Award No. 7774
Docket No. PM-8065

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Livingston Smith, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF SLEEPING CAR PORTERS

THE PULLMAN COMPANY

STATEMENT OF CLAIM: * * * for and in behalf of A. Acacio, who was formerly employed by The Pullman Company as an attendant operating out of the District of St. Louis, Missouri.

Because The Pullman Company did, under date of September 20, 1955, through Superintendent T. C. Birth, discharge Mr. Acacio from his position as an attendant in the St. Louis District, which discharge was predicated on charges which were unproved, which action was unjust, unfair and arbitrary.

And further, because Mr. Acacio did not have a fair and impartial hearing as provided for in the rules of the Agreement governing the wages and working conditions of the class of employes of which Mr. Acacio was a part.

And further, because the charge, " 'You placed your hand in the pants of a young female passenger occupying accommodations in the adjacent Car 1210 and held her tightly' ", was not proved beyond a reasonable doubt as provided for in the rules of the above-mentioned Agreement.

And further, for the record of Mr. Acacio to be cleared of the charge in this case and for him to be reinstated to his former position as an attendant in the St. Louis District, and for him to be paid for all time lost as a result of this unjust and illegal action.

OPINION OF BOARD: This is a discipline case involving the discharge of Lounge Car Attendant, A. Acacio, who now seeks reinstatement, with seniority and all other contractual rights unimpaired, together with pay for all time lost.

The alleged incident occurred near New York City on June 27, 1955, while claimant was attending Lounge Car and concerned adjoining Car 1210. Notice of Investigation was given on August 10, 1955, and hearing was held on August 22, 1955, with claimant being notified on September 20, 1955, that he stood dismissed from service.

The Organization asserts that claimant here did not receive a fair and impartial hearing as required by Rule 49, and that he (claimant) could not properly have been found guilty, beyond a reasonable doubt on the basis of evidence properly admissible at the investigation. It is alleged that Respondent improperly introduced and considered evidence of a purported

"prior offense" which occurred on July 9, 1952, some three years prior to the instant hearing—and long after the 90 day limitation for the filing of charges, after receipt of complaint; and further this evidence was hearsay. It was further pointed out that the evidence concerning the incident of June 27, 1955 was likewise hearsay in that the statement introduced was from the mother of the child involved, rather than from the said child herself or her brother, and that no attempt was made by the Respondent to verify the facts contained in the mother's statement concerning the alleged molestation. Finally it was asserted that even this evidence would not produce proof of claimant's guilt beyond a reasonable doubt as required by the Rule particularly when considered against claimant's 23 years of uninterrupted service without a blemish on his record.

The Respondent took the position that the complaint of the child's mother indicated clearly and beyond a reasonable doubt that claimant was guilty as charged. It was pointed out that the investigation revealed that claimant was on several occasions in close physical proximity of the said child and by his own admission had his arm around her waist. The Respondent further asserted that it could properly consider a previous known act of deviation which had occurred in 1952, even though no formal complaint was made by the aggrieved party, to determine whether or not claimant had in fact a tendency to commit like acts. It was contended that such earlier act was not considered to determine the guilt of the claimant but rather, if it was considered at all, only to determine the proper degree of discipline to be imposed. As to the requirement of Rule 49, that guilt be proved beyond reasonable doubt it was asserted that no right had been relinquished by the Carrier to consider all evidence and that they would not have discharged claimant if there was a reasonable doubt present as to his (claimant's) guilt.

Little good can come of a lengthy repetition of evidence of record. Claimant here stands charged with a most reprehensible act, that of fondling a small girl. This Carrier owes the traveling public unlimited assurance that it will not be exposed to such possibilities as are here alleged to have happened. While this Board owes a like responsibility to society, it is likewise charged with the duty and responsibility of seeing that anyone charged with such an act receives a fair, complete, impartial and unprejudiced hearing. In brief, this Board has in its hands the future welfare, economic and otherwise, of an individual. This is a duty that cannot be casually assumed or lightly discharged.

At this point we must consider the charge of the Organization that the Fogarty incident of July, 1952 was improperly made a part of the charge against claimant, inasmuch as the said Fogarty made no formal complaint and that no formal charges were placed against claimant within the 90 day period required in the applicable rule quoted above. We wholeheartedly agree with the Organization in this regard and cannot too strongly criticize the respondent for injecting this incident into these proceedings. Suffice to say that no facet of this incident will enter into our final determination of this matter.

It was further charged that the statement by the mother of the child was in truth and in fact second-handed hearsay and should not be considered. This Board has previously held that written statements standing alone, form good and sufficient evidence in investigations of this type. In the instant case an eight year old child could not be expected to, or charged with the failure of making a formal statement. The mother's statement has been examined with care. It is objective, stating only facts as the writer believed them to be, and are free from bias, prejudice and invectives.

At this point it is well to consider the proper meaning of the "beyond a reasonable doubt" provision of the confronting discipline rule. There can be no doubt this rule requires the presentment of much more conclusive evidence than that which this Board has found to constitute "substantial evidence" which will warrant a finding that discipline so imposed will not be disturbed. The definitions of what is meant by "reasonable doubt" are many

and varied. We consider it to be the existence of evidence, the conclusiveness of which might be subject to varied interpretations by reasonable minds, or to put it another way, an existing doubt for which there is plausible reason.

It is questioned whether we can here, on the basis of circumstantial evidence, there being no "eye witness", find this claimant guilty as charged under the criminal law theory of, and approach to the doctrine of reasonable doubt. The proper answer to this question is that the law reports are replete with recorded verdicts of guilty, by jury, where the evidence was circumstantial and the jury was charged on "reasonable doubt."

That the claimant was in close proximity with the child was admitted by him as well as the fact that he had his arm around her waist. The question here is: Did the claimant's hand or hands come within the forbidden area of the child's person?

Admittedly, there were no witnesses and no vocal outcry or physical resistance by the child. But the following exerpt from the transcript of the hearing is singularly revealing:

"Mr. McNeal: At what part of the girl's body were you holding her?

Mr. Acacio: I was holding her around the waist.

Mr. McNeal: Do you recall at any time placing your hand in the immediate area of this young female's genitals?

Mr. Acacio: I don't recall that, but if it did there was no consciousness of doing it." * * *

"Mr. McNeal: Is it possible that while going around a curve that your hand could have slipped?

Mr. Acacio: Well, it could, it could be. But there is no none whatsover about being with intention of doing so."

This indicates not only the possibility that an improper act was committed by the claimant, but also supports the contention of the child's mother that his conduct was unbecoming to the extreme. It is the kind of conduct which this Carrier cannot tolerate as a practice by its personnel. It is, therefore, necessary that we find that the Claimant was, within the meaning of the rule, guilty of the offense as charged.

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 penalty imposed should not be disturbed.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 11th day of March, 1957.