

Award No. 4211
Docket No. 4111
2-P&LE-TWUOA-'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:

**RAILROAD DIVISION, TRANSPORT WORKERS UNION
OF AMERICA, A. F. of L.—C. I. O.**

**THE PITTSBURGH & LAKE ERIE RAILROAD COMPANY
AND THE LAKE ERIE & EASTERN RAILROAD COMPANY**

DISPUTE: CLAIM OF EMPLOYEES:

Claim is being presented in behalf of car inspector Bacha for:
(1) four hours at pro-rata rate for August 26, 1960 and four hours at pro-rata rate for September 15, 1960 for being required to attend investigation in connection with allegedly having performed improper work on August 21, 1960. (2) the carrier to withdraw the five (5) day suspended sentence imposed on Mr. Bacha and have his record cleared of said disciplinary action.

EMPLOYEES' STATEMENT OF FACTS: This case arose at Youngstown, Ohio and is known as Case Y-149.

That the investigation held concerning Mr. Bacha was improper as the Foreman acted as accuser, then conducted the hearing and then passed sentence on Mr. Bacha.

That the carrier refused to let Foreman Cook, who checked the work performed by Mr. Bacha appear at the investigation. Foreman Cook had not taken exception to the work as performed by Mr. Bacha.

Car inspector Bacha has a perfect record of not having any hot boxes for the past twelve months, this means prior to this incident. That he had no hot boxes even in the train of cars in this case.

That another car inspector, car inspector Hanlon, who had been told by the carrier to go over the cars, that is to check the work done by Mr. Bacha, found nothing wrong with the work as performed by Mr. Bacha.

That the Railroad Division, Transport Workers Union of America, AFL-CIO does have a bargaining agreement effective May 1, 1948 and revised March 1, 1956 with the Pittsburgh & Lake Erie Railroad Company and the Lake Erie & Eastern Railroad Company, covering carmen, their helpers and

claim lacks agreement support. This statement is supported by the fact that under date of October 1, 1959, the carmen's organization served formal notice on the Carrier requesting an addition to existing Rule 46 of the carmen's agreement (previously quoted herein) in the form of a proposed paragraph (g) to read:

"(g) Any employe required by the carrier to be present at an investigation and not working on said day shall be compensated four (4) hours for said day. This does not refer to employe as stated in paragraph (d)."

Negotiations with respect to the inclusion of the above proposed addition to Rule 46 are still being conducted on the property.

The National Railroad Adjustment Board has consistently denied claims which were not supported by Agreement rules, as evidenced by the following excerpts:

In First Division Award No. 18249, the Findings included the following:

"The payment here claimed must be based on rules of the agreement permitting such payment. Here there is an absence of such a rule and hence the claim fails."

Second Division Award No. 3040 —

"Our function is to determine if the existing rules of the agreement have been violated. * * *"

Third Division Award No. 7440 —

"There being no rule to support the claim, it must be denied. See Award 6803."

Carrier therefore submits that this portion of the claim, as well as the request for removal of the discipline, be denied.

CONCLUSION: Carrier has conclusively established that claimant Car Inspector Bacha did not properly perform his duties in treating cars on August 21, 1960. He was found guilty of the charge placed against him and discipline, commensurate with the offense, was assessed against his record.

Awards of the National Railroad Adjustment Board have been cited in support of Carrier's position.

Carrier therefore submits that the request of the organization is absolutely without merit or rule support and requests that it be denied in its entirety.

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.

This appeal concerns claim of Car Inspector Bacha that (1) he should receive four hours pay at pro-rata rate for each of two different days, August 26th and September 15, 1960, because he was required to attend on those days an investigation concerning his having allegedly performed improper work on August 21, 1960; and (2) that Carrier should withdraw the five-day suspended sentence imposed and clear Claimant's record of said disciplinary action.

The charge investigated was incorporated in a letter from Mr. Peters, General Foreman, to Mr. Bacha August 23, 1960, to the effect that Claimant had not properly treated certain journal boxes on 7 cars of a 60 car train which he had worked August 21, 1960. It was alleged that carrier's traveling Car Inspectors Gill and Gillen had found a number of journal boxes on which the packing had not been properly adjusted and the necessary correction of the condition, before the cars could be moved, delayed said train for one hour.

The investigation was recessed from August 26th to September 15th to permit having Traveling Car Inspectors Gill and Gillen attend as witnesses, the former having preferred the charges and both having viewed the work complained of and supervised the corrective measures taken as to the journal boxes above mentioned.

Complaint is made that claimant did not have a fair investigation; that the General Foreman acted as accuser, conducted the hearing and passed sentence. True enough, the letter notifying Claimant of the charges and the scheduled investigation came from the office of the General Foreman whence such correspondence emanates, but we learn from the record that the actual charge, as above mentioned, was made by Inspector Gill. Further, there is nothing in Rule 46 or elsewhere in the current Agreement that runs counter to the procedure followed in this investigation. See Awards 3613 and 1795. General Foreman Peters was a proper officer to conduct the hearing and, as explained during progress of the claim, in no case on this property does the person holding an investigation pass judgment upon the evidence adduced or assess discipline, those being functions performed by the office of the Master Mechanic following review of all the facts disclosed by the transcript. In addition, as Carrier points out, the seriousness of the offense, the possibility of damage through neglect to property and equipment, the effect of the offense upon other employees, and the record of past service of the Claimant — all are considerations weighed with care prior to assessment of discipline. Award 2066.

Claim also is made for payment to Claimant of four hours for each of the two days he attended the investigation. There is as yet no rule providing for such payment; however, there is pending a request for such an addition to Rule 46 of the Carmen's Agreement. Until adopted, such a claim as that here made could not be sustained.

Inspector Bacha more or less admitted that the work of adjusting the packing in the journal boxes was not properly done when he testified that: "The packing may have been a little high on the falling side but it was definitely down on the rising side."; also in saying: "Well it seems to me that the trouble with my work is that it was not in accordance with the lubrication manual issued January 1, 1959." As has been said so often in past awards,

* * * the credibility of witnesses and the weight to be given to their testimony is for the trier of facts to determine. * * *

Award 1809.

Here the trier of facts has found Claimant did not perform his work properly. And, as was further said in Award 1809:

“* * * 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. * * *”

From a detailed examination of the record as a whole and particularly of the testimony in the transcript, we believe, not only as above stated, that Claimant had a fair and impartial investigation in all respects, but also that the evidence supports the charge of work improperly performed. And further, we believe that the penalty assessed was not arbitrary or unreasonable, but was in fact lenient, reflecting, as it must have done, full credit to Claimant for what was no doubt a good previous service record.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 7th day of June 1963.