason of said discharge.

OPINION OF BOARD: On January 17, 1949, H. E. Dearie, with several years service, was assigned as Pullman Conductor, New Orleans to Houston, in line 3467 on Southern Pacific Train No. 3, leaving New Orleans at 8 P.M.

March 25, 1949, Dearie was dismissed from service on grounds that on the trip above mentioned he had (1) collected a cash fare for upper berth 6, car Lake Lucerne, No. 30, (2) failed to give the passenger a receipt for such check, (3) failed to make a record of the transaction on diagram and (4) failed to account for the money collected for the sale of upper berth 6 at the completion of the trip.

In accord with Dearie's request a hearing was held April 28, 1949, at which both oral and written testimony was introduced. Following this hearing the conductor was advised the Carrier's original dismissal order would stand. Later the claimant's request for a supplemental hearing was granted. This hearing, held on June 13, 1949, was full and complete. At the claimant's request the Carrier brought in Clara Vance, a Passenger Service Inspector, on whose report the charges against Dearie was originally based. She was interrogated at great length. At the former hearing she was not present and her statement was introduced. In addition Porter Upton, assigned to car Lake Lucerne on the night in question, testified personally. So did the claimant and Train Conductor Labit who was in charge of the train that evening.

From the foregoing it appears this is not a case where the accused was denied the right to face the witnesses or examine them but one where he was

ultimately afforded all those privileges. Moreover this was at a supplemental hearing, after all statements used by the Carrier had been introduced in evidence at a prior hearing and their contents were known to all parties. On that account, assuming without deciding Rule 49 of the current Agreement required it, we see no merit in the claimant's contention that Carrier's action in failing to comply with his request to furnish him with copies of all statements to be used by it at the first hearing resulted in depriving him of a fair and impartial trial. The supplemental hearing, particularly since it was held at his request and under conditions where he could have no such complaint, cured whatever irregularities might have inhered in the former hearing.

The principal contention advanced by the claimant is that the record discloses no substantial evidence to sustain the charge that he collected a cash fare for upper berth 6, car Lake Lucerne, No. 30, on the trip in question.

At the outset it must be conceded the evidence was conflicting and that some of it was favorable to the claimant. Likewise conceded there were some discrepancies in the testimony of the witnesses on which the Carrier relies to sustain its action. For that matter the same can be said of some of the testimony relied on by the claimant, including his own. Be that as it may, it must be remembered the fact evidence supporting a charge is contradictory or conflicting does not concern us so long as the record discloses substantive testimony which if believed is sufficient to establish the guilt of the person charged. (See Award 3827.)

The evidence of record covers many pages and it would serve no useful purpose to encumber this Opinion by detailing it. It suffices to say that fully cognizant of the seriousness of the charge and the discipline imposed we have carefully examined the record at length and, after analyzing the testimony of each witness, are fully convinced there is ample evidence to sustain the Carrier's conclusion the defendant was guilty of collecting a cash fare on the evening in question for upper 6 and having failed to account for it. The Passenger Service Inspector so testified and, even though her testimony on other matters less material was not all that it might have been, she was positive, definite, and certain in her statement she gave Conductor Dearie $7.00 and that he returned her 50c in change, and that she occupied upper 6 of car Lake Lucerne that night.

If the foregoing statements stood alone, in the face of their outright denial by Conductor Dearie and his explanation that the woman already had a Pullman ticket, that she paid him no money, and that he instructed the Pullman Porter to put her in upper 7 of the same car, we might, even though mindful of the rule it is not our function to weight the evidence or resolve conflicts therein, be tempted to conclude the Company arbitrarily rejected the claimant's testimony and accepted the Inspector's and that its action in so doing was so unreasonable and unfair as to constitute an abuse of its discretion. But that is not the case.

Preliminary to commenting upon the evidence we have in mind we pause to state that it was not absolutely essential, as the claimant suggests, for the Company to have eye witnesses to the passing of money between the Inspector and the Conductor in order to establish the payment and collection of the cash fare. Assuming for present purposes that under confronting conditions the Carrier would not have been justified in accepting the Inspector's unsupported statement, it cannot be denied it had the right to receive, accept and give credence to any and all circumstantial evidence tending to corroborate her testimony and support the charges it had made against the Conductor. We therefore turn to those circumstances.

In the first place, there can be no question but what the Inspector was in car 30 on the night in question and that she was put in upper 6. She so states and Porter Upton's testimony corroborates her beyond per adventure of all doubt. In connection with this it must be remembered that Upton testified this woman (referring to the Inspector) came to Dearie and in his

presence asked for a berth, whereupon he, in the Conductor's presence, said upper 6 was ready, and that the woman in the presence of both of them said "she would take that upper." He also said the Conductor's reply to this was to tell him the lady's bags were in the chair car and to go get them. Last but not least, this same Porter testified positively that both upper 7 and upper 6 of car Lake Lucerne were occupied on the night in question and that upper 6 was not listed on his call card the morning after such night.

The foregoing circumstances, in our opinion, particularly when it is kept in mind that Conductor Dearie failed to make a record of the upper 6 transaction and that his only explanation for his failure to do so was that the Porter might have made a mistake and put the woman Inspector in upper 6 instead of 7 as he had directed, were more than enough to justify the Company's acceptance of the Inspector's statement as to payment of the fare and its finding the claimant was guilty of collecting and retaining it as charged.

We are not unmindful of the fact the record contains much indicating good conduct and faithful service on the part of Dearie prior to the events responsible for the present dispute. The trouble is such evidence is negative in character and, except for purposes of testing his credibility and the weight to be given his testimony, was of little probative value. Of a certainty it did not disprove the charges. Neither did it require the Carrier to disbelieve or reject evidence tending to establish them. Nor is it sufficient, as suggested, to warrant us in holding the disciplinary action assessed by the Carrier under the existing conditions and circumstances was so severe, unjust and unreasonable as to constitute abuse of discretion.

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 Carrier did not violate the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 21st day of September, 1950.