

Award No. 468

Docket No. 477

2-MP-BM-'40

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

The Second Division consisted of the regular members and in addition Referee Frank M. Swacker when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION No. 2, RAILWAY EMPLOYES'
DEPARTMENT, A. F. OF L. (BOILERMAKERS)**

MISSOURI PACIFIC RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYEES: That Boilermaker S. E. Harris, Omaha, Nebr., be compensated for all time lost, due to being furloughed unjustly and Boilermaker G. L. Staley's name be removed from the seniority roster at that point.

EMPLOYEES' STATEMENT OF FACTS: Boilermaker S. E. Harris was given written notice on October 25, 1939, that he would be displaced quitting time October 31, 1939, by Boilermaker George L. Staley.

POSITION OF EMPLOYEES: It is the contention of the employes that George L. Staley was reemployed at Omaha, Nebr., November 1, 1939; that he holds no seniority at that point as a mechanic; and by the management reemploying him and giving him seniority over three other boilermakers, when boilermakers were furloughed at that point and other points on the railroad, they violated current wage agreement effective July 1, 1936.

George L. Staley was first employed by the carrier as a boilermaker at Falls City, Nebr., August 28, 1922; he was later transferred to Omaha, Nebr., on September 7, 1923. While working at Omaha, he was promoted to roundhouse foreman sometime in 1926. He worked as foreman there and at Concordia and Lincoln, Nebr., and while working at Omaha, had his fingers on one hand cut off in an accident. While working at Lincoln, he was removed for cause on April 17, 1938, said cause being drunk and leaving the job unprotected.

He personally handled his case and prosecuted his appeals through the regular channels of the railroad until he was reemployed at Omaha, Nebr., November 1, 1939.

On October 25, 1939, the local committee and Boilermaker Harris of Omaha were informed by Master Mechanic Kilbury that Mr. Harris would be displaced by Mr. Staley effective with quitting time October 31, 1939. (See Exhibit A.)

While Mr. Staley was out of service as a foreman, he was reinstated and reemployed as a laborer at Kansas City, Mo., a different seniority point and in a seniority sub-division not covered by the mechanical department agreement. The date of his reemployment as a laborer was October 14, 1938.

The facts in this case as herein presented by the carrier and remarks likewise presented to support its contentions, we feel are such that the Board would not have the temerity to sustain the employees' contentions—matter of fact we doubt the right of the Board to place limitations or modifications in a contract unless, of course, vagueness, obscurity or absurdity of meaning leaves no alternative. This dispute occasions no such treatment. The facts are not in dispute and it can be readily observed that the employees are attempting to obtain, by ruling of your Honorable Board, a rule, or stretching the application of an existing rule, that would give to them a voice in the now managerial function of handling discipline, where, in meritorious cases, the management feels disposed to modify the initial disciplinary measure that may have been applied in certain cases by favorably considering reinstatements, where, in its opinion, such action is justified. The employees in the negotiation of the current wage agreement, did not seek such a condition of employment as they are herein petitioning for. They do not enjoy such a right now. Should, however, the Board find in favor of the complainants, such an award would be an act far beyond the power vested in the Board by the Railway Labor Act amended, and it would likewise create and/or establish a rule and/or practice which is unquestionably beyond the powers of the Board to so do.

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.

This case involves an important question of principle. There are some side issues and contentions which are somewhat confusing. The fundamental issue is:

Has management the right to restore a man to service as a matter of grace on a leniency basis after he had been rightfully discharged for cause, and incident thereto, restore him to the full seniority rights previously enjoyed by him? This is not to be confused with a situation where a man having been discharged and having appealed such discharge in usual form either on the ground that he was not guilty of the offense charged or that the punishment was excessive and in the course of such appeal the management should agree with either such contention and in that case restore him to service with seniority unimpaired. There is no doubt about the right of management to correct errors in discipline. No such situation is involved here, however. The man in question was discharged—did not even ask for an investigation—went out of the service—later returned to the service and worked in another capacity under another contract for several months which the management considered a probational period. At the end of that time he was restored to duty in his former capacity of boilermaker.

The claim of the organization is that the management cannot do this ex parte. It is said that seniority exists by virtue of contract; that it is a contract right; a property right; that there is a carefully devised system for the administration of seniority under which rights accrue to each man, each different from the other, that is, when one steps out, the right of all those junior to him is automatically enhanced; that this arises under the covenants of the contract; that one party to the contract can take no steps acting alone to infringe on the rights theretofore acquired and subsisting.

As above stated, the situation is to be distinguished from the case where it is asserted by a discharged man that his discharge was unjust or discipline excessive and so found by the management. In that case the removal of seniority of the senior man being erroneous was simply void and the status quo restored.

In the instant case, however, as previously stated, the man was discharged for cause, admitting the charge involved. Thereafter the management undertook to restore him merely as an act of grace and accord him his previous seniority. This, of course, had the effect of setting back those men junior to him, i. e., taking away a portion of their property right, which had become vested in due course. This, the organization says, cannot be done without the consent of these junior men or their representatives, the general committee.

We think the contention is sound. If management could do that, it could hire a man never before connected with the property and accord him any seniority status it saw fit. In that case the seniority provisions of the schedule would be worthless.

There are many side arguments. The organization contending that if management had such power it might abuse it for discriminatory purposes; on the other side it is contended that the consequences of sustaining the organization's position would be to compel or impose upon the individual a requirement that he be represented by the organization. There is no question but that an individual employe has a right to prosecute a grievance either in person or by a representative of his choosing, other than the organization. It may be observed that he is seeking a waiver of rights of others represented by the general committee.

But be the consequences whatever they may in either direction, that is not our concern, but rather are we confined to ascertainment of the application of the contract.

One of the side issues, which requires some consideration, is, in the particular instance, that the man had been off of work as a boilermaker on various supervisory assignments for about twelve years up to the time of his discharge. Rule 25 (d) of the agreement provides that men occupying supervisory positions will retain their home point seniority unimpaired "so long as continuity of service is unbroken." But for that rule he would have lost his seniority twelve years previously. He was discharged April 17, 1938, and was out of the service for about six months; therefore, when he was employed in another capacity not coming under the classification of the contract involved, we consider this constituted a break in the continuity of service.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: J. L. Mindling
Secretary

Dated at Chicago, Illinois, this 25th day of June, 1940.