Award No. 5849
Docket No. PC-5720

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Paul N. Guthrie, 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 F. A. Coughlin of the Chicago-Northern District, that:

1. Under date of November 11, 1950 the action of The Pullman Company in discharging Conductor Coughlin from the service of The Pullman Company was unwarranted, unjust, and in abuse of its discretion.

2. We now ask that Conductor Coughlin be restored to service with all rights unimpaired and compensated for all lost time.

OPINION OF BOARD: This claim is concerned with the action of the Carrier in discharging Pullman Conductor Coughlin on November 11, 1950. Conductor Coughlin, at the time of the events which gave rise to the discharge, was assigned to Chicago and North Western Trains 511-510, Chicago-Duluth. On August 6, 1950, Claimant was on duty as Pullman Conductor from Duluth to Chicago, Train 510, leaving Duluth at 8:10 P. M. When the train arrived at Solon Springs, Wisconsin, a Mr. J. V. Johnson boarded the train for Chicago. He occupied Bedroom "F" on Car Poplar Court. He was accompanied by a seven years old granddaughter for whom he had not paid the bedroom differential. When Conductor Coughlin checked Mr. Johnson's ticket, $1.38 was collected as the extra charge for the child.

It is alleged that Conductor Coughlin failed to give the passenger a cash fare check; that he failed to report on his diagram the fact that two passengers occupied Bedroom "F"; that he did not report or turn in to the Company the $1.38 collected from Passenger Johnson.

These matters came to the attention of the Company when under date of September 13, 1950, Passenger Johnson reported the matter along with stating his suspicions concerning Conductor Coughlin. Mr. Johnson elaborated upon the occurrences in another communication dated September 27, 1950, upon the request of the Company for further data. Thereafter, on or about October 24, 1950, Conductor Coughlin was interviewed by Company officials, and on November 11, 1950, he was discharged from his position.

The Company justifies its action in discharging the Claimant on grounds of honesty and moral responsibility. To quote:

"In this connection the Company wishes to point out that the principle of moral responsibility is paramount in this dispute, not the amount of money which Coughlin failed to turn in to the Company."

In deciding this case we must look at the evidence before the Board. Does it support the claim that Claimant was intent upon defrauding the Company? Was this a calculated act of dishonesty on the part of Claimant, or was it a matter of oversight and a violation of certain rules concerning the handling of cash fares?

In our judgment the evidence in the record simply fails to prove that Claimant was intent upon defrauding the Company. Claimant's own story that he simply could not remember the passenger in question and the incident cited, has the stamp of credibility. In evaluating this, it must be remembered that he was not questioned about the matter until more than two and one-half months had passed, and in the meantime he had undoubtedly dealt with hundreds of passengers which would make it very difficult to remember a particular passenger unless there was some special circumstance to impress it upon his memory. The record does not reveal that Claimant was ever confronted with Passenger Johnson while this matter was being considered so that his memory might have been aided in recalling the occurrences.

The record shows and both parties admit that on the back of the ticket taken from Passenger Johnson Claimant had written 1.20 12 6 which totaled $1.38, the correct amount of fare collected. It does not stand to reason that had Claimant intended to defraud the Company he would have noted the fare collected on a ticket which was admittedly turned in to the Company.

The evidence in this docket leaves much more than a reasonable doubt about the Claimant's guilt of the charge of dishonesty. Certainly no weight can be given to such a statement as that made by Passenger Johnson when he reported that Claimant acted "sheepishly" when the fare was collected. If the Company suspected that Claimant was not properly handling and reporting cash fares, there was every opportunity for a careful check to be made over a period of time. Instead, Claimant was convicted of dishonesty solely upon this one instance when the burden of available evidence indicates an oversight and a violation of rules for handling cash fares.

Evidence in the record does support a finding that Claimant violated the rule which requires the giving of a cash fare check when the fare is collected. It is also clear that his cash fare report to the Company did not include the $1.38 in question. Therefore, some penalty was in order, but dismissal from the service was arbitrary and unreasonable. Claimant's record appears to have been a very good one prior to this incident. The penalty given him was particularly severe not only because of the economic consequences to him, but also in that he was labeled as dishonest and one who would defraud. A man's honor should not be so lightly assaulted when the evidence is so lacking in conclusiveness as is demonstrated in this case.

It remains to be asked, what would have been an appropriate penalty for the violation of the rules and procedure for handling fares? The most extreme penalty which reason and good conscience can support in this case would be a suspension of three months. These are qualities which must be taken into account in the handling of these discipline matters. (Award 5030.)

It is appropriate that Claimant Coughlin be restored to his position with seniority rights unimpaired, and with pay for time lost except for a period of three months.

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 Employe involved in this dispute are respectively Carrier and Employe 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 the Company violated the Agreement.

AWARD

Claim sustained to extent specified in the above opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Acting Secretary

Dated at Chicago, Illinois, this 18th day of July, 1952.

DISSENT TO AWARD NO. 5849, DOCKET NO. PC-5720

This Award expresses an opinion that there are mitigating circumstances which now are used to substitute the judgment of the Third Division by modification of the discipline assessed by the Carrier, whose findings of the Claimant's violation of instructions and whose imposition of discipline were declared by the Award to be amply supported by the evidence.

