Award No. 3986

Docket No. PC-3935

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Fred L. Fox, Referee

PARTIES TO DISPUTE:

ORDER OF RAILWAY CONDUCTORS, PULLMAN SYSTEM

THE PULLMAN COMPANY

STATEMENT OF CLAIM: The Order of Railway Conductors, Pullman System, claims for and in behalf of former Conductor E. H. Acker, of the Pennsylvania Terminal District that the Pullman Company did, under date of April 15, 1947, discharge E. H. Acker from service on charges unproven, and in so discharging E. H. Acker acted unjustly and in abuse of its discretion, and in violation of Rule 49 of the Agreement.

We now ask that E. H. Acker be restored to his former position as a conductor in the Pennsylvania Terminal District, with all rights unimpaired and that he be paid for all time lost by reason of said discharge.

OPINION OF BOARD: Until April 15, 1947, the claimant, E. H. Acker, was employed by the Carrier as a conductor, and on said day he was discharged from service, for reasons stated in a letter from District Superintendent to him. Claimant asked for and received a hearing, which was held on May 7, 1947, but time for making decision was extended by agreement, and on June 19, 1947, he was notified by the District Superintendent that his dismissal stood, which action, on appeal, was sustained by the Carrier's Assistant Vice President on September 5, 1947. The claim is that claimant was dismissed on charges unproven, unjustly, in abuse of Carrier's discretion, and in violation of Rule 49 of the Agreement; and that he should be returned to his position, with seniority rights unimpaired, and paid for time lost by reason of his discharge.

Rule 49 of the Agreement reads:

> "A conductor disciplined, or who considers he has been unjustly treated, may elect to present his grievance for hearing and decision as hereinafter stated, provided written request is presented by him within 60 days from the date of the action complained of, except that in cases of discharge written request for hearing must be presented within 30 days from the date of discharge. When a hearing is requested, the conductor shall be given a fair and impartial hearing. * * *."

The Petitioner contends that the claimant was not given that fair and impartial hearing which the quoted rule requires, and bases that contention upon the following:

Admittedly, claimant was not discharged on any one charge, but upon a series of charges, four in number, specifically made in a letter of the District Superintendent, dated April 15, 1947, and covering alleged misconduct

of claimant on four separate dates, namely, January 17, February 23, March 18, and March 19, 1947, on neither of which the claimant had been disciplined at that time. At this point we will define and discuss the charges made.

The first charge is that on January 17, 1947, claimant was discourteous and belligerent toward an Atlantic Coast Line Transportation Inspector, and used abusive language when he contacted him in line of duty. The proof is that the Inspector was traveling through claimant's car, when he had no Pullman transportation, and not entitled to be in said car, and that he was assuming to check on Pullman employes, in respect to their care of toilet facilities, when he had no right to do so. Claimant admits that he may have used strong language directed at the Inspector on that occasion.

The second charge is that claimant on February 23, 1947, failed to transfer two women passengers, enroute from Washington, D. C., to Tampa, Florida, from a car which ended its run at Jacksonville, Florida, to a car destined for Tampa. The initial error was committed in the ticket office in Washington, when space in the wrong car was sold the passenger. It is contended, however, that claimant, in checking his car, should have detected this error, and transferred the passengers to a car destined for Tampa. The passengers were greatly inconvenienced, for when they reached Jacksonville they were unable to obtain space in a Tampa car, because claimant had previously wired ahead all vacant space in the Tampa car. It is also charged that on arriving at Jacksonville, claimant, when his attention was called to this error by the Night Agent, his conduct was discourteous and indifferent. These charges are fully established.

The third charge is that claimant on March 18, 1947, failed to properly check the occupants of his car, resulting in two women passengers, and the four months old child of one of them, being carried past their destination, Nahunta, Georgia, to Jacksonville, Florida, arriving there late at night, and resulting in the passengers having to take a bus to reach their destination where they arrived at 5:00 A. M. the following morning instead of around 11:00 P. M. of the night before, had they not been carried by. It is charged that at Jacksonville, when the result of claimant's conduct was made manifest, he offered no apology to his passengers and was indifferent to their welfare. We think this charge was fully established at the hearing. The unfortunate results were due solely to claimant's failure to take up the tickets which his passengers had purchased at a station in Rocky Mount, North Carolina, and he had some eleven hours to do so. The passengers inquired of a porter more than once as to the time when their train would reach Nahunta, and the porter collected their baggage preparatory to unloading it at Nohunta, and the train was actually flagged and stopped at that point, but neither the train conductor nor claimant knew that passengers were to alight at that point, due solely to their neglect of duty, although the impression is sought to be made that the passengers had refused to surrender their tickets.

