Award No. 11849
Docket No. PM-13705

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

David Dolnick, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF SLEEPING CAR PORTERS

THE PULLMAN COMPANY

STATEMENT OF CLAIM: . . . for and in behalf of J. Taylor, who is now, and for some time past has been, employed by The Pullman Company as a porter operating out of Dallas, Texas.

Because The Pullman Company did, under date of July 9, 1962, through Superintendent Weinbrenner of the Dallas District, render a decision in which Porter Taylor was given an actual suspension of one round trip from his regular assignment in Line 3112, commencing July 13, 1962.

And further, because the charge against Porter Taylor was not proved beyond a reasonable doubt as is required under the rules of the Agreement governing the class of employes of which Porter Taylor is a part, and the disciplinary action was therefore, unjust, unreasonable, arbitrary, and in abuse of the Company's discretion.

And further, for the record of Porter Taylor to be cleared of the charge in this case, and for him to be reimbursed for the one round trip he lost in his regular assignment as a result of this unjust and unreasonable action.

OPINION OF BOARD: Claimant was suspended for one round trip which represented four and one-half (4½) days. He was disciplined after a hearing in accordance with the provisions of the Agreement on a charge which read as follows:

> "You engaged in an angry dispute with Fort Worth and Denver Railroad Brakeman Ray Anderson, Jr., used obscene language toward him, and threatened him with bodily harm."

Petitioner argues that Claimant was wrongfully disciplined because the charge against him was not proved beyond a reasonable doubt. Rule 49 of the Agreement provides, in part, as follows:

> "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."

Brakeman Anderson stated at the hearing that Claimant cursed him; waived a 3 or 4 inch open knife and made cutting motions in the air toward him; that Claimant said "I'll cut your blankety blank heart out"; that Claimant kicked at him and, that if he had not dodged, Claimant would have kicked him in the head. Anderson also testified that Claimant threw a piece of apple at him and finally threw the apple core at him.

Claimant denied that he cursed, kicked or made cutting motions with an open knife at Anderson. He categorically denied every charge of using obscene language and of threatening Anderson with bodily harm. On the contrary, Claimant testified that Anderson cursed him and that he ignored it.

It is admitted by both Anderson and Claimant that Claimant was in the vestibule of the railroad coach and Anderson was at his station awaiting the arrival and boarding of coach passengers. The train had stopped at the Fort Worth Station. Claimant was eating an apple and some of the peeling had dropped on the steps used by passengers. Another Porter, Dave Turner, brushed them off the ground.

Claimant said that he had peeled the apple before he arrived in the vestibule of the coach car and that only a stray piece had fallen on the steps. Anderson said that Claimant was peeling the apple while he was eating it. Porter Dave Turner said: "Porter Taylor was eating an apple. I noticed that some of the apple peeling had fallen on the coach step. I pushed it off on the ground and walked back toward my car." The incident started because of the fallen apple peeling which Anderson felt was dangerous to the boarding passengers.

No one heard any of the alleged obscene language or saw any of the alleged threats to bodily harm. The only direct evidence is that of Claimant and Anderson. Their statements and testimony are in complete conflict.

Petitioner argues that on the basis of the record no evidence was produced which proves beyond a reasonable doubt that Claimant was guilty as charged.

Either Claimant or Anderson testified falsely. Who did so we are unable to determine from the evidence in the record. It is difficult, if not impossible, for the Board to sit in judgment and evaluate the veracity of the testimony without observing the witnesses and having an opportunity to interrogate them.

In Award 11015, with the same Referee, we said:

> "What constitutes reasonable doubt depends upon the circumstances of each case and primarily the evidence in the record. No one can, with definite precision, lay down a rule which will apply the principle of 'reasonable doubt' equally to all disciplinary cases."

When, as here, there is no effective corroborating evidence and no circumstances which justifies the conclusion that the weight of such testimony is with one or the other party, we are obliged to seek out any evidence or circumstance of arbitrariness, bad faith or vindictiveness on the part of the Carrier. We have been unable to find any. In the absence of any showing that Carrier was arbitrary, vindictive or acted in bad faith, we may not set aside the discipline.

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 Carrier did not violate the Agreement.

AWARD

Claim is denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 20th day of November 1963.