Award No. 10191

Docket No. PC-10854

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

J. Harvey Daly, Referee

PARTIES TO DISPUTE:

ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN, PULLMAN SYSTEM

THE PULLMAN COMPANY

STATEMENT OF CLAIM: The Order of Railway Conductors and Brakemen, Pullman System, claims for and in behalf of Conductor J. C. Lockwood, Penn Terminal District, that The Pullman Company acted arbitrarily and capriciously when:

1. Under date of March 6, 1958 Conductor Lockwood was given an actual suspension of 3¾ days.

2. We further contend that the Company's action in combining two charges against Conductor Lockwood and penalizing him on these combined charges constituted a violation of paragraph (i) of Rule 49 of the parties' Agreement, because insufficient proof was offered that Conductor Lockwood was discourteous to a passenger.

3. We now ask that Conductor Lockwood be credited and paid for all time lost, and that the charges of being discourteous to a passenger be expunged from his record; that he be credited and paid in accordance with the Memorandum of Understanding concerning Compensation for Wage Loss, found on page 99 of the Agreement.

STATEMENT OF FACTS: This is a disciplinary action. The Claimant, Conductor J. C. Lockwood and a Carrier employe since July 24, 1944, on January 2, 1958, was serving as Pullman Conductor on a trip between New York City and Cincinnati, Ohio.

The Claimant is charged with alleged discourtesy to Mr. S. P. Chockley, Treasurer, Norfolk and Western Railroad Company, who occupied Bedroom F in Car K-19, and with failure to evaluate properly Mr. Chockley's Pullman Pass.

The basis for the Claimant's three and three-quarters days' suspension is the following letter, dated January 3, 1958, from Mr. Chockley to Mr. Henry J. Jostock, Secretary-Treasurer, The Pullman Company:

The record indicates that the Carrier, in determining the extent of disciplinary action against the Claimant, took into consideration an incident which occurred on January 23, 1953. On that occasion, Claimant was charged with making discourteous remarks to a passenger and a "Warning" was placed in his record.

The record also indicates that no action was taken against Conductor Montgomery for his error.

OPINION OF BOARD: The Carrier's action is based, totally and completely, on Mr. Chockley's letter. There was no other supportive or corroborative evidence introduced or offered.

Are we to give more weight to Chockley's statement to Claimant?

For our answer — let us go to the record. The Claimant, an admitted "gravel voiced" individual, has been a Carrier employe for about fourteen years, and in that period of time he has had only one previous complaint on his record. For one in a public contact position — this is a most satisfactory record.

The record also indicated that the Claimant is a superior salesman. Can a discourteous conductor have a superior sales record? Our experience leads us to believe that such an accomplishment would be well nigh impossible.

In First Division Award No. 19525 — the Board held:

> "One letter of complaint from a revenue passenger, unsworn to, is not enough to establish guilt unless the accused admits at the hearing what the letter alleges. The Division finds that, on balance, the record of the investigation does not contain substantial evidence of such admission. This being so, the Division is compelled to rule that carrier's action contained elements of arbitrariness sufficient to warrant reversing carrier's verdict of dismissal."

In Award No. 6827 (Messmore) — the Board held:

> "The dominant factor in this case is, did the claimant violate any rule. After reading all the evidence, we fail to find that he did. In the absence of such a showing, no other course is left open to this Board than to hold the Carrier acted in an arbitrary manner in exacting the discipline as it did in the instant case. However, where it is shown that the discipline is unwarranted, or the Carrier acted arbitrarily without sufficient evidence of just cause, then the Carrier's exaction of discipline cannot stand. See Awards 6116, 6056, 5787, 5543, 4325."

In Award No. 4427 (Carter) the Board ruled:

> ". . . An employe cannot be found guilty on evidence that is wholly speculative."
>
> ". . . The Carrier relies wholly upon the uncorroborated and hearsay statement attributed to this patron. The evidence is clearly insufficient to prove the charge."

From the facts set forth above, we must conclude that the Carrier's action was not supported by the facts. Therefore, the Carrier's action was arbitrary and unjust.

Accordingly, we hold that the Claimant must be credited and paid for all time lost, and that the charges of being discourteous to a passenger must be expunged from his record.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

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 Carrier violated the Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 14th day of November, 1961.

