

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 H. L. Dazong, who is now, and for some time past has been, employed by The Pullman Company as a porter operating out of the New York Central District.

Because The Pullman Company did, under date of December 4, 1953, take disciplinary action against Porter Dazong by giving him an actual suspension of 15 days; which action was based upon charges on which Porter Dazong had not been proven guilty beyond a reasonable doubt as provided for in the Agreement between The Pullman Company and its Porters, Attendants, Maids and Bus Boys, represented by the Brotherhood of Sleeping Car Porters, Revised, Effective January 1, 1953, and which action was therefore unjust, unreasonable, and in abuse of the Company's discretion.

And further, for the record of Porter Dazong to be cleared of the charge in the instant case, and for him to be reimbursed for the 15 days' pay lost as a result of this action.

OPINION OF BOARD: Claimant, a Pullman Porter on the Santa Fe "Chief", was suspended for 16 days upon a charge that while in service:

"You used disrespectful language to and swore at the husband of a woman passenger who boarded your car at Kansas City, Mo."

Rule 49, under which the discipline was imposed, reads:

"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."

The transcript of the hearing contains evidence:

In support of the charge:

1. Letter of the complaining witness, the president of a corporation, who offered to appear or give a deposition but who was called upon to do neither; this letter dated the day after the incident.

2. Letter of the daughter of the complaining witness, dated 24 days after the incident;

3. Written report of the Pullman Conductor on the train, dated two days after the incident; and also his written supplementary report dated 44 days after the incident; and

4. Written report of the Porter in the adjoining car, dated 27 days after the incident;

In defense against the charge:

1. The oral testimony of the Claimant upon which he was freely cross examined by the Carrier;

2. The written report of the Claimant submitted to the Carrier two days after the incident;

3. Letter of a disinterested passenger, vice president of a corporation, dated 29 days after the incident.

It appears without contradiction that Claimant has a record of five years on the "Chief" and more than 30 years service with Pullman without any previous disciplinary action ever having been taken against him.

Claimant was represented at the hearing by the Organization. As above indicated, except for his oral testimony, all of the evidence was documentary and untested by cross-examination.

The Uncontradicted Evidence.

The "Chief" arrived Kansas City about 9:58 P. M. and the scheduled departure time was 10:05 P. M., although many times the train left 10 to 15 minutes late due to refueling of the deisel.

The complaining witness, together with his daughter and four-year old grandson, arrived to put his wife and three small granddaughters on the "Chief" en route to Los Angeles. As they all boarded the train, Claimant remarked that the train would pull out in five minutes. The complaining witness and his four-year old grandson decided to get off the car immediately, but the daughter apparently lingered aboard which made the complaining witness quite anxious.

Several minutes elapsed, apparently more than five, whereupon the complaining witness told Claimant that he "didn't give a damn about the five minutes" but wanted to be sure that his daughter was not left on the train. In fact the train did not depart until 10:25 and during this period the incident, upon which the charge is based, ensued on the platform. The disinterested witness observed part of it; the wife and the daughter observed none of it; and the Pullman Conductor and the Porter in the adjoining car arrived upon its conclusion.

Before the train left, the complaining witness requested that his wife and granddaughters be transferred to another car; and the Pullman Conductor offered to do so and showed other accommodations on the train to him and to his wife and the granddaughters; but the wife and the granddaughters decided to remain in their original space.

The next morning Claimant told the wife he was sorry that her husband got so excited the night before, to which she replied, "Oh, pay no attention to that, he is on edge lately because he is having labor trouble at his plant and they are on strike." She also said, "He blows up very easily."

The next morning the wife also reported to the Pullman Conductor that everything was all right and that Claimant had been very nice to her. Notwithstanding this, and solely by reason of telegraphic instructions from the District Office of the Carrier at Kansas City, the wife and her granddaughters were transferred at Las Vegas to higher accommodations in another

car without any additional collection, although they all wanted to stay where they were.

The evidence in support of the charge.

The daughter of the complaining witness apparently formed a conclusion upon boarding the train that Claimant was "cross and unpleasant". She was "greatly surprised to see the terrible argument between that man and my father and also with the Pullman Conductor. He seemed to say 'damn it, damn it, damn it' so many times, shaking his hands and arms."

