

Award No. 5370
Docket No. PC-5325

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Alex Elson, 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 Conductor J. D. Lawless, New Orleans District that:

(1) The Pullman Company, under date of October 12, 1949, suspended Conductor Lawless from service for twelve days (October 12 to October 24, 1949) on charges unproved; and, further, that The Pullman Company in suspending Conductor Lawless acted unjustly and in abuse of its discretion and in violation of Rule 49 of the Agreement between The Pullman Company and its conductors.

(2) We now ask that Conductor Lawless be compensated for the twelve days that he was suspended, and that his record be cleared of the charges.

OPINION OF BOARD: This is a discipline case. Claimant, J. D. Lawless, a Pullman conductor was suspended from service for 12 days on the ground that he was negligent in the performance of his duties in failing to properly supervise the service on the Southern Pacific Train No. 2, Los Angeles to New Orleans, on the morning of September 5, 1949, while Train No. 2 was passing El Paso, Texas.

The charges were based upon a letter written to the president of the Pullman Company by D. J. Russell, vice president of the Southern Pacific Company. The essential portions of the letter, insofar as they relate to negligence of duty may be briefly summarized as follows:

1. " * * * there were soiled towels in the dirty towel containers, and the floors were not clean in the washrooms or in the aiseways. One of the most objectionable conditions was the drinking fountains where there was an accumulation of used cups, old string and other debris * * *."

2. " * * * Several of the porters were sitting around and there were two in one smoking room conversing, but in the washroom of the Pullman car next to the lounge car, there were two porters and the Pullman Conductor. The Pullman Conductor and one porter were sitting on the seat and the porter was smoking."

On behalf of the claimant in the course of the investigation there was introduced the testimony of Conductor Lawless, statements of 7 porters,

as well as 2 letters from passengers. All of the testimony tends to refute the allegations of the letter of Mr. Russell except on one point—the fact that the porter was smoking in the washroom of the Pullman car while Conductor Lawless was sitting on a seat in the washroom. The porter admitted that he was smoking on duty and was suspended for 12 days. All witnesses seem to agree that the conductor was seated in the washroom of the car in question, and that Porter Sharpe was seated beside him. A discrepancy exists between the statement given by Lawless on September 8, 1949, and the testimony which he gave at the hearing on November 18, 1949. In the statement Lawless states he told Mr. Russell when he was asked why he permitted Sharpe to smoke a cigarette in the smoking room, that the porter had just come out of the annex with a cigarette in his mouth. In his testimony, Conductor Lawless states that he did not see the porter smoking when he came out of the annex and saw him smoking for the first time when Mr. Russell pointed him out.

The Organization claim is that the interval between the time that Lawless noticed the porter smoking and when Mr. Russell came on the scene was so short that he did not have time to assert his authority and prevent the porter from continuing to smoke. The above discrepancy in the testimony of Lawless tends to throw considerable doubt on this contention.

The physical facts in this case are also of significance. The vestibule, sometimes referred to in the record as the smoking room or washroom, was of the usual size and arrangement. The seat on which Lawless was sitting faces the men's toilet and also the entrance into the smoking room. Lawless claims that at the time of the incident he was sitting on the seat working with his forms on the top of a suitcase, and that he had his back to Porter Sharpe who was sitting next to him. The physical circumstances are such that it is difficult to believe that he would be unaware of the fact that the porter was smoking.

This Board has consistently held that when there is substantial evidence to sustain the charges, the findings based thereon will not be disturbed. There is evidence in the record to support the charge of the Carrier.

The Organization also contends that Rule 49 of the applicable agreement was violated. This rule reads as follows:

"RULE 49. Hearing and Decision. 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."

It is contended that the charges made against Conductor Lawless were blanket charges lacking in particularity as to the specific instances of negligence in the performance of his duty, and that the Carrier failed to produce complainant Russell at the hearing.

The record shows that in advance of the letter of charges dated October 12, 1949, claimant Lawless conferred with his Superintendent and was requested to and did submit on September 9, 1949, a statement giving his version of the situation on September 5. It is obvious from the statement of Conductor Lawless that he had been given a copy of Russell's letter. The statement discusses in detail each of the allegations in Mr. Russell's letter. In view of the fact that all of this occurred prior to the fact that the letter of charges was issued, it is the opinion of the Board that neither Lawless or the Organization was taken by surprise at the hearing. There is no substance to the complaint of the Organization in this respect.

As to failure to produce Mr. Russell as a witness, without the admission of the porter and the other corroborating circumstances with reference to

the smoking incident, this complaint would have considerable substance. When a carrier is attempting to support charges solely on the basis of the allegations of one person, the least that a fair hearing would require is that that person be produced so that there can be a cross examination of him. We realize that the Carrier does not possess subpoena power. Nevertheless, the failure of a principal witness to respond to a reasonable request to appear should normally result in dropping the charge.

Considering the record as a whole, the Board is of the Opinion that discipline imposed by the Carrier should not be disturbed and that the claim should be denied.

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 the Employees involved in this dispute are respectively Carrier and Employees 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 is no reason for disturbing the action of the Carrier.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 20th day of June, 1951.