

Award No. 2860

Docket No. 2717

2-Pull-EW-'58

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee D. Emmett Ferguson when the award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 122, RAILWAY EMPLOYEES'
DEPARTMENT, AFL-CIO (Electrical Workers)**

THE PULLMAN COMPANY

DISPUTE: CLAIM OF EMPLOYEES:

1. That under the current agreement The Pullman Company unjustly withheld Electrician S. Mitchell from service during the period of November 5 to November 12, 1956, and assessed his record with a notation to this effect.

2. That accordingly The Pullman Company be ordered to compensate Electrician S. Mitchell for his loss of compensation during this period.

3. That accordingly The Pullman Company be ordered to remove this notation from his service record.

EMPLOYEES' STATEMENT OF FACTS: Electrician S. Mitchell, hereinafter referred to as the claimant, was employed by The Pullman Company as an electrician at the Buffalo Shops on July 23, 1923 and has been in their service ever since.

Under date of September 10, 1956, the claimant was notified to appear for a hearing at 2:00 P.M. September 11, 1956. The hearing was then recessed until October 5, 1956 which date the hearing was completed; a copy of this hearing record is submitted herewith and identified as Exhibit A.

Under date of October 31, 1956, Manager L. N. Friol, Buffalo Shops, notified the claimant that he would be withheld from service for five work days and his service record assessed with a notation; a copy of this decision is submitted herewith and identified as Exhibit B.

Under date of November 9, 1956, we appealed this decision; a copy of this appeal is submitted herewith and identified as Exhibit C.

The National Railroad Adjustment Board has repeatedly held that where the carrier has not acted arbitrarily, without just cause, or in bad faith, the judgment of the Board in discipline cases will not be substituted for that of the carrier. In Second Division Award 1323, Docket No. 1256, the Board stated:

"... it has become axiomatic that it is not the function of the National Railroad Adjustment Board to substitute its judgment for that of the carrier's in disciplinary matters, unless the carrier's action be so arbitrary, capricious or fraught with bad faith as to amount to an abuse of discretion. Such a case for intervention is not presently before us. The record is adequate to support the penalty assessed." (See also Second Division Awards 993, 1041, 1109, 1157, 1253 and Fourth Division Award 257.)

Also, in Third Division Award 2769, Docket No. PM-2677, the Board stated, under **OPINION OF BOARD**, as follows:

"... In its consideration of claims involving discipline, this Division of the National Railroad Adjustment Board (1) where there is positive evidence of probative force will not weigh such evidence or resolve conflicts therein, (2) when there is real substantial evidence to sustain charges the findings based thereon will not be disturbed; (3) if the Carrier has not acted arbitrarily, without just cause, or in bad faith its action will not be set aside; and (4) unless prejudice or bias is disclosed by facts or circumstances of record it will not substitute its judgment for that of the Carrier." (See also Third Division Awards 419, 431, 1022, 2297, 2632, 3112, 3125, 3149, 3235, 3984, 3985, 3986, 5011, 5032, 5881 and 5974.)

CONCLUSION

The Pullman Company has shown in this ex parte submission that on Tuesday afternoon, September 4, 1956, when Electrician S. Mitchell was scheduled to be on duty in the battery house at Buffalo Shops, he was observed by Leader Electrician R. Michael asleep on duty outside the battery house behind a tall pile of "skids." Further, the company has shown that Mitchell's condition was also observed by Assistant Foreman J. A. Stegmeier and Foreman R. Herget. The company has also shown that the excuse offered by Mitchell to explain his presence outside the battery house; namely, that he was "sick," is not supported by evidence.

The company has shown, thus, that the hearing officer was fully justified in finding that the charge against Mitchell was substantiated. Finally, the company has shown that its position in this dispute is supported by awards of the National Railroad Adjustment Board.

FINDINGS: The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

The parties to said dispute were given due notice of hearing thereon.

Senator Mitchell, the claimant, had thirty three years seniority with the Pullman Company as an electrician, when he was suspended November 5, 1956 for allegedly sleeping on the job. He was found by three supervisors in a sleeping position, outside his work area, with his eyes closed. When he was accosted he declared he had been sickened by the fumes discharged by batteries. He was checked by the Company nurse as to pulse, temperature, respiration and was asked if he wanted to go home. He elected to work out the balance of the day.

At the investigation he continued to deny that he was asleep and mentioned the spot where he had rested, declaring that "if he had come up, he would have seen where I emptied my stomach." Mr. La Breck the local chairman testified, "I went there several days afterwards and you could still see the evidence of it."

It thus appears that the investigation held by the company failed to investigate and in the determination overlooked the best evidence as to Mitchell's sickness. This was arbitrary and violates our understanding of the application of the rule.

AWARD

Claim Sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 23rd day of May, 1958.