

Award No. 9691
Docket No. PM-11683

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Frank Elkouri, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF SLEEPING CAR PORTERS

THE PULLMAN COMPANY

STATEMENT OF CLAIM: * * * for and in behalf of B. T. Pumphrey, 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 September 18, 1959, discharge Mr. Pumphrey from his former position as a porter in the above-mentioned district.

And further, because the said discharge was in violation of the rules of the Agreement between The Pullman Company and Porters, Attendants, Maids and Bus Boys employed by The Pullman Company in the United States of America and Canada, represented by the Brotherhood of Sleeping Car Porters, which Agreement was then and is now in effect, in that Mr. Pumphrey did not have a fair and impartial hearing and the charges made against him were not proved beyond a reasonable doubt.

And further, for Mr. Pumphrey to be returned to his former position as a porter in the Chicago Western District with seniority rights and vacation rights unimpaired and with pay for all time lost as it is provided for under the above-mentioned Agreement.

OPINION OF BOARD: This is an alleged molestation case. Claimant contends that the charge was not proved beyond a reasonable doubt. In this regard, Rule 49 of the Agreement provides that 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." Also applying directly to this case is the Memorandum of Understanding between the Parties which provides that "the Company is privileged to withhold the name and address of a woman passenger who is the primary accuser in a molestation case when such passenger expressly requests that her identity be not revealed."

Claimant was given a copy of the letter of complaint from the woman passenger long before the hearing, but her address was withheld (pursuant to her request) and neither Claimant nor his representative had opportunity to

interview her. The only two persons who knew what really happened between Claimant and the passenger were those persons themselves. Claimant denied the accusations of the passenger's statement, and it must be determined whether that statement establishes the offense of molestation when the statement is evaluated in the light of certain important considerations noted hereinbelow. While the Memorandum of Understanding dispenses with the right to cross-examine the complaining passenger in this alleged molestation case, it by no means dispenses with the Agreement requirement of proof beyond a reasonable doubt.

Molestation involves a certain element of moral turpitude; it involves invasive conduct engaged in wantonly and without any basis for the actor to presume that his actions are other than offensive.

In the present case several factors, taken together, leave serious doubt as to whether Claimant's actions, whatever they really were, constituted the offense of molestation. Highly significant is the fact that while the passenger's statement asserts that Claimant molested her by acts occurring over a period of at least a day and two nights, at no time during the entire trip did she voice the slightest complaint to the conductor or other members of the train crew, although she had ample opportunity to do so. As was stated in Award 8693: "We find it difficult to believe that an adult woman passenger who was repeatedly molested as charged would not, at the very least, have reported this incident to someone in authority not later than the termination of her trip * * *." In the present case the passenger did make some critical comment near the end of the trip about Claimant to a fellow passenger, Mrs. Scherer, but this in no way explains her failure to complain promptly to someone in authority on the train if she felt Claimant was guilty of molestation. Nor was she afraid, it appears, for Mrs. Scherer's statement points out that when Mrs. Scherer asked the passenger why she did not call Mrs. Scherer's room regardless of time, the passenger "said she thought she could handle it and that she didn't want to get me up."

Also casting doubt upon some of the important details of the complaining passenger's statement is the fact that while it asserts that she spoke "in a loud voice" to Claimant, that "there was some commotion", and that there was a "struggle with" Claimant, neither the passengers in Room B nor the passengers in Room D (the two rooms adjacent to Compartment C, occupied by the complaining passenger) heard any noise or commotion.

The factor that most strongly leaves doubt as to whether Claimant's actions constituted the offense of molestation is the peculiar relationship of informality that developed between Claimant and the passenger. The passenger's own statements somehow leave the impression that a highly unusual degree of casualness developed between them, and it appears reasonably clear that the passenger accepted this situation of informality without objection to the point that Claimant may have been led to presume, of course contrary to the intention of the passenger, that he could make "himself at home with her" (to use the words which Mrs. Scherer attributed to the passenger). As noted above, molestation involves a certain element of moral turpitude. In this regard, acts, assuming that they actually occurred, which might constitute molestation in one situation might equally well amount to something less than molestation in another situation—the acts may in the latter situation involve something, for instance, in the nature of a "frolic" constituting serious misconduct but not involving moral turpitude.

All in all the Record herein does not establish beyond a reasonable doubt that Claimant was guilty of molestation, but it does establish by that quantum of proof that he at least was far too casual and informal in his general attitude toward the complaining passenger, and in this connection that he told her at various times that she was pretty and that she looked nice—comments which are hardly proper in a porter-passenger relationship regardless of their propriety in other settings. Thus the Record does establish by the required degree of proof that Claimant was guilty of making improper remarks, abusing the porter-passenger relationship. These actions by a porter constitute serious misconduct, which might well justify discharge were it not for the fact that Claimant has many years of service with the Carrier with no indication in the Record of any past misconduct to be considered against him in the determination of the punishment to be assessed. In this case the claim for reinstatement with seniority and vacation rights unimpaired should be sustained, but the claim for pay for time lost should be denied.

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 Employee involved in this dispute are respectively Carrier and Employee 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 claim should be disposed of in accordance with the Opinion.

AWARD

Claim sustained to the extent indicated in Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 7th day of December, 1960.