Award No. 5277
Docket No. PM-5181

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Hubert Wyckoff, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF SLEEPING CAR PORTERS

THE PULLMAN COMPANY

STATEMENT OF CLAIM: * * * for and in behalf of Lee Foster, who is now, and for some time past has been, employed by The Pullman Company as a porter operating out of the Chicago Central District.

Because The Pullman Company did, under date of March 9, 1950, take disciplinary action against Porter Foster in that it assessed his record with a "Warning" and further gave him an actual suspension of ten (10) days on charges unproved; which action was unjust, unreasonable, arbitrary, and in abuse of the Company's discretion.

And further, for the record of Porter Foster to be cleared of the charges in the instances above quoted, and for the "Warning" to be removed from his record and for him to be reimbursed for the ten (10) days' pay lost as a result of this unjust and unreasonable action.

OPINION OF BOARD: Claimant was a porter assigned to service between Chicago and Los Angeles. He was charged: **first,** while enroute Los Angeles-Chicago on October 11, 1949, with the odor of intoxicants on his breath, failure to maintain car platforms in proper condition (swept but not mopped), failure to lock toilets at certain station stops (claimed by the Porter to be women's toilets with women in occupancy), failure to patrol properly a car he was assigned to guard (not patrolled enough) and failure to comply with instructions with regard to the preparation of berths; and **second,** while en route Chicago-Los Angeles on October 21, 1949, with failure to comply with Pullman Conductor's instructions with regard to keeping his car in a clean and orderly condition (proper stowage of fan brackets).

Claimant has rendered over twenty years' service with a clear discipline record. After hearing, he was assessed a ten-day suspension on the first charge and a warning on the second charge.

Claimant himself was the only witness at the hearing and he denied or explained the charges against him as above noted. All the rest of the evidence, both pro and con, was in the form of reports and letters from witnesses who were afar except perhaps for some conductors. The reports of a Service Supervisor, the Pullman Conductor and an Agent at Phoenix tend to support the charges; but reports or letters from an Agent at Los Angeles, the Train Conductor, the Trainmaster, the Dining Car Steward and a passenger (a parson) all exonerated Claimant. Everyone agrees he was not drunk.

Claimant testified that he had recently had some teeth extracted and, to substantiate the assertion, exhibited his mouth at the hearing. Attention seems first to have focused on him when the Service Supervisor boarded the train that night at 7:15 P. M. at Yuma. (He detrained at Phoenix at 11:50 P. M.) Both the Service Inspector and the Pullman Conductor appear to have been more concerned with Claimant's general health then with his breath. Thus, the Service Inspector reported:

> "Porter Foster is far below our standard requirements. * * *
>
> While this porter was not drunk, he definitely had been drinking since leaving Los Angeles at 10:30 A. M. * * *
>
> In addition to his drinking on duty, feel that porter Foster is not physically or mentally able to render service on the cars and most heartily recommend that he be sent to the Company doctor for a check up."

And the Pullman Conductor reported:

> "Porter Foster acted very odd after leaving L. A. * * *
>
> I spoke to him about keeping his car clean and detected a slight odor of liquor. * * *
>
> He was not drunk. * * *
>
> But I don't think he is physically well enough to do his job or himself justice."

Whatever his condition was, it was not of sufficient notice or moment for the Agent in Los Angeles to bar him from the assignment or for the Conductors to remove him from the train at Phoenix where the day and the affair apparently reached their culmination.

Rule 49 guarantees the right of the Management to discipline, suspend or discharge an employe "for incompetency or other just and sufficient reasons" and also the right of such an employe to have a "fair and impartial hearing." It is well settled that it is not the function of this Board to weigh the credibility of witnesses and to resolve conflicts of evidence (Awards 419, 891, 1022, 2297, 2498, 3127, 3171, 3827, 4840 and 4973).

The reason generally assigned for not disturbing judgments based on conflicting testimony is the Carrier's opportunity to assess credibility by observation of the witnesses. But where, as here, the conflict arises from written reports and letters without more, the Carrier is in not much better case than we are to determine credibility (Awards 2613, 2634 and 4684). However, the essential question presented by this record is, not one simply of a choice of credibility among an array of conflicting witnesses, but whether the Carrier's action was fair and impartial in the view it took of the evidence upon which the discipline was based.

If we disregard all conflicting evidence in this record except that of the two witnesses most favorable to the Carrier's position—the Service Inspector and the Pullman Conductor—the reasonable inference would be that the Porter was ill, for the Service Inspector's essential conclusion was a "most hearty" recommendation that the Porter be sent to the Company doctor for check up, a conclusion which the Pullman Conductor corroborated.

It may be granted that all the forms of a fair hearing were present here. Claimant himself was fully heard; and although the case against him was on paper only and untested by cross-examination, so was his own corroboration.

But the difficulty is that the substance of the Carrier's own evidence will not stand up under fair scrutiny. The Porter's clear service record should

have fairly raised serious doubts about a quick judgment on his breath; and a fair conclusion of guilt would at least have awaited either direct examination of the witnesses, or the results of the medical examination recommended by the closest observer on the spot.

In view of the foregoing considerations we are unable to conclude that the evidence furnishes a just and sufficient reason for the suspension or that Claimant had a fair and impartial hearing.

It is impossible for us to conclude that any of the other items ever would have been made the subject of a charge but for the mention of liquor in the report. In this view, all the charges fall with the main issue (Award 5030).

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 Employe involved in this dispute are respectively Carrier and Employe 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: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 20th day of March, 1951.