

Award No. 4302
Docket No. 3961
2-PULL-CM-'63

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Ben Harwood when the award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 122, RAILWAY EMPLOYEES'
DEPARTMENT, A. F. of L.-C. I. O. (Carmen)**

THE PULLMAN COMPANY

DISPUTE: CLAIM OF EMPLOYEES:

1. That under the current agreement, Painter C. A. Herring was unjustly dismissed from the service of the Pullman Company on March 23, 1961.

2. That accordingly, the Pullman Company be ordered to reinstate the employe to service with all service rights unimpaired and with pay for all time lost since March 23, 1961.

EMPLOYEES' STATEMENT OF FACTS: Painter C. A. Herring, hereinafter referred to as the claimant, was employed by the Pullman Company, hereinafter referred to as the carrier, with seniority date of September 30, 1953.

On the evening of February 23, 1961, the claimant approached his local chairman, Mr. W. L. White, complaining that leader Johanning had used abusive and foul language to him that day.

On February 24, 1961, Leader Johanning and Mr. W. R. Sahrman, Shop Manager, came to the sandblast pit, approached the claimant and questioned him about the conversation held the previous day between the claimant and Leader Johanning. Leader Johanning told the Shop Manager in front of the claimant, that the claimant had used threatening remarks to him the previous day. The claimant denied it, calling him a "damn liar", that it had been Leader Johanning who had used the threatening remarks and foul language.

On March 7, 1961, hearing was accorded the claimant in the office of Shop Manager W. R. Sahrman.

Under date of March 22, 1961, Supervisor, Shop Cost Analysis C. H. Poole, directed a letter to claimant discharging him from the service, copy attached and identified as Exhibit B. This dispute has been handled with all carrier officials with whom such matters are subject to be appealed, without satisfactory results.

with Adolph E. Wenke sitting as referee, settling a dispute in which the employe was discharged from the service of the carrier, the Board ruled as follows:

"The evidence adduced as to what happened in the dispensary thereafter fully supports the company's finding that Rufus was guilty of the charges made against him. The question then arises as to whether or not the discipline imposed was, under all the circumstances, including claimant's twenty-three years of service, unreasonable. In this respect the company could take into consideration claimant's record during his years of service, including the incident of October 19, 1948. See Awards 1261 and 1367 of this Division. In view of the serious nature of claimant's conduct and his previous actions of a similar nature we find the company was justified in taking the action that it did."

Also, in Second Division Award 1367, cited in Award 1544, the Board held that the past record of an employe could rightfully be used in determining the discipline to be imposed. The Board stated that it is not only proper but essential in the interest of justice to take the past record of an employe into consideration inasmuch as what might be just and fair discipline to an employe whose past record is good, might and usually would, prove inadequate discipline for an employe with a bad record. In this connection, the Board, with Adolph E. Wenke sitting as referee, stated as follows:

"In disciplinary actions it is not only proper, but essential in the interests of justice, to take into consideration the employes' past record when, after the employe has been found guilty of the charges made against him, discipline is being imposed. This for the reason that what might be just and fair to impose upon an employe whose past record has been good might, and probably would be, entirely inadequate for an employe whose past record has been bad. It should be understood that such past record should in no way be considered in determining the guilt or innocence of the party as to the charges for which he is being tried.

"In view of the claimant's past record, considering the nature of the charge of which she has here been found guilty, we do not find the discipline imposed to be either unreasonable, excessive or arbitrary."

Also see Second Division Award 1924 and Third Division Awards 430, 599, 2498, 2772, 3235, 3987 and 4269.

CONCLUSION: In this ex parte submission the company has shown that Painter Herring was guilty of each of the charges placed against him for his actions on February 23 and February 24, 1961, and that in each instance the penalty of discharge was warranted. Additionally, the company has shown that awards of the National Railroad Adjustment Board support the company in this dispute.

The claim of the Organization is without merit and 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.

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

A reading of the transcript of the investigation conducted in this case leaves no doubt that the evidence set forth therein fully substantiated the charges against the claimant which were as follows:

"1. You made threatening remarks to your supervisor, Leader H. Johanning, on February 23, 1961.

2. You were loud and belligerent to Leader Johanning on February 24, 1961, and called him a 'damn liar.' "

No useful purpose would be served by a detailed review of the evidence. As was observed in Award 1137 of the Fourth Division, Referee O'Gallagher:

"This is a discipline case in which there is evidence of a substantial character present in the record to show clearly that Claimant had a fair and impartial hearing. The record further shows that the decision of the Carrier to dismiss the Claimant from its service was not arrived at arbitrarily, capriciously or from motives of prejudice. Therefore, the Carrier having exercised its discretionary power to discharge the Claimant, this Board has no power or right to substitute its judgment for that of the Carrier, nor to determine what we might or might not have done had the matter come to us initially."

And again, as stated, in Second Division Award 3430, Referee Murphy:

"We do not feel that this Board should substitute its judgment for that of the carrier unless the evidence proves that the carrier assessed an unjust or discriminatory penalty. The carrier has a right to expect its employees to observe the Rules and perform their work. . . . This discretion is vested in them and we may not set aside their judgment unless the evidence proves that they have abused this right."

Here, likewise, it is the opinion of the Board that the investigation held in the case now before us was fairly and impartially conducted and that the disciplinary action taken by the Carrier was not arbitrary, capricious or in bad faith. Therefore, we believe this claim cannot be sustained.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 30th day of September, 1963.