

Award No. 1969
Docket No. 1815
2-Pull-EW-'55

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee J. Glenn Donaldson 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 J. J. Mertz, considers that he was unjustly treated when he was suspended from service for three work days during the period from November 4 to 7, 1953.
2. That accordingly the Carrier be ordered to compensate him for the wage loss suffered by him during the period of November 4 to 7, 1953.
3. That accordingly the Carrier be ordered to clear his record of this charge.

EMPLOYEES' STATEMENT OF FACTS: Electrician J. J. Mertz, herein-after referred to as the claimant, was employed by The Pullman Company as an electrician at the St. Louis District on March 31, 1943 and has been in their service ever since.

Under date of September 28, 1953, the claimant was notified to appear for a hearing at 9:00 A. M. October 2, 1953. A copy of said notification appears in the hearing record, Page 1, which is hereby submitted and identified as Exhibit A.

On October 30, 1953, F. J. Hellweg, foreman, St. Louis, Missouri, notified the claimant that he would be suspended from service for three work days during the period of November 4 to 7, 1953. A copy of this notification is hereby submitted and identified as Exhibit B.

On December 31, 1953, we appealed this decision of Mr. F. J. Hellweg. A copy of this appeal is hereby submitted and identified as Exhibit C.

On February 17, 1954 Mr. Dodds, appeal officer, The Pullman Company denied this appeal. A copy of this denial is hereby submitted and identified as Exhibit D.

"... 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 that Electrician Mertz was obligated, by the instructions outlined in the servicing procedure booklet, when according car **POPLAR PIKE** an "M" inspection on August 25, 1953, that he was required thoroughly to inspect and service the generator. The company has shown, also, that on August 26, after departure of the car from St. Louis, the car became a complete cooling failure as a result of a stuck pole changer in the generator. It has shown, additionally, that if Electrician Mertz had properly inspected the generator, as he alleges to have done, he would have detected that the generator was not in proper working order. The company has also shown that Electrician Mertz previously was assessed with a "Warning" for being remiss in the performance of his duties.

Therefore, the company has shown that the assessment of a three (3) day suspension from service placed against Electrician Mertz constituted proper and reasonable disciplinary action in the instant case.

For these reasons the company maintains that the organization's claim in behalf of Electrician Mertz 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.

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

Grievant was charged with failure to properly make an M (monthly) inspection of a Pullman car, as a consequence of which a complete cooling failure occurred approximately one hundred miles from the inspection point. The alleged negligence is pin-pointed by a company officer at the investigation hearing as follows:

"Mr. Davis: 'The possibility is that the pole changer failed to change direction leaving the station here. * * * They said the mechanic at Indianapolis freed the pole changer and the car commenced to cool. It must be assumed that it was the failure of the pole changer to operate that caused the batteries to discharge.'" (Carrier's Exhibit A, p. 7)

It was not satisfactorily explained by anything in the transcript how this situation could prevail when, at the same time the generator light was on and the lights were bright indicating charged batteries. (See carrier's Exhibit A, p. 3.)

Grievant testified that he found the generators, armature and brushes in very good condition; that he checked the pole changer and blew the generator out with air. Grievant had been employed by the company for over ten years and his service record contains but a single warning.

The record is replete with further assumptions and expressions of possibilities on the part of company officers:

"Mr. Davis: '* * * If the pole changer had been properly checked and the generator blown at St. Louis when the "M" inspection was being made, it would not have got dirty from here to Effingham; so it must be assumed that was not done properly when the "M" inspection was made.'" (p. 6)

* * * *

"Mr. Hellweg: 'I said that it was not inspected properly or it would not have failed leaving St. Louis.'" (p. 7)

* * * *

"Mr. Hellweg: 'They are only inspected once a month and it is fair to assume that the inspection will cover everything in connection with the proper operation of that generator.'" (p. 8)

* * * *

"Mr. Davis: '* * * It also appears that if he had made proper inspection and had followed out the procedure, the servicing procedures, chances are that this pole changer would not have stuck leaving St. Louis on the date in question. * * *'" (p. 11)

(It should be noted that Mr. Davis had previously stated that he was not an electrician and had never seen the inside of one of these generators.)

"Mr. Davis: 'It seems to me that if proper inspection had been made, the way it was supposed to be done, that this pole changer would not have stuck leaving Union Station in St. Louis.'" (p. 13)

As we said in Award 1769, discipline must be based upon something more than a mere suspicion or possibility that an employe failed in his duties. Courts have frequently stated in weighing the proof offered by a plaintiff in tort actions that no number of possibilities makes a probability. Such is the case before us and we are compelled to sustain the claim upon the grounds that the penalty was wholly unwarranted for want of proof of the charge made. The action of the carrier under the record made was arbitrary and the charge should not be considered in derogation of grievant's service record.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 30th day of June, 1955.