DISSENT TO AWARD NO. 10191, DOCKET NO. PC-10854

In Award 10191, the majority admits that Claimant overcharged the complaining passenger $1.10. The fact that another conductor undercharged the passenger does not exculpate Claimant of the charge against him in this respect (Awards 8488 and 9935). The majority also admits that Claimant previously had been disciplined for making discourteous remarks to a passenger on another occasion.

Claimant's statement denying the instant discourtesy charge evidences that he understood how to compute fares for the various types of equipment, but alleges that he did not know how much credit to allow for a section notwithstanding his fourteen years of service with the Carrier. In addition, it confirms the passenger's statement that the transaction occurred in the diner; that the passenger complained about the amount he was being charged by Claimant, and that he informed the passenger that the Company would refund the difference if he was wrong. The conflict between the Claimant's and the passenger's reports of the incident involve solely Claimant's attitude so that the admitted circumstances surrounding the incident lend credence to the passenger's statement of what occurred. Such circumstances must be given consideration in reaching a decision (Second Division Award 1831), and in any event the testimony of one witness, if believed, is sufficient (Award 8754).

These and other principles consistently followed by this Board in hundreds of previous Awards of refusing to weigh and reconcile conflicting evidence

or to substitute its judgment for that of Carrier warranted denial of the instance claim (Award 9322). Rules agreed to by the parties cannot change this Board's function of review (Awards 6924 and 9455).

Furthermore, Claimant's previous service record, whether good or bad, did not prove or disprove his guilt of the immediate charge, but, based on the record in the instant case, Claimant's previous similar offense for which he was given a warning warranted the penalty assessed for this second offense notwithstanding the opinion expressed by the Local Chairman at the investigation, viz., "Any discipline stronger than a book 'warning,' a book discipline, is entirely uncalled for in this instance." The matter of fitting punishment to offenses based on the record rests with the Carrier (Award 1599).

It is elementary that no rule need be cited to prohibit discourteous acts to passengers (Awards 6171). In a news release dated March 28, 1958, about the same time as the incident herein occurred, the Interstate Commerce Commission made suggestions for improving the sagging business of the railroads, viz., to be more considerate of and eliminate unjustifiable discourtesies to passengers.

Award 10191 is in error in sustaining the claim herein, is inimical to the public interest and we dissent.

/s/ W. H. Castle

/s/ P. C. Carter

/s/ R. A. Carroll

/s/ D. S. Dugan

/s/ J. F. Mullen

LABOR MEMBER'S ANSWER TO CARRIER MEMBERS' DISSENT IN AWARD 10191 — DOCKET PC 10854

Award 10191 properly held that the Carrier violated the Agreement. The record indicates conclusively that the Carrier's action was based totally and completely on the charge of being discourteous to a passenger. The only evidence advanced in support of this charge was a letter from the passenger, and it is noteworthy that the passenger did not allege discourtesy on the part of the Claimant. No probative or corroborative evidence was introduced by the Carrier in support of its charge of discourtesy, other than the involved passenger's letter.

The dissenters' citation of several Awards is for the purpose of creating confusion, and consists of nothing more than a restatement of the position taken by the Carrier Member in this dispute, all of which was carefully considered and found lacking in merit by the majority, and are likewise lacking in merit when made in the form of a dissent.

The record shows — as the majority points out — that the key rule involved in this dispute is 49 (i), the pertinent portion of which reads as follows:

"* * * a decision to discipline shall be made only upon evidence in the record which establishes guilt beyond a reasonable doubt."

Of a certainty, the Carrier did not, by any stretch of the imagination, support its charge of discourtesy beyond a reasonable doubt, as required by Rule 49 (i), supra.

In Award 5744 we held —

"This evidence which stands without corroborating fact or circumstance is not sufficient to sustain the charge."

In like tenor, see Awards 5743 — 7140 — 7193.

Award 10191 represents the result of careful consideration of the intent of the parties as expressed by the language of Rule 49 of the Agreement. It is therefore a correct decision, and a proper exercise of the duty of this Board to give effect to Agreements as written.

/s/ H. C. Kohler
Labor Member — Third Division — NRAB