

**Award No. 4042**  
**Docket No. 3791**  
**2-KCT-CM-'62**

**NATIONAL RAILROAD ADJUSTMENT BOARD**  
**SECOND DIVISION**

**The Second Division consisted of the regular members and in addition Referee Carroll R. Daugherty when award was rendered.**

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**PARTIES TO DISPUTE:**

**SYSTEM FEDERATION NO. 38, RAILWAY EMPLOYES'**  
**DEPARTMENT, A. F. of L. - C. I. O. (Carmen)**

**KANSAS CITY TERMINAL RAILWAY COMPANY**

**DISPUTE CLAIM OF EMPLOYES:** That under the current agreement Coach Cleaner Emerson Thomas was unjustly dismissed from the service on October 27, 1959 and that the carrier be ordered to reinstate him in the service with all rights unimpaired.

**EMPLOYES' STATEMENT OF FACTS:** Emerson Thomas, hereinafter referred to as the claimant, was employed April 6, 1945 by the Kansas City Terminal Railway Company, hereinafter referred to as the carrier. The carrier's superintendent, H. W. Mathews elected to dismiss the claimant from service of the carrier which is affirmed by the copy of letter to claimant by Mr. H. W. Mathews under date of October 27, 1959.

Mr. W. M. Browne, Local Chairman, requested a formal hearing on behalf of the claimant October 28, 1959. A formal hearing was subsequently held November 4, 1959.

On November 13, 1959 carrier's Superintendent H. W. Mathews affirmed decision of October 27, 1959.

This dispute has been handled up to and including the highest officer so designated to adjust it. The agreement effective July 1, 1936 as subsequently amended is controlling.

**POSITION OF EMPLOYES:** It is submitted that this dispute is subject to be resolved on the basis of the facts and evidence set forth in conjunction with the rules of the aforesaid controlling agreement made between the carrier and System Federation No. 38 in pursuant of the Railway Labor Act.

We further submit that a fair and impartial review of the facts and evidence contained in the hearing transcript, shows beyond question that:

(a) The carrier completely failed to adduce any reasonable evidence at the hearing held on Nov. 4, 1959, to support the charges preferred in its letter dated Nov. 2, 1959 directed to claimant, the pertinent part of which reads:

is a special agent of the railroad. Such conduct and such interference with employes engaged in their duties cannot be tolerated by the carrier. The off-duty status of Mr. Thomas does not render him immune from action by the carrier, especially where, as here, his conduct occurs on company property and, indeed, amounted to interference with the proper operations of this Terminal.

The other assertions of General Chairman Herman either quarrel with the evidence, or are irrelevant. He states that it was "definitely established" that Thomas was not intoxicated; there is evidence to the contrary on the part of both the special agent and the city patrolman. He states that there was no violence; it has never been claimed that there was, but Thomas was belligerent and boisterous; he created enough of a disturbance to require the brakeman to summon the special agent and the city patrolman.

The evidence of Mr. Thomas' conduct fully warranted his discharge.

III. The penalty of discharge was applied in the light of Mr. Thomas' past record. When so considered, it was appropriate and not arbitrary or capricious in any degree. The offense committed here, and his past offenses, justified the carrier in denying the plea of leniency brought forth in his behalf. He was properly dismissed; it was discretionary on the part of the carrier, in view of this, whether to restore him to service or not; in refusing to do so, that discretion was exercised and it cannot be said that it was other than soundly exercised.

No basis exists for the Division to substitute its judgment as to the carrier's decision in the instant case, or its action in refusing the plea of leniency. The claim should be denied.

**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 waived right of appearance at hearing thereon.

Petitioner here asks for reinstatement of discharged claimant to carrier's service, with seniority rights unimpaired. Pay for time lost is not requested. Thus, the claim is placed, at least in part, on a leniency basis.

On the property the organization asked for leniency reinstatement. Carrier denied same on the grounds that said plea constituted an admission of claimant's guilt and, given such admission, carrier's decision to discharge must stand in the light of claimant's earlier record of discharges and leniency reinstatements.

In substance petitioner now makes two main contentions: (1) Claimant merited some degree of discipline for his behavior on carrier's property on October 20, 1959; but in the light of the testimony presented at carrier's investigation the discipline of discharge was excessive and constituted an abuse of managerial discretion. (2) Evidence on claimant's record is not prop-

erly before the Division because carrier failed to present detailed evidence thereon.

As to (1), the Division might be inclined, from its study of the transcript, to agree with petitioner. Standing by itself, claimant's behavior might on balance, be held not to have been so violative of carrier's proper rules as to have warranted the supreme penalty. And carrier's decision to dismiss might then be judged to have contained elements of arbitrariness.

But the Division is unable to agree with petitioner's second contention. It does not matter whether claimant's record was placed in the investigation transcript. Carrier was entirely within its rights in giving weight to said record at any time before making its final decision. And so is this Division before reaching its finding, so long as carrier's submission contains claimant's record. (As a matter of fact petitioners in discharge cases here frequently protest as prejudicial the introduction by carriers of past records of accused employes into the transcripts of carriers' investigations.) The Division finds that carrier's uncontroverted statements concerning two previous discharges, in 1947 and in 1951, are proper evidence of claimant's previous unsatisfactory behavior.

The Division finds that claimant's record was poor. Then given this finding plus the findings that claimant merited some degree of discipline and that his record is properly and sufficiently before the Division, it must follow that carrier's decision did not constitute an abuse of discretion. The guilt together with the record were not an unreasonable basis for the penalty of discharge. Carrier's denial of leniency was not improper, and the Division is not able to grant leniency where carrier has refused to.

#### AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman  
Executive Secretary

Dated at Chicago, Illinois, this 3rd day of August 1962.