

Award No. 1831
Docket No. 1718
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 the 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 W. J. Sheehan, considers that he was unjustly treated when discharged from the service of The Pullman Company on August 10, 1953.

2. That accordingly the Carrier be ordered to restore Electrician Sheehan to service with seniority rights unimpaired and paid for all time lost since August 10, 1953.

EMPLOYEES' STATEMENT OF FACTS: Electrician W. J. Sheehan, hereinafter referred to as the claimant, was employed by The Pullman Company as an electrician at the Boston District on March 22, 1950.

Under date April 11, 1953, the claimant was notified to appear for a hearing at 10:00 A. M., April 30, 1953. A copy of said notification submitted herewith and identified as Exhibit A.

The hearing was postponed until July 9, 1953, a copy of the hearing record is also submitted and identified as Exhibit A.

Under date of August 10, 1953, W. J. Donahue, foreman, Boston District, notified the claimant that he was dismissed from service, a copy attached and identified as Exhibit B.

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

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

POSITION OF EMPLOYEES: It is submitted that when the charge against the claimant, as follows, is considered:

"You partook of intoxicants and engaged in an angry dispute with a Pullman Porter during the course of which you used physical violence upon him, inflicting serious injury to his person."

twenty-five years his junior, and that as a result of Sheehan's blows, Berrings suffered severe injuries to his face, which injuries necessitated his absence from service for a period of thirty-three (33) days.

The Pullman Company has shown, in addition, that at the time of Sheehan's attack upon Porter Berrings, Sheehan appeared to be under the influence of intoxicants and had the strong odor of intoxicants upon his breath.

Discussing the case of an employe dismissed from service on a charge of assault, the National Railroad Adjustment Board, in Third Division Award 6103, under **OPINION OF BOARD**, made the following observation:

"As to the proof of the charge, this is purely a question of fact. Under such circumstances, in disputes of the character here involved, this Division is committed to the doctrine that it is not a proper function of the Board to weigh the evidence. Put differently, the evidence produced by the Carrier at the investigation, if believed, is amply sufficient to sustain the charge made. For this Board to interfere with the action taken by the Carrier under these circumstances would require us to pass upon the credibility of the witnesses involved, a function we have consistently declined to perform. We have often said, and we think correctly, that it is not the function of this Board to substitute its judgment for that of the Carrier or to determine what we might have done if it had been our duty to make the decision in the first instance. We interfere only where an examination of the record reveals that the action taken was unjust, arbitrary, or unreasonable. Where the evidence produced in support of the charge, if believed, is sufficient to sustain it, even though there may be evidence directly in conflict, the imposition of discipline cannot be said to be unjust, arbitrary or unreasonable. It is not the function of this Board to weigh the evidence or to determine the credibility of witnesses. If there is substantial evidence in the record to support the charge, even though contradicted, the Carrier's action in assessing discipline cannot be said to be arbitrary or capricious. See Awards 2621, 5946, 4068."

Inasmuch as there is substantial evidence in the record to support the charge against Electrician Sheehan, his dismissal was entirely warranted. The organization's claim, therefore, 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.

Claimant was assigned as an electrician in the Boston District and at the times herein mentioned was on duty at the Exeter Street Yard, Boston, Massachusetts. He was charged by the carrier with partaking of intoxicants and using physical violence on a Pullman porter on April 6, 1953. He was accorded an investigation, found guilty and dismissed from the service. Claimant contends that he was unjustly treated and demands that he be returned to service and paid for all time lost.

The story told by Porter E. Berrings was substantially as follows: At about 7:45 P. M. on April 6, 1953, Berrings was working car Mortello Tower when he heard the car bell ringing and a pounding on the rear door. He

did not go to the door at once as he assumed that anyone entitled to enter had a key. He went to the door and the claimant came in and cursed the porter for keeping the door locked. He appeared to have been under the influence of intoxicants. He then went on his way. About 9:00 P. M., claimant returned to repair a toilet hopper and again attempted to enter through the rear door. Berrings did not open it and claimant came in through the open front end door. Berrings was fixing a number plate sign in the men's smoking room at the front end of the car. Claimant directed abusive language at Berrings. The latter started to leave the smoking room to place the number sign in the car window when claimant struck him several times in the face and left the car. Berrings suffered injuries to his eyes, nose, mouth and teeth. He was required to be absent from service for 33 days as a result of the attack.

