Award No. 6924
Docket No. PM-6936

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Leroy A. Rader, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF SLEEPING CAR PORTERS

THE PULLMAN COMPANY

STATEMENT OF CLAIM: * * * for and in behalf of H. L. Smith, who was formerly employed by The Pullman Company as a porter operating out of the Chicago Western District.

Because The Pullman Company did, under date of July 6, 1953, take disciplinary action against H. L. Smith by discharging him from the service of The Pullman Company, which action was based upon charges unproved and was unjust, unreasonable, arbitrary, and in abuse of the Company's discretion.

And further, for H. L. Smith to be returned to his former position as a porter for The Pullman Company with seniority rights and vacation rights unimpaired, and for him to be paid for all time lost as a result of this unjust action.

OPINION OF BOARD: Claimant was discharged by reason of an incident occurring while he was on duty in March of 1953, after a hearing at which several witnesses testified. It is contended in his behalf that the charges against Claimant were not proven "beyond a reasonable doubt," citing Rule 49 of the current Agreement. Also that this rule which was recently adopted in the new Agreement changes the degree of proof previously considered sufficient by this Board in reviewing discipline cases coming before it, citing Award 2769 and other Awards, which followed this general pattern in such cases.

The new part of Rule 49 deals with degree of proof and states in part as follows:

> "Rule 49. Hearings. An employe shall not be disciplined, suspended or discharged without a fair and impartial hearing.
>
> "Discipline shall be imposed only when the evidence produced proves beyond a reasonable doubt that the employe is guilty of the charges made against him.
>
> "* * *
>
> "No charges upon which an employe has been disciplined which appear on the employe's service record shall be introduced into the hearing of a current case unless previous disciplinary action was a result of charges similar to the current charge and shall be limited

to such previous incidents as have occurred within a 5-year period prior to the date of the current incident.

"* * *."

On behalf of Petitioner it is stated:

"For the meaning of the reasonable doubt rule, we can only resort to the criminal law from which it was taken. At law, the question always presented is: What is the measure of the jury's persuasion? In criminal cases the rule has grown up that the persuasion must be beyond a reasonable doubt. From time to time various efforts have been made to define in more detail this elusive and indefinable state of mind. * * *"

Chief Justice Shaw of Massachusetts * * * states this to be as follows:

"Reasonable doubt is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say that they feel an abiding conviction, to a moral certainty, of the truth of the charge * * *. The evidence must establish the truth of the fact to a reasonable and moral certainty, * * * a certainty that convinces and directs the understanding, and satisfies the reason and judgment * * *. This we take to be proof beyond a reasonable doubt." Com. v. Webster, 5 Cush. Mass. 295, 320 (1850).

Since the words "reasonable doubt" are words of common connotation, as intelligible to jurors as to judges, the most learned writer on the law of evidence has said that, "The effort to perpetuate and develop these elaborate and unserviceable definitions is a useless one . . ." IX Wigmore on Evidence, Third Ed., p. 319. We agree, and suggest that the United States Court of Appeals for the Seventh Circuit stated the reasonable doubt rule in a nutshell when it held that in order to convict one accused of crime the evidence against him must be inconsistent with innocence. United States v. Glasser, 116 F. 2d 690, 700 (C. A. 7, 1941).

Rule 49 is an unusual rule in a collectively bargaining agreement. Undoubtedly it means something more in the matter of proof than the previous rule. However, we do not believe that the degree of proof changes the concept of the function of this Board with reference to our previous awards on the proposition that our duty here in a review of such cases confers any additional power on this Board in a consideration of like and similar cases. We have said many times that the decision made on the property should not be disturbed unless it is clearly shown that there has been an abuse of the right exercised, or, in other words, that Carrier has acted in an arbitrary, capricious or unfair manner in the conduct of the hearing or in the extent of disciplinary action taken.

This rule may make for more careful consideration of evidence in hearings on the property but we do not believe, as far as review is concerned, on a tribunal such as this Board is constituted, that it changed our concept of our consideration of this case, or other similar cases, in our method of review and consideration of the same. Suffice to say in consideration of such cases on the property that there are many definitions of "reasonable doubt" and of "proof beyond a reasonable doubt" and Rule 49 may make for a more careful analysis of evidence on the property by the hearing officer. As good a definition of a "reasonable doubt" is that in considering and weighing the evidence in its entirety if there is a doubt of substantial nature or character remaining after such a consideration then it is a doubt of which the benefit should be given to the individual whose conduct is being considered in a discipline case. We do not think that it follows that such investigation should be conducted in the nature of proceedings in a criminal court as these matters are not alleged

crimes as against society as a whole but are merely investigations held in an informal manner to determine if discipline should be meted out to a member of one party of a collective bargaining agreement.

In the instant case we think on the record made that Claimant's conduct on the occasion in question was such as to warrant discharge. With reference to Claimant's card playing, we do not think it makes any difference whether he was guilty of gambling or not. He is on duty to render service not as an entertainer, his work not being that of a social host and in this connection it is apparent from the record that he labored under a misconception of his duties as a Pullman Porter. The record also shows that he was guilty of several other infractions of the rules and regulations which justified his discharge.

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 Agreement was not violated.

AWARD

Claim denied in accordance with Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 29th day of March, 1955.