

**Award No. 4468
Docket No. 3985
2-NOUPT-CM-'64**

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Charles W. Anrod when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 99, RAILWAY EMPLOYEES'
DEPARTMENT, A. F. of L.—C. I. O. (Carmen)**

NEW ORLEANS UNION PASSENGER TERMINAL

DISPUTE: CLAIM OF EMPLOYEES:

1. That under the current agreement carman helper F. J. Wartmann was unjustly suspended from the service of the New Orleans Union Passenger Terminal for five days, July 19 to July 23, 1960.
2. That accordingly the New Orleans Union Passenger Terminal be ordered to compensate carman helper F. J. Wartmann for all time lost account the aforesaid unjust suspension.

EMPLOYEES' STATEMENT OF FACTS: F. J. Wartmann, hereinafter referred to as the claimant, is employed as a carman helper by the New Orleans Union Passenger Terminal, hereinafter referred to as the carrier and is regularly assigned to the second shift at the station as an oiler.

On the evening of July 5, 1960 Pullman Sleeper "Glenn Nevis" was taken from the repair track and placed on the head end of TP Train No. 21, departing the terminal at 8:00 P. M. for deadhead movement to Fort Worth. Train No. 21 with Car "Glenn Nevis" proceeded to Avondale, La., and picked up four (4) merchandise cars on the head end. At Vacherie depot, 46.5 miles from New Orleans, La., the journal box at position 11 on Car "Glenn Nevis" broke out in a blaze. The train was stopped and examination revealed that the journal was red hot, necessitating that Car "Glenn Nevis" be set out on the passing track.

On July 7, 1960, carrier cited Car Foreman C. A. McCarthy and Carmen Helpers F. J. Wartmann, Claimant and Henry Kelly for investigation to determine responsibility in connection with the hot box and burning off of journal on Pullman Car "Glenn Nevis" at Vacherie, La. July 5, 1960. The investigation was held in the mechanical superintendent's office on July 13, 1960.

3rd Division Award 5401:

"Our function in cases of the kind here involved, as we understand it, under awards of this Division of the Board so well known and established that they require no citation or further consideration, is not to pass upon the credibility of the witnesses or weigh the evidence but to determine whether the evidence is substantial and supports the charges as made. If it is we cannot substitute our judgment for that of the carrier and it is our duty to leave its findings undisturbed unless it is apparent its action is so clearly wrong as to amount to an abuse of discretion."

The carrier therefore requests your division deny this claim.

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 employees 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 waived right of appearance at hearing thereon.

The Claimant F. J. Wartmann has been employed as a carman helper (oiler) at the Carrier's New Orleans (Louisiana) passenger terminal. On July 5, 1960, he was assigned to service Pullman car Glen Nevis. The car was added to Texas and Pacific Railroad train No. 21 which left New Orleans at about 8:00 P. M. At Vacherie, Louisiana, a distance of approximately 46 miles, journal box 11 of the car became overheated and a fire broke out. After the fire was extinguished, it was decided to move the car onto a passing track. In the course of that movement, the journal box twisted off and the truck frame dropped down.

After an investigation hearing, the Claimant was dismissed from the Carrier's service, effective as of July 19, 1960, on the ground that he failed properly to service journal box 11 and to place his pool mark on the car in line with his instructions. Subsequently, the Carrier rescinded the Claimant's dismissal and reinstated him, effective as of July 24, 1960, with accumulated seniority but without pay for any time lost.

The Claimant filed the instant grievance in which he contended that he properly serviced the journal box in question and thus was unjustly suspended. He requested compensation at the pro rata rate for all time lost during the period of his suspension. The Carrier denied the grievance.

In an effort to justify the Claimant's disciplinary suspension, the Carrier has called our attention to certain inferred facts intended to demonstrate that no other circumstance than the Claimant's failure properly to service journal box 11 could have conceivably caused the overheating thereof.

The law of labor relations is firmly settled that the burden of proof squarely rests upon the employer convincingly to prove that an employe committed the offense upon which his disciplinary penalty is based. In meeting this burden, the employer is free to rely on circumstantial evidence which may often be more certain, satisfying, and persuasive than direct evidence. However, irrespective of whether the employer relies on circumstantial or direct evidence or both types of evidence, he is not relieved from proving

convincingly that the employe is guilty of the wrongdoing with which he is charged. Mere suspicious circumstances are insufficient to take the place of such proof. See: Awards 1198, 3869, 4046, and 4338 of the Second Division and cases cited therein.

Applying the above principle to this case, we have reached the following conclusions:

The Claimant's contention that he serviced journal box 11 in accordance with his instructions has substantially been corroborated by two disinterested witnesses. Assistant yardmaster B. P. Palazzolo testified at the investigation hearing that he saw the Claimant start oiling the boxes and that he also saw him raising the box lids and pouring oil (Carrier's Exhibit "A", p. 2, 3). Moreover, carman R. W. Swanton stated on the witness stand that, while passing the Claimant at the time in question, he observed that the latter had his dope knife and oil can and was working the boxes (*ibid.*, p. 15). There is nothing in the record which would in any way contradict the testimony of the witnesses.

The Claimant asserts, further, that he put his pool mark on the bottom of the sill steps of car Glen Nevis but admits that he could not see it later on. In this connection, car foreman, C. A. McCarthy testified that he inspected car Glen Nevis after it was returned to New Orleans and found a vague pool mark on the odd numbered side which included journal box 11 (*ibid.*, p. 10).

A careful review of the evidence on the record considered as a whole has convinced us that the chain of events pointing the Claimant's guilt is inconclusive. Specifically, we think it possible that the Claimant did place his pool mark on the sill step of the car and that the mark faded or was inadvertently erased when the car was handled after the fire or when it was temporarily repaired before it was returned to New Orleans. In other words, the possibility that circumstances other than the Claimant's alleged failure properly to service journal box 11 caused the overheating thereof cannot logically be excluded. This is particularly true in view of the fact that the Claimant has been described by his foreman as a conscientious worker whose ability has never been in doubt (*ibid.*, p. 11). The most that can be said in favor of the Carrier's position is that there exists a suspicion that the Claimant may have committed the offense for which he was disciplined. But mere suspicion is insufficient to prove the Claimant's guilt convincingly.

Accordingly, we hold that the Claimant is entitled to be compensated for the loss in his pro rata rate for the period of his suspension, i.e., from July 19 to 23, 1960 (both dates inclusive), in accordance with Rule 30 of the applicable labor agreement, less any compensation which he may have earned in other gainful employment during said period.

AWARD

Claim sustained in accordance with the above findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 28th day of February, 1964.