Claimant tells a different story. He says he rang the bell a couple of times and the porter finally let him in. He says the porter started giving him a lot of abuse about making him come to the door. After some further conversation, claimant went on through the car. An hour or so later, he was sent back to the car to fix the toilet hopper. He went in the front door. The porter was sitting on the window side of the men's room. After inquiring what was wrong with the car, claimant says the porter came out with the number sign and started pushing him around and saying he was going to show him who was boss on the car. Both started pushing and swinging, claimant backing up towards the end of the car. After he assumed the trouble was over, claimant says the porter came toward him with a blade in his hand which he described as being six or seven inches long. He says he figured he could not get away, so he rushed the porter. He says he was cut on the back of his hand. He escaped and caused company officials and the city police to be notified. The police arrived first. They searched the porter and found a small one and one-half inch penknife on him. Claimant says this was not the blade used. The car was carefully searched and no other knife or blade was found. Claimant asked the police if he and the porter made up and shook hands if that would close the matter. He was told that it would, subject to the approval of the Lieutenant of Police. The police closed the case.

Claimant was 41 years of age. Berrings was 66 and in poor physical condition due to a spine operation. Foreman Donahue says there was a superficial scratch on the back of claimant's hand immediately following the difficulty. Berrings says claimant received the scratch when he struck the number sign and knocked it from his hands. Foreman Donahue stated that he smelled a strong odor of liquor on claimant's breath when he arrived at the scene of the trouble. The police sergeant who handled the matter for the Police Department also states that he detected this odor of liquor on claimant's breath. Berrings says he had never had any previous trouble with claimant during the five or six years he had known him. He says that claimant acted differently than he ever did before and that he was not acting normal because of the way he cursed him. Claimant admits having a couple of beers with his lunch before 3:00 P. M. He denies taking a drink after coming to work at 3:00 P. M. Claimant was very evasive when he was asked if the argument would not have occurred if he had not been drinking.

No basis exists for sustaining the claim. While there was conflict in the evidence, there is substantial evidence to sustain carrier's action. It is quite evident to us that claimant became angry when the porter delayed answering the bell and admitting him to the car the first time he was there. He evidently became much more belligerent when he had to enter the open front end door on his second entrance. While the evidence does not show that claimant was drunk, it does show that he had been drinking. It is quite evident that claimant was the aggressor. His claim that the porter drew a blade is not corroborated. No blade or knife was found after a strict search. His story that he was required to rush the porter instead of leaving the car does not appear probable under the evidence in the record. The age, physical condition and injuries sustained by the porter tend to refute the story told

by claimant. The injury to claimant's hand appeared to be something other than a cut. Such evidence is sufficient to sustain a finding of guilt.

The organization seems to argue that the carrier is obliged to believe the claimant. This, of course, is not so. The decision must result from a consideration of all the evidence, including the circumstances surrounding the incident. In this case, it supports the carrier's position. It is argued that the loss of claimant's seniority rights is of great importance to him and his family and, for this reason, evidently, his word should be accepted and other evidence and circumstances should be disregarded. We concede the seriousness of the matter. But it must be remembered that other employees, including Porter Berrings, likewise have seniority rights entitling them to work,—to work without fear of unwarranted physical assault by other employees. It is the duty of the carrier to protect other employees from such risks and possible liability to itself for not so doing. But when he willfully breaches the contract of employment, he must answer for the consequences of his own acts. The carrier has found from the evidence that claimant assaulted, beat up and seriously injured a fellow employee. The evidence before us is sufficient to sustain such finding and sufficient, also, for us to say that it was not an arbitrary or capricious one. Under such circumstances this Board will not disturb the carrier's action.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 2nd day of August, 1954.