The Pullman Conductor reported no cursing in his presence but stated in his letter:

"(When I came down to the train, the complaining witness) informed me that the porter was very discourteous to him and cussed at him in the presence of (his wife). I went to the porter and with his loud voice, which is customary for him, (he) stated he was a human being and he wasn't down there to be cussed at, and acted up in front of (the complaining witness) . . . Don't know whether Porter Dazong is hard of hearing or not, but when you talk to him he replies in a very loud and harsh voice."

Apparently the Pullman Conductor's only recommendation or ultimate conclusion was: "Something ought to be done to tone down his voice."

The Porter in the adjoining car observed:

"A heated argument going on between Porter Dazong, a gentleman who had come to see his party off and the Pullman Conductor. It seemed to me that it might develop into a fight. I did not hear what started the argument . . ."

The complaining witness' version of the incident is as follows:

"Several minutes elapsed (after he got off the train) and I was still concerned about my daughter (who was still aboard). The porter's report was still not clear and I told him I didn't give a damn about the five minutes, I wanted to be sure my daughter wasn't left on the train. This aged porter seemed to go into an unforgivable tirade and his facial expression was mean, belligerent, and he remarked 'damn you, you can't damn me. If you want to damn anybody damn your wife, etc., etc.'"

The Pullman Conductor made his appearance and I told him about this unpleasantness, and talked with him about changing my wife to another car, and naturally he interviewed the porter, and for no reason on earth he was just as unreasonable, and I might say fanatical and belligerent . . . I couldn't decide the best thing to do, but because of his (the Pullman Conductor's) assurance that he would look out for the family, and in order not to delay the departure of the train, I left."

The evidence in defense against the charge.

Claimant's version of the incident is as follows:

" . . . I was standing down on the platform when this man (the complaining witness) came out. He walked over to me and shaking his finger in my face said, 'What makes you fellows such damn liars?' I told him I was only following instructions and please do not shake his finger in my face. I started to walk away from him and he said, 'All of you people are damn liars.' I turned around and told him to go and see the Conductor and call him a damn liar because I only

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

Rule 49 of the Agreement was violated by the Carrier and the disciplinary action should not stand.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 16th day of December, 1955.

get my instructions from him. This man walked away. A short time later, the Conductor and this man came back to me and the Conductor said, 'Listen, you, I am going to have you taken off this train.' I said, 'Now, wait a minute, don't I get any protection at all. This man has just accused me of being a damn liar and now you come and say you are going to have me taken off the train without me explaining anything to you' The Conductor said that the man has already told me what it is all about and he was going to have me taken off. I told him to make sure what he was doing when he took me off . . .

The next morning I went to this lady passenger and asked her if she wished breakfast and she told me she was going to the diner. I told her I was sorry that her husband got so excited last evening and she said, 'Oh, pay no attention to that, he is on edge lately because he is having labor trouble at his plant and they are on strike.' She also said that 'he blows up very easily.'

At Las Vegas the Pullman Conductor came to me and told me he had a telegram to remove this lady from my car because I was discourteous to her and he instructed me to take her to PA29 bedroom F. This I did."

The disinterested passenger made the following statement in his letter:

"Having heard some of the discussion between the porter and the irate passenger in my opinion Dazong simply did his duty as to telling him the train would leave at such a time & at no time was he discourteous or abusive to the passenger who I think was the 'impossible' type."

First. It may well be that under the old Rule, this record would have required a denial of the claim.

The amendment of the Rule has not changed the authority of this Board. It is still true that we should not disturb determinations of the Carrier in discipline cases unless the action taken is so arbitrary, capricious or unreasonable as to amount to an abuse of discretion.

But, while under the old Rule any "substantial evidence" would sustain disciplinary action, the new Rule requires proof "beyond a reasonable doubt" (Awards 7140, 6928, 6924 and 7004).

Second. The action taken by the Carrier here can be justified only upon the untenable theory that "the customer is always right" no matter how dubious such a conclusion may be.

Essentially what this record presents is this: an explosion-prone, self-admittedly profane complaining witness in an advanced state of anxiety for a variety of reasons; a porter with a 30-year unblemished record but with a loud voice; a disinterested passenger-witness who corroborated the porter; and an argument about a matter of no importance, since it had to do with no more than how long people could loiter on a fast-moving train they had no real right to board.

We must find on the record presented that the Carrier abused its discretion in concluding that the evidence produced proved beyond a reasonable doubt that the employee was guilty of the charges made against him.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the record and all the evidence, finds and holds: