

Award No. 3641

Docket No. 3396

2-L&N-CM-'61

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition referee Howard Johnson when the award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION No. 91, RAILWAY EMPLOYEES'
DEPARTMENT, A. F. of L.—C. I. O. (Carmen)**

LOUISVILLE AND NASHVILLE RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYEES:

1. That under the current agreement, Carman J. F. Kersting was unjustly dismissed from service on October 17, 1958, and

2. That accordingly the Carrier be ordered to restore the aforementioned carman to service with all seniority rights unimpaired and compensated additionally for all time lost subsequent to October 17, 1958.

EMPLOYEES' STATEMENT OF FACTS: Carman J. F. Kersting, hereinafter referred to as the claimant, was first employed as a carman helper at the carrier's Union Station, Joint Coach Yard, Louisville, Kentucky on March 10, 1944, holding seniority as such at this point until September 8, 1955, at which time he qualified as a (carman) mechanic and established seniority as such on 9-18-1955.

Under date of September 12, 1958 the carrier's trainmaster and master mechanic wrote the claimant, among others, charging them with responsibility in connection with the wheels of L&N 1397 being flattened in Train No. 99, about 11:27 A. M., September 9, 1958, Union Station, Louisville, Kentucky, also with failure to conduct proper brake test on this train, advising further that investigation would be held on Tuesday, September 16, 1958 in Room 300, Union Passenger Station, Louisville, Kentucky.

Under date of September 13, 1957 the same carrier officials wrote the claimant, among others, postponing the investigation until 1:00 P. M. (DST) Monday, September 22, 1958.

On September 22, 1958, an investigation was held as scheduled and all of those charged participated.

the discharge of that duty. Dismissal of the claimant followed a fair and impartial investigation which established his responsibility and as discipline was not arbitrary or capricious, carrier submits the discipline should not be disturbed.

In this connection, attention is invited to this Board's findings in previous discipline cases which should be applicable here:

"There was direct conflict in the evidence. The board is in no position to resolve conflicts in the evidence. The credibility of witnesses and the weight to be given their testimony is for the trier of the facts to determine. If there is evidence of a substantial character in the record which supports the action of the carrier, and it appears that a fair hearing has been accorded the employe charged, a finding of guilt will not be disturbed by this Board, unless some arbitrary action can be established. None is here shown. Reasonable grounds exist to sustain the determination of guilt made by the carrier." (Second Division Award 1809, Ref. Carter)

". . . This Board is loathe to interfere in cases of discipline if there is any reasonable ground on which it can be justified." (Second Division Award 1109)

FINDINGS: The Second Division of the Adjustment Board, based 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.

Parties to said dispute were given due notice of hearing thereon.

The claim is that Carman Kersting was unjustly dismissed and that Carrier should restore him to service with seniority rights unimpaired and compensation for all time lost.

Notice of hearing was given the conductor, flagman, baggagemen, engineer and three inspectors including claimant, stating as follows:

"You are charged with responsibility in connection with the wheels on L&N 1397 being flattened, train No. 99, at about 11:27 AM, September 9, 1958, Union Station, Louisville, Ky.; also with failure to conduct proper brake test on this train".

Testimony was given by nine employes including the seven charged. It showed that preparatory to leaving Louisville the train was backed to pick up an extra coach for Memphis; that claimant was the inspector for the last four cars including the extra coach; that he and the inspectors for the middle and front portions of the train signalled that the brakes were working properly, the trainmaster so informed the conductor who gave the starting signal to the engineer. When the train started pipefitter Preston, who was on the station platform, noticed that the wheels of the last car were sliding and gave a stop signal to the flagman who transmitted it to the engineer; the train was stopped in about two car lengths, and Preston found that the angle cock at

the rear of the next to last car was closed, so that no air was reaching the brakes on the last car; he started to open the angle cock, but before he had it fully opened the train started; Preston got out from between the cars, signalled for another stop, emergency brakes were applied, the train stopped and Preston fully opened the angle cock. After another brake test the trainmaster signalled for another start but the baggageman found that the wheels on baggage car L&N 1397 were sliding, the emergency brakes were then applied, and the train stopped in five or six car lengths; after clearing a street crossing an inspection showed a 3½ inch flattening of wheels on the baggage car, requiring shopping before the car could be safely used; the train returned to the station, another baggage car was substituted, and the train departed after about a 32 minute delay; apparently some confusion resulted because a woman was seen running to board the train, and because in the emergency several attentive employes signalled for the stops, which certainly is no discredit to either Employes or Carrier.