After stating these several charges, the District Superintendent, in his letter of April 15, 1947, made the following statement:

> "After taking into consideration your actions as detailed above and after reviewing your past generally unsatisfactory service record, it is my opinion that drastic disciplinary action is warranted because of your discourteous and indifferent attitude toward passengers as well as your belligerent treatment of railroad and Pullman employes toward whom you have used abusive and profane language, therefore, it is my decision that you be dismissed from the service as of the date of this letter."

The reference in the above quoted letter to claimant's "generally unsatisfactory service record" was, apparently, due to the fact that since claimant's employment by the Carrier on October 14, 1943, his service record, prior to January 17, 1947, the date of the first of the pending charges, shows that on July 22, 1944, June 5, 1945, he was "warned" on account of dis-

courtesy to passengers; that on September 23, 1945, and on December 18, 1946, he was suspended for five and fifteen days, respectively, for discourtesy to passengers; on September 22, 1944, he was "warned" for failure to wire report of vacant space; on November 7, 1944, he was instructed in respect to shortage in remittance; on April 7, 1945, he was "warned" on account of passengers being carried by; and on March 28, 1946, he was "warned" for his failure to lift a passenger's ticket.

This record presents an extremely unfavorable picture as to claimant's disposition, cooperation and competency. We cannot try claimant on this record of past service, or use it in determining his guilt or innocence on the four specific charges now pending; but if, without considering his past record, we find him guilty of such charges, then we may consider his past record in determining whether the penalty imposed was justified, or too severe. The awards of this Division appear to be unanimous on this point, and their citation is not deemed necessary.

Claimant apparently does not now deny that he was at fault in the four instances referred to in the charges against him or that his service record may be considered, in imposing the penalty, should he be found guilty of the current charges. His defense consists in this: that the Carrier could not prefer a number of charges none of which, taken alone, would have justified his dismissal from service, and then aggregate the same, and on consideration of all of them together, impose a penalty greater than would have been justified, had they been considered separately, and that this practice violates Rule 49 of the Agreement.

We are not impressed with this contention. Here we have a situation where an employe, within a period of two months, committed four separate and distinct violations of rules, for neither of which he had been disciplined prior to his discharge from service, and we can see no reason why they may not be presented together, and action taken on them as a whole. In what way was the claimant prejudiced? Had he been separately charged and convicted of offenses Nos. 1, 2 and 4, and subsequently charged with offense No. 3, and found guilty, would not all have been properly considered in imposing discipline? From the fact that the Carrier considered all said offenses when it discharged claimant, and did not discharge him for any one of such offenses, it does not follow that it would not have been justified in discharging him for either the second or third offense charged, had either been preferred separately. This is not a case where, as in Award No. 2298 of this Division, one of two charges was not sustained. Here all charges are sustained by the showing made on the docket.

We are of the opinion that, while claimant was proven guilty of charges Nos. 1 and 4, they were not of such a nature as would have justified the Carrier, on those charges alone, in dismissing him from the service. Whether, considering his past service record, such charges would have justified a dismissal is a question we need not decide. We think claimant's conviction of either Charge No. 2 or 3, taken alone, or in connection with his previous service record, fully justified his dismissal from the Carrier's service. The Carrier could not be expected to continue to indulge the claimant in continuing his acts of discourtesy, indifference, and general neglect of duty. Both in its own interest and that of the public, his dismissal was justified.

We have not considered it necessary to discuss the well-established rule that the discretion of the Carrier, in matters of discipline, will not be disturbed, unless its actions have been arbitrary, capricious, in bad faith, or based on bias or prejudice, or on an abuse of discretion. This principle has been fully discussed in very recent awards of this Division, Nos. 3984 and 3985.

FINDINGS; The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and Employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act, as approved June 21, 1934.

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That there has been no violation of the Agreement.

AWARD

Claims (1 and 2) denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 15th day of July, 1948.