It is submitted that such an Award represents arbitrary action beyond the authority of this Board.

In **M.St.P&SSM. Ry. Co.** vs. **Rock**, 279 U. S. 410, the Supreme Court of the United States said:

> "The carriers owe a duty to their patrons as well as those engaged in the operation of their railroads to take care to employ only those who are careful and competent to do the work assigned to them and to exclude the unfit from their service."

In **Robertson** vs. **P. & S. F. R. Co.**, 77 S. W. 2d 1078, it is held:

> "Disobedience of reasonable rules of the employer which are known to the employe constitute just grounds for discharge."

In **Adams** vs. **So. P. Co.**, 266 Pac. 541, the following language was used:

> "An employe is not entitled to have a jury decide whether or not his infraction of the rules established by his employer warrants dismissal."

The Duty of prescribing and enforcing such reasonable rules and regulations cannot be escaped by delegating it to some outside person or tribunal, nor can such outside person or tribunal, having no responsibility in connection with the operation of the railroad, usurp such managerial functions or substitute his or its judgment for that of the Management. For such outside person or tribunal to so act, is to destroy the ability of the Management to maintain discipline. As applied to the National Railroad Adjustment Board, such action would go beyond the authority conferred upon it and violate decisions of the courts.

O. R. C., et al. vs. **Pullman Co.**, No. 616, decided February 12, 1943, by the District Court of the United States for the Eastern District of

Wisconsin, was an action to enforce Award No. 1482 made by the Third Division, Referee Richards. In holding the Award should not be enforced, Judge Duffy said:

> "The Pullman Company even to a greater degree than a railway, **must impose discipline upon its employes** who willfully violate its rules."

In **T. & N. O. R. Co.** vs. **Ry. Clerks**, 281 U. S. 548, the Supreme Court said:

> "The Railway Labor Act of 1926 does not interfere with the normal exercise of the right of the Carrier to select its employes or to discharge them."

See also **Virginian Ry. Co.** vs. **System Federation No. 40**, 300 U. S. 515.

The docket in the instant case cited 308 Awards in which this Division refused to change discipline assessed by Carriers. 157 thereof covered cases in which employes were dismissed for cause. Excerpts are quoted therefrom to show that the decisions therein were based upon a recognition of one or more of the following principles:

1. That this Division should not disturb or set aside discipline assessed by Carriers.

2. That this Division is without authority to disturb the action of Management in discipline cases merely because it thinks the discipline meted out is not what it would have meted out had it been in the position of the Carrier.

3. That this Division should not substitute its judgment for that of Carrier's in discipline cases.

4. That it is not a proper function of this Division to weigh evidence or to resolve conflicts therein.

5. That this Division is without authority to consider leniency.

6. That this Division should be cautious about ordering the reinstatement of employes to service.

The Award in the instant case is based upon Award 5030, Referee Jay S. Parker. The Opinion in Award 5030 shows that the decision therein is based upon no conclusive proof of the charges having been shown and no hearing having been given the Claimant therein on any charge. The factors, supra, on which that Award was based distinguished that case from the instant case in which a proper hearing was held and the record thereof admittedly supports the charges.

Let's see what Referee Parker, the author of Award 5030, would have done in the instant case in view of the accepted facts if he had been Referee herein. Award 5034, in which Jay S. Parker was Referee, involved a similar claim on behalf of a Pullman Conductor who had no previous discipline on his record which was denied. About the only difference between that case and the instant case was that therein the amount of money involved was $6.50 whereas in the instant case the amount of money was $1.38. The Opinion in Award 5034 contains as follows:

> "March 25, 1949, Dearie was dismissed from service on grounds that on the trip above mentioned he had (1) collected a cash fare for upper berth 6, car Lake Lucerne, No. 30, (2) failed to give the passenger a receipt for such check, (3) failed to make a record of the transaction on diagram and (4) failed to account for the

money collected for the sale of upper berth 6 at the completion of the trip.

* * *

At the outset it must be conceded the evidence was conflicting and that some of it was favorable to the claimant. Likewise conceded there were some discrepancies in the testimony of the witnesses on which the Carrier relies to sustain its action. For that matter the same can be said of some of the testimony relied on by the claimant, including his own. Be that as it may, it must be remembered the fact evidence supporting a charge is contradictory or conflicting does not concern us so long as the record discloses substantive testimony which if believed is sufficient to establish the guilt of the person charged. (See Award 3827.)

* * *

We are not unmindful of the fact the record contains much indicating good conduct and faithful service on the part of Dearie prior to the events responsible for the present dispute. The trouble is such evidence is negative in character and, except for purposes of testing his credibility and the weight to be given his testimony, was of little probative value. Of a certainty it did not disprove the charges. Neither did it require the Carrier to disbelieve or reject evidence tending to establish them. Nor is it sufficient, as suggested, to warrant us in holding the disciplinary action assessed by the Carrier under the existing conditions and circumstances was so severe, unjust and unreasonable as to constitute abuse of discretion."

We dissent to the Award herein for the reasons shown, viz., it violates principles firmly established by this Division in hundreds of Awards and by many Court decisions.

(s) W. H. Castle

(s) R. M. Butler

(s) J. E. Kemp

(s) C. P. Dugan