Claimant had been with Carrier for 19 years and the engineer for 41 years; the others questioned on the point showed service of from 17 to 46 years.

Claimant testified that the additional car had yard air applied before the arrival of train No. 99; that he opened the angle cock "to bleed the car" after cutting off the yard air at the block and released the hand brake; that when he coupled the additional car he did not open the angle cock at the rear of the train as it backed in because "it was already open on the rear end of the last car backing in to couple on to the rear car;" asked whether he made proper brake test of his portion of the train, he replied "yes to the best of my knowledge", asked whether he saw that the brakes at the rear end of the train were released, he said: "to the best of my knowledge they were released". He stated that in making the second brake test before the train finally departed he made it in the same manner as he made the first test.

After the investigation Discipline Bulletin No. 126 was posted saying: "A car inspector has been dismissed from the service for failure to open angle cock in passenger train and failure to make proper brake test and inspection;" a copy was sent him with a dismissal letter stating in part:

"Attached Discipline Bulletin No. 126 applies to you in case of wheels being flattened on L&N 1397 due to your failure to open angle cock in passenger equipment and failure to make proper brake test and inspection, train No. 99, about 11:27 a.m., September 9, 1958, Union Station, Louisville, Ky."

Thus the discipline was based upon "**wheels being flattened on L&N 1397 due to (his) failure to open angle cock in passenger equipment and failure to make proper brake test and inspection.**" In other words he was found guilty of three things: (1) a failure to open angle cock; (2) a failure to make proper brake test; and (3) wheels being flattened.

The Employes object that claimant's failure to open the angle cock was not charged prior to the investigation, that there is no evidence that he failed to open the angle cock or to make a proper brake test, and that in any event the flattening of the wheels was not caused by such failure, but by someone's subsequent application of emergency brakes.

The physical evidence establishes without question that the angle cock must have been closed when the train backed in; that claimant assumed it was open and therefore admittedly failed to open it; and that he could not

have made a proper brake test on the end car, although he testified that he had done so **to the best of his knowledge**, which is not a positive statement. And if, as he testified, the angle cock had been open when he made his examination, it is so improbable as to be virtually impossible, that before the train started, someone, without being seen, would or could have reached between the cars from the station platform and closed the angle cock.

With regard to the flattening of the wheels on baggage car L&N 1397, that probably would not have happened but for the chain of events put in motion by claimant's error. But it cannot in law be considered a proximate result of his error, since it was not a foreseeable consequence and resulted from intervening causes for which he was not responsible. As a matter of fact, the whole sequence of events may conceivably have resulted from the application of brakes because of signals from persons observing the woman running for the train. In any event, while there was an unfortunate and somewhat expensive result, it was caused by a chain of circumstances probably set off by claimant's error, but for which he cannot be held legally responsible.

It may be that claimant's failure to make a proper brake test, which we deem proven, would have been considered by the carrier as valid cause for his discharge, in spite of his apparently unblemished record of 19 years' service. But the discharge was based also upon his failure to open the angle cock, with which he was not charged, and upon the flattening of the baggage car's wheels, which was not a proximate result of his failure to make the proper brake test.

Two of the three reasons given for the discipline thus being found untenable we must consider the discipline imposed excessive. It seems very improbable that if restored to service claimant will be guilty of a similar error. The Board believes that he should be restored to service with seniority rights unimpaired, but without compensation for time lost.

AWARD

That claimant be restored to service with seniority rights unimpaired, but without compensation for time lost.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 18th day of January 1961.