

Award No. 5243
Docket No. 5109
2-FW&D-MA-'67

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee David Dolnick when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 114, RAILWAY EMPLOYEES'
DEPARTMENT, A. F. OF L. - C. I. O.
(Carmen)

FORT WORTH AND DENVER RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYEES: 1. That under the controlling agreement promoted Machinist Helper R. V. Shaver was unjustly withheld from service on April 7, 1965, at Wichita Falls, Texas.

2. That accordingly the Fort Worth & Denver Railway Company be ordered to compensate promoted Machinist Helper R. V. Shaver for all time lost from April 22, 1965, at the Machinist rate of pay, until he is restored to service. This to include premiums for Hospitalization and Life Insurance. Also that all pass, vacation, and seniority rights be restored unimpaired.

3. That the Carrier be ordered to clear this charge from his personal record.

EMPLOYEES' STATEMENT OF FACTS: Promoted Machinist Helper R. V. Shaver, hereinafter referred to as the Claimant, was employed by the Fort Worth & Denver Railway Company, hereinafter referred to as the Carrier, for a period of approximately 22 years at its Wichita Falls, Texas roundhouse.

On March 1, 1965 the Claimant was involved in an automobile accident on one of his rest days. He sustained several injuries including a broken arm and the Carrier then granted him his vacation from March 3 to March 28, 1965. On April 22, 1965, his doctor released him to return to work. In the intervening period the Carrier notified the Claimant on April 7, 1965, that he was being withheld from service. See Attached Exhibit A.

After this notice was received the Organization requested that the Claimant be accorded an investigation as listed in Exhibit B.

This investigation was held on April 28, 1965, and is listed as Exhibit C.

This dispute was handled on the property with all Carrier officers who handle disputes, including Carriers highest officer, which letter is listed as Exhibit D.

The Carrier has refused to restore the Claimant to service in subsequent conferences as evidenced in attached Exhibits E and F.

that in determining the quantum of discipline, as here, the Carrier is privileged to take into consideration an employe's prior service record. (e.g. Awards 10739, Levinson, 12492, Ives, 13063, Englestine, 11796, Seff, 12126, Dolnick, 12301, Rock, 12738 and 12985, Coburn)."

It would unduly lengthen this submission to quote from those awards holding that dismissal is a proper penalty for violation of Rule G. Suffice it to say that such authority is by far the majority view. See, among many others, Third Division Awards 1848-Yeager, Sleeping Car Conductors vs. Pullman Co.; 2457-Smith, BRT vs. D&RG RR Co.; 3184-Thaxter, BRT vs. Penn. RR Co.; 3829-Douglas, Brotherhood of Sleeping Car Porters vs. CMStP&P RR Co.; 4629-Shake, ORC vs. Pullman Co.; 5832-Daugherty, ORC vs. Pullman Co.; 6012-Messmore, BMW vs. M-K-T RR Co.; 7072-Carter, ORC vs. Pullman Co.; 9233-Begley, BRC vs. Southern Ry. Co.; 9863-Weston, ORT vs. NYC RR Co.; 10355-Norwood, ORC vs. Penn. RR Co.

In conclusion, this Carrier submits that substantive evidence at the investigation clearly supports the Carrier's action in withholding the claimant from service and subsequently dismissing him from its services as outlined in its dismissal notice. The investigation is devoid of any showing that Carrier acted arbitrarily in arriving at this decision. The investigation held was fair and impartial and there is no basis for overturning the Carrier's decision. The claim presently before this Board must, therefore, be denied.

All data herein and herewith submitted have previously been made known to the Union.

Oral hearing is not desired, but Carrier requests that it be granted sixty (60) days to make reply to Petitioner's Submission. (Exhibits not reproduced)

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 employes 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 were given due notice of hearing thereon.

Claimant was dismissed from service on June 2, 1965 after an investigation held on April 28, 1965. He was charged with violating Safety Rule G. Specifically, he violated Rule G because he was driving his automobile while intoxicated and this condition resulted in an accident in which the Claimant suffered injuries that made him unavailable for employment for nearly two (2) months.

There is no question of Claimant's guilt to the violation of Safety Rule G. He was arrested after the accident, he was indicted by the grand jury, he pleaded guilty in Court to the charge of driving while intoxicated, and he was sentenced to serve three (3) days in the Wichita County Jail and fined \$100.00. There is some evidence that the Claimant had been warned about his excessive use of intoxicants.

While there may be some justification to sustain the discharge, there are extenuating circumstances which are convincing that dismissal from ser-

vice is not the proper penalty. First, the accident occurred on March 1, 1965, Claimant was granted his request to take his vacation from March 3 to March 28, 1965, but he was not withheld from service until April 7, 1965, the date Claimant was indicted. And Carrier waited thirty (30) days even though its Special Agent made an investigation on March 8, 1965 and reported that the police report showed that Claimant was intoxicated while driving his automobile. Third, at the time the investigation was held, Claimant had not been convicted. Fourth, Claimant had about twenty-two (22) years of service with the Carrier. His previous indiscretions were not too serious. There is no evidence that he had previously been disciplined. He was, otherwise, a valued employe. Under all of these circumstances Claimant deserves to be disciplined, but not dismissed from service. He has already been sufficiently penalized by being out of service for more than two (2) years.

AWARD

R. V. Shaver shall forthwith be reinstated as an employe of the Carrier with seniority and vacation rights unimpaired, but without back pay or other benefits claimed.

NATIONAL RAILROAD ADJUSTMENT BOARD

By Order of SECOND DIVISION
ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 26th day of July, 1967.