Award No. 1605
Docket No. 1536
2-ACL-CM-'52

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Edward F. Carter when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 42, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. (Carmen)

ATLANTIC COAST LINE RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES: That under the current agreement Carman (Painter) Allen F. Harris was unjustly dismissed from the service October 20, 1951, and that accordingly the Carrier be ordered to reinstate this employe with seniority rights unimpaired and pay for all time lost since the aforesaid date.

EMPLOYES' STATEMENT OF FACTS: Allen F. Harris, hereinafter referred to as the claimant, was employed by the carrier at the Jacksonville shops, Jacksonville, Florida for approximately 29 years until his dismissal from the service October 20, 1951. Following the receipt of a letter from General Chairman Winters, dated September 5, 1951, a copy of which is submitted herewith and identified as Exhibit A, requesting a complete two year audit of the secretary-treasurer's books be made, the claimant contacted his immediate foreman on the morning of September 11 advising him that he would have to be off to attend to some business and upon being properly excused, he returned home to audit the accounts. On Thursday, September 13, he became ill and consulted Dr. Eugene D. Simmons who advised complete rest and recommended hospitalization. On Friday, September 14, the claimant drove to the shop to pick up his check, became seriously ill while at the shop, was arrested by City policeman at the request of two railroad policemen, Sergeant Brown and Patrolman Harrison. He was lodged in jail charged with drunk and disorderly conduct, called his wife who posted $10.00 bond for his release and again consulted Dr. Simmons who had the claimant placed in Dr. Miller's Sanatarium on Saturday morning, September 15, where he underwent extensive treatment which is confirmed by Dr. Eugene D. Simmons letter of September 29, 1951, submitted herewith and identified as Exhibit B. On September 15 the master mechanic directed a letter to the claimant requesting that he appear in the master mechanic's office Tuesday morning, September 18, 1951, at 10:00 o'clock "for investigation concerning your absence from work without permission on September 11, 12, 13 and 14, 1951, and for being in an improper condition for the performance of your assigned duties on September 14th," a copy of which is submitted herewith and identified as Exhibit C. The investigation originally set for September 18 was rescheduled for September 25 by the master mechanic and was finally postponed until October 1 through intervention of Dr. Simmons who advised the master mechanic that the claimant

hesitatingly have said so. In contrast to the vague testimony introduced by claimant on his behalf is the positive and clear testimony of carrier's witnesses, namely, Sergeants Brown and Harrison and Car Department Foreman Davis. These men were not novices in their professions and in their ability to determine whether or not a person is drunk. Their years of training and experience have eminently qualified them to recognize when a person is under the influence of intoxicants. The arrest of Mr. Harris and the charges preferred against him by City Patrolman Matthews are indisputable evidence that he, too, concurred in the views of carrier's three witnesses above referred to. Based on testimony and action of these gentlemen, carrier feels that Claimant Harris was drunk, as charged.

Carrier thinks the history of Exhibit B is interesting and worthy of note. As will be observed, claimant did not appear for trial on September 15th and his $10.00 bond was estreated. However, on November 1, the case was reopened and the claimant was found not guilty. It must be remembered that forty-six days had elapsed between date bond was forfeited and date case was reopened, and during that time claimant had received treatment at a corrective institution. Further, that so often, with the passing of time, some people are prone to forget the facts surrounding a case, especially when the punishment involved jeopardizes a person's employment. The forfeited bond was not returned when the case was reopened and had not been returned on June 20, 1952.

Rule 18 of "Rules and Regulations for the Government of Shops" contains no exceptions. It says "their habitual use is sufficient cause for dismissal". Claimant accepted and continued in the carrier's employment knowing the full import of the rule. He had two alternatives—either comply with the rule or leave the service. He did neither.

It is a well known fact that a man who will indulge in intoxicating liquors to such an extent that it will be noticeable to those with whom he comes in contact, and who while in such condition wilfully comes upon his employer's premises would not hesitate to undertake the performance of his duties on a railroad in a similar physical condition. He is a hazard to which no railroad should be required for a single moment to submit.

No regulation of the railroad company is more important or more generally enforced than the one prohibiting the use of intoxicants. This regulation is more generally observed by the employes themselves because they recognize that a man addicted to the use of intoxicants is at all times a peril to his own safety, as well as the safety of his fellow employes and the traveling public.

