

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 125

Heard at Montreal, Wednesday, October 9th, 1968

Concerning

CANADIAN NATIONAL RAILWAYS

and

CANADIAN BROTHERHOOD OF RAILWAY, TRANSPORT AND GENERAL WORKERS

DISPUTE:

The Brotherhood claims that the Company improperly disciplined Porter H.D. Gooden by suspending him from service for six months as a result of charges that he made improper advances to a female passenger.

JOINT STATEMENT OF ISSUE:

On December 21, 1967, Mr. Gooden was assigned as Porter to Sleeping Car 8723 and Miss Marie Wallace was a passenger in that car occupying Lower Berth 2 from Toronto, Ontario to Noranda, Quebec.

Miss Wallace arrived in Noranda on December 22, and the following day complained to the Agent at that station that the Porter on Car 8723 had made an improper suggestion to her. She informed the Agent that she was returning to Toronto in Car 8723 on December 26 and requested assurance that the same porter would not be on duty in that car.

The circumstances were reported to the Company's office in Toronto and the matter was investigated. A statement was taken from Mr. Gooden on January 9, 1968 and on January 22, 1968 he was informed that he was being suspended from service for a period of six months.

The Brotherhood has protested the Company's action through the various steps of the Grievance Procedure.

FOR THE EMPLOYEES:

(Sgd.) J. A. PELLETIER
EXECUTIVE VICE-PRESIDENT

FOR THE COMPANY:

(Sgd.) E. K. HOUSE
ASSISTANT VICE-PRESIDENT, LABOUR RELATIONS

There appeared on behalf of the Company:

O. W. McNamara – Labour Relations Officer, Montreal
D. C. Fraleigh – Labour Relations Officer, Toronto
W. W. Fitz-Gerald – Assistant Superintendent S.D&P.C. Services, Toronto

And on Behalf of the Brotherhood:

F. C. Johnston – Regional Vice-President, Toronto
J. Huggins – President, Local 283, Toronto
H. L. Critchley – Representative, Edmonton

AWARD OF THE ARBITRATOR

The grievor, a sleeping car porter, was suspended for making an improper suggestion to a female passenger. If in fact such a suggestion was made, then quite clearly discipline was properly imposed. In my view, there is an onus on the company in cases of this sort to establish that there was in fact reasonable cause for discipline. The necessary facts must be established according to the usual standard of proof in civil cases: that is, on the balance of probabilities. In the instant case, the offence alleged is an extremely serious one, and serious discipline has been imposed. The evidence to establish that it occurred is, essentially, that of the female passenger, who did not attend the hearing to give evidence. Her "evidence" consists of a statement made to an official of the Ontario Northland Railway on December 26, 1967, and a statement made to an official of the Canadian National Railways on April 19, 1968. There are of course grave dangers in accepting the uncorroborated statement of the complainant in a matter such as this. While it is not to be expected that there would be direct witnesses of such an incident, corroboration may be found in the circumstances surrounding it.

The grievor does not deny that he spoke to the female passenger at the time and place in question. His statement as to the words used, and as to the circumstances, however, is quite different from hers. His "evidence" is set out in a transcript of the company's investigation held on January 9, 1968. At that time the grievor was questioned by an official of the company. Neither the grievor nor the complainant has appeared for examination and cross-examination, so that it is impossible for me to assess the credibility of either of them on this basis. There are before me however, statements of Porter Roach and Conductor Higgins, and of a male passenger. It is not a question of assessing *viva voce* evidence, tested by cross-examination, but rather of studying the statements made in order to draw whatever inferences are possible from the uncontested facts.

