

Award No. 1756

Docket No. 1664

2-PULL-EW-'54

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Edward F. Carter when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 122, RAILWAY EMPLOYEES'
DEPARTMENT, A. F. of L. (Electrical Workers)**

THE PULLMAN COMPANY

DISPUTE: CLAIM OF EMPLOYEES: 1. That under the current agreement Electrician L. L. Marino was unjustly discharged from the service on April 22, 1953.

2. That accordingly the Carrier be ordered to restore the aforesaid Electrician to service with seniority rights unimpaired and paid for all time lost since April 22, 1953.

EMPLOYEES' STATEMENT OF FACTS: Electrician L. L. Marino, hereinafter referred to as the claimant, was employed by The Pullman Company as an electrician at the Omaha district on December 18, 1948. Under date of March 9, 1953, or almost three months after the occurrence, the claimant was notified to appear for a hearing on the following charge:

"You reported falsely that you rode Union Pacific Train No. 111, leaving Omaha on December 26, 1952, and made repairs to heating equipment on cars on that train, and further, you made false claim for pay for the hours comprehended by the trip."

The hearing record supports the above as fact. Hearing was conducted on March 26, 1953, or three months after the alleged occurrence. Hearing record is submitted herewith and identified as Exhibit A.

Under date of April 22, 1953, or almost four months after the alleged occurrence, the carrier's General Foreman R. V. Schwenk, notified the claimant he was dismissed from the service, copy submitted herewith and identified as Exhibit B.

The carrier's officers refused to adjust this case in the subsequent handling.

The agreement effective July 1, 1948, as subsequently amended, is controlling.

could not recall having been spoken to; and to remedy heating trouble when none existed was, to say the least, literally incredible.

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.)

The record has shown that Electrician Marino's discharge was entirely justified. The claim in his behalf should be denied.

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.

The Claimant, Marino, was employed by the carrier as an electrician at Omaha, Nebraska. On March 9, 1953, he was charged with falsely reporting that he rode Union Pacific Train 111 from Omaha to North Platte on December 26, 1952, for the purpose of making repairs to the heating equipment on Pullman cars and with falsifying a claim for pay for hours comprehended by the trip. An investigation was held and claimant was dismissed from the service. The organization claims that Marino was unjustly discharged. It asks that Marino be restored to service with seniority rights unimpaired and that he be paid for all time lost.

The evidence shows the following:

Claimant was assigned to work from midnight to 8:00 A. M. on December 26, 1952. At about 12:15 A. M., claimant called Foreman Schwenk by telephone and advised that Electrician G. A. Fowler would not be available for duty because of illness. Foreman Schwenk directed claimant to

call Electrician J. E. Slack to work Fowler's position, which he did. Slack states that claimant said that he would be a little late, indicating that he had not reported for work when he called Slack. At 7:45 A. M. Foreman Schwenk asked Slack where claimant was, and the answer was that claimant had not been seen. Claimant failed to check out and no one having seen him, the foreman marked him absent from work. On December 27, 1952 at about 7:55 A. M., claimant advised Assistant Foreman Scoular that he had worked the previous day and had worked overtime. His statement was that heating trouble developed on two cars of Union Pacific Train No. 111 and that he had ridden it westward to North Platte to make repairs and had returned to Omaha on the evening of December 26, 1952, on Union Pacific Train No. 6. Claimant was permitted to change his time card. He claimed eighteen hours' time, which was based on the schedule time of arrival of Train No. 6. Since Train No. 6 was two hours late on the day in question, Assistant Foreman Scoular placed a question mark on claimant's time card. Claimant then changed his time card to show that he worked twenty hours instead of eighteen hours. On December 31, 1952, claimant informed his foreman that he should not have claimed overtime for the reason that he should have detrained at Grand Island and returned on Union Pacific Train No. 12 which arrived at Omaha at 7:00 A. M., a time within the period of his regular assignment. He stated that he fell asleep after completing his work on Train No. 111 and awakened after the train had passed Grand Island. He was paid for eight hours' work only, but his overtime claim had been sent in and an investigation of his actions on December 26, 1952 had been commenced.

Claimant says he was called by the wife of Electrician Fowler before he left home advising of Fowler's inability to work. He says he called the foreman after arriving at the station and then called Slack to work Fowler's assignment pursuant to the foreman's instructions. He then met Train No. 111. The Pullman Porter told him that everything was alright but he says one of the porters later told him they were having heating trouble in cars Squaw Bonnet and Denargo. He boarded the train and found that the floor heat valve was stuck on the Denargo and that the blower fan on the Squaw Bonnet was not operating properly. The train pulled out before he completed his work. When his work was completed, he sat down in a roomette and fell asleep. He awakened after passing Grand Island. He told no one that he intended to get off at Grand Island. The porter told him after he awoke that the train had passed Grand Island. He detrained at North Platte, stayed with Robert Barrett, a friend, and returned to Omaha on Train No. 6. He saw no Pullman employees upon arrival in Omaha and went directly home.

The evidence of the train conductors, Pullman conductors and Pullman porters on Trains No. 111 and 6, state that they never saw claimant on either of these trains. The porters on cars Denargo and Squaw Bonnet state that they had no trouble with these cars and that they neither called or saw claimant on them. No one saw claimant during all the hours he claimed he was on duty. He used no pass for transportation. The inspection reports on the cars in question contain nothing to support his story. He made out his time card on the apparent assumption that Train No. 6 was on time when it was in fact two hours late. It does not seem possible that he would have made this error if he had ridden the train into Omaha. His written statement and oral evidence as to where he was when he called Foreman Schwenk and Electrician Slack are in conflict. The reduction of the amount of his time claim from twenty hours to eighteen hours does not appear to be based on any new discovery of facts. It appears to us that the more likely reason was the hope that the investigation would be stopped if the claim for overtime was abandoned. He failed even to produce a statement from his friend Robert Barrett that he was in North Platte on the day in question. An examination of all the evidence indicates that it was sufficient to sustain the action of the carrier.

The organization contends that Rule 52 requires a prompt hearing and that a lapse of seventy-seven days does not meet the requirement. A careful

reading of the rule will show that a prompt hearing is required when charges have been filed and the employee has been withheld from service. The carrier oftentimes does not discover the facts immediately after they occur. It often takes a reasonable time to develop the facts before a charge can be filed. In the case before us, claimant continued to work during the seventy-seven days before the formal investigation. The hearing was in all respects consistent with Rule 52.

Some intimation is made that this Board should, even if the dismissal of the claimant be sustained, reinstate him with seniority rights unimpaired without pay for time lost. We do not think so. The offense committed by this claimant consisted of obtaining eight hours' pay by false pretenses and a fraudulent attempt to secure twelve hours at overtime rates. This involves moral turpitude. The carrier has a right to expect its employees to be honest whether they are strictly supervised or not. For the Board to restore an employee's position after he has been apprehended in defrauding the carrier is not justified. Employees make mistakes the same as everybody else and this Board has restored employees when the discipline appears to have served its purpose. But when the offense involves moral turpitude, the carrier and not this Board should determine whether the risks inherent in the reinstatement of such an employee are to be again assumed by the carrier.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 12th day of May, 1954.