The carrier submits that the discipline administered in this case was justified and was not excessive considering the flagrant violation of the rule, also in that it subjected the company to the unnecessary hazard of personal injury to the employe here involved, as well as the safety of its other employes, and we are of the opinion your Board will so rule.

The respondent carrier reserves the right, if and when it is furnished with the ex parte petition filed by the petitioner in this case, which it has not seen, to make such further answer and defense as it may deem necessary and proper in relation to all allegations and claims as may have been advanced by the petitioner in such petition and which have not been answered in this, its initial answer.

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.

The parties to said dispute were given due notice of hearing thereon.

Claimant entered the employ of the Carrier as a Steprate Car Repairer on March 8, 1923 and at the time this dispute arose he was assigned as a Painter on the first shift at Jacksonville, Florida. At the beginning of the first shift on September 10, 1951, he requested and was granted permission to be absent to attend to personal business. On September 15, 1951, claimant was advised by letter to report for investigation on the following charge:

> "You will report to this office, Tuesday morning, September 18, 1951, at ten o'clock, for investigation concerning your absence from work without permission on September 11, 12, 13 and 14, 1951 and for being in an improper condition for performance of your assigned duties on date of September 14th."

Due to a misunderstanding by the Claimant and his foreman as to the time he was to be absent from duty pursuant to his request of September 10th, 1951, that part of the charge was dismissed by the Carrier. The investigation was thereafter held on the charge "for being in an improper condition for performance of your assigned duties on date of September 14th." On October 20, 1951, Claimant received a notice of dismissal which in part reads:

> "This is to advise that you are being dismissed from the service of the Atlantic Coast Line Railroad Company effective this date, October 20, 1951, for being on the company property on September 14, 1951 under the influence of intoxicants."

The record shows that on September 14, 1951, Claimant drove his automobile to the Superintendent of Terminal's office on Carrier's property to get his pay check. While there he was arrested and placed in jail for intoxication. After an examination of the record of the investigation we are convinced that the evidence, though conflicting, was sufficient to sustain the charge that Claimant was intoxicated at the time and place stated.

We point out however that Claimant was charged with being in an improper condition for work on September 14th, a date when he was not required to work. While we think that the commission of crimes involving moral turpitude may be so harmful to Carrier's welfare as to warrant a dismissal in the absence of an agreement or unilateral rule so providing, we do not think that an employe may be dismissed from the service for the commission of a misdemeanor in the absence of such a rule. The Carrier relies upon a provision of its Rules and Regulations for the Government of Shops to sustain its action. This rule provides:

> "The use of intoxicants by employes while on duty is prohibited. Their habitual use, or their use to such an extent as to interfere with proper performance of duty, or the frequenting of places where they are used, is sufficient cause for dismissal."

Claimant was not on duty at the time charged and consequently his use of intoxicants did not interfere with the proper performance of his duties. There is no evidence that claimant habitually used intoxicants or that he frequented places where they were used. No violation of this rule is shown by the record.

It is apparent that Claimant was charged with one offense, being in an improper condition to perform his duties, and was dismissed on a wholly different charge, for being on company property under the influence of intoxicants. The Carrier argues that these proceedings involve agreements and rules to be enforced by laymen and that the technicalities of legal pro-

cedure ought not to be required. With this we are in full accord. But there must be a substantial compliance. No rule has been pointed out to us making it a violation of any agreement or rule provision for an employe to be found on company property in an intoxicated condition outside of hours when he is required to work or at a time when he is reporting for duty. We think the charge made was sufficient to warrant discipline if it was established. The charge as made was not established, but the Carrier dismissed the Claimant for an altogether different reason, a reason that violates no agreement or rule provision. Nor was it such that, by its very nature, the Carrier would be justified in taking disciplinary action for its own protection in the absence of agreement or rule. We do not think the record sustains a dismissal of the Claimant. See Award 1112.

The claim warrants an affirmative award reinstating Claimant with seniority rights unimpaired and pay for all time lost since October 20, 1951, less the compensation earned in outside employment, if any. See Rule 21, current agreement.

AWARD

Claim sustained and Claimant ordered reinstated with seniority rights unimpaired and with pay for all time lost since October 20, 1951, less compensation earned in outside employment, if any.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 17th day of December, 1952.