On December 21, 1967, the female passenger, a single woman of about 22 years of age was a passenger in Sleeper Car 8723, and occupied lower berth. In the early part of the evening she spent some time with friends who were occupying bedroom B on the same car. These friends were a man of about her own age, and the man's brother, aged 15. The man was properly ticketed for bedroom B. The brother, it seems, had only a coach ticket, and was required by the conductor to step up his ticket if he was to remain in bedroom B. The young lady and the two male passengers were seen in bedroom B at about 9:00 p.m. Subsequently the young lady and the man went to the lounge car, where they spent some time, part of it at least in the company of other passengers. There is no direct evidence of any drinking, although the inference is an easy one.

At about 12:30 p.m. the young lady and the man returned from the lounge car. The young lady's statement is that the man "accompanied me to my car where I entered the ladies' rest room and he continued on to his own quarters". The man's statement is that "after escorting (the lady) from the lounge car to her sleeping quarters I returned to my bedroom accommodation to retire". The grievor's statement is that "I was patrolling the car and saw the passenger in question emerging from bedroom B. This bedroom was occupied by two young gentlemen. When she came out of the bedroom, I noticed that her hair was disarranged, her blouse was partly out of her skirt and it appeared to me that she had been drinking, because she was unsteady on her feet."

However all this may be, the grievor did speak to the young lady, and there was no one else present at the time. Her statement is that as she was moving down the corridor she heard someone speak and when she turned around the grievor was standing behind her. She said "I beg your pardon" and he replied "Nothing". She continued on to her berth, when the grievor again stopped behind her and said "Would you like me to sleep with you?". She replied "Pardon me", and he said "Ssh, be quiet. I didn't mean anything by it. I just thought you might like me to keep you company". She then excused herself, saying she had left something in the washroom.

The grievor's account of the matter is that he spoke to the lady after she had left bedroom B. He said "Are you ready for your bed now Madame" She replied "Yes", and he said "Have a good night Madame". He then proceeded to the section end of the car (past the berths) and, turning back, saw the lady returning toward the bedrooms.

The case depends on which of the above accounts is closer to the truth. There is no doubt that some conversation took place relating to the young lady's going to bed. Following the conversation, the young lady returned to bedroom B, knocked on the door, and advised her friends of her version of what had occurred. She then, on the suggestion of her friends, traded places with one of them for the night. That is, she spent the night in bedroom B, and one of the young men – said to be the older one – spent the night in lower berth 2. The young men left at Kirkland Lake, at which time the young lady returned to lower berth 2 for the rest of her trip. It was only some time after the arrival of

the young lady at Noranda that she made any complaint of the incident. The grievor, however, did make some mention of the matter to Porter Roach.

It has been suggested by the grievor that the young lady made her accusation against him in order to provide an explanation for what might be thought to be her own unseemly conduct. It is not necessary for me, however, to come to any conclusions as to the department of the young lady or her friends. The question before me is only as to the conduct of the grievor, and in particular as to his words, for there is no suggestion of any physical act on his part.

The young lady's conduct may indeed have been the natural reaction of a frightened young lady, as the company suggests. It does not follow, however, that the grievor actually uttered the words which caused this reaction. The reaction was the result of what the young lady thought she heard. It would be natural enough for the porter to enquire of her at that time if she were ready for bed. One can only guess how those words might be interpreted by a young lady, travelling alone, who had spent the last several hours with friends in the lounge car. The words were spoken in the sleeping car of a moving train at night. Not having seen the witness, or heard evidence tested by cross-examination, I can only conclude that it has not been shown to be more probable that the words spoken by the grievor were as reported by the young lady. Certainly, from this distance, it would be wrong to question her sincerity or her character. More importantly for this case, however, it would be wrong to accept as accurate her observations in the circumstances described, in a matter of this sort, where innocent words may so easily be misinterpreted.

Accordingly, on the material which the parties have placed before me, I am unable to conclude that the grievor did, on the occasion in question, make an improper suggestion to the female passenger. There was, therefore, no ground for the imposition of discipline. The grievance must be allowed, and the grievor is entitled to the relief asked.

(signed) J. F. W. WEATHERILL
ARBITRATOR