Award No. 5372
Docket No. PC-5372

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Alex Elson, Referee.

PARTIES TO DISPUTE:

ORDER OF RAILWAY CONDUCTORS

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: The Order of Railway Conductors claims for and in behalf of Conductor J. W. Tracey:

1. That the Management violated Rules 24 and 28 of the Agreement between the C.M.St.P.&P.R.R. Co., and its Sleeping and Parlor Car Conductors, when assignments were made January 26, 1950 under bid No. A to Trains 11 and 22 between Chicago and Mason City.

2. That Conductor J. B. Kane, who was assigned to Trains 11 and 22 under bid No. A, does not hold sufficient seniority under Rule 24 of the Agreement to qualify him for the award.

3. That Conductor J. W. Tracey, who bid on the run, does hold sufficient seniority to qualify him for the assignment under bid No. A.

4. That Conductor J. W. Tracey should be compensated for each trip in each direction on Trains 11 and 22 between Chicago and Mason City, including all time of late train arrivals, starting from the date of the award of bid No. A.

EMPLOYES' STATEMENT OF FACTS: There is in evidence an Agreement between the Chicago, Milwaukee, St. Paul and Pacific Railroad Company and the Sleeping and Parlor Car Conductors in the service of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, represented by the Order of Railway Conductors, effective August 1, 1948.

This dispute has been progressed in accordance with the Agreement. Decision of the highest officer designated for that purpose, denying the claim, is attached as Exhibit No. 1.

Mr. J. B. Kane was employed as a Sleeping and Parlor Car Conductor by the Milwaukee Road under date of January 26, 1933. Conductor Kane was dismissed for cause from the service of the Milwaukee Road under date of October 26, 1949.

On or about January 9, 1950, Mr. M. P. Ayars, Superintendent, Sleeping and Dining Car Department, without conference and agreement with

Kane was reinstated without impairment of his seniority rights and with those rights he acquired, strictly in accordance with the schedule rules, an assignment which was open on bulletin and to which he was assigned, on the basis of his seniority, over junior applicants.

As will be noted from Carrier's Exhibit "A", Claimant J. W. Tracey, with seniority date of March 13th, 1948, is junior to Conductor Kane with seniority date of January 26th, 1933. As indicated above, Conductor Kane was reinstated on January 9th, 1950. On January 11th, 1950 a regular assignment was bulletined because of changes in service resulting from the coal strike. This assignment covered the operation of Trains 11 and 22 between Chicago, Illinois and Mason City, Iowa with three conductors in the line. On January 11th, 1950 Conductor Kane made application for that assignment. On January 13th, 1950 Conductor J. W. Tracey made application for that assignment. Altogether, five conductors made application for the assignment, the senior three, including Conductor Kane, were assigned to the run on January 26th, 1950. Certainly under those circumstances the claim in behalf of Conductor Tracey cannot be justified.

By their submission of this case, the Employes are asking your Honorable Board to hold that the Carrier could not give favorable consideration to the reinstatement of an employe with seniority rights unimpaired—an employe who, at the time of his dismissal, had served approximately 17 years as a sleeping and parlor car conductor.

It is the Organization's position in this case that a reinstatement is only proper when the Organization makes the request upon the Carrier for reinstatement and that it is not proper for the Carrier to give favorable consideration to a request for reinstatement by an individual employe, regardless of his years of service with the Carrier or other circumstances. Surely there is no basis for such a contention on the part of the Organization.

We assert the action of the Carrier in reinstating Mr. Kane to service as sleeping and parlor car conductor was not in violation of the schedule rules, did justice to an employe who had served the Carrier in the capacity of sleeping and parlor car conductor for approximately 17 years and was in conformity with the practice of this Carrier in giving favorable consideration to requests of dismissed employes for reinstatement without impairment of seniority rights, a practice which should, in our opinion, subject the Carrier to commendation rather than to complaint and claim and we respectfully request that the claim be declined.

(Exhibits not reproduced.)

OPINION OF BOARD: The claim in this case charges violation by the Carrier of the seniority provisions of the Agreement against Conductor Tracey in favor of Conductor Kane.

The principal facts are not in dispute. Kane was dismissed by the Carrier on October 26, 1949, for cause. He requested a hearing on October 31, 1949. The hearing was held November 11, 1949, and on November 16, 1949, his dismissal was confirmed. The Carrier claims that Kane continued to appeal following confirmation of his dismissal, and on January 9, 1950, he was reinstated on a leniency basis. The assignment in question on Trains 11 and 12 to Kane made on January 26, 1950, is challenged because Kane was selected in favor of Tracey, who also made an application for the assignment.

Kane's seniority date prior to his dismissal was January 26, 1933. He was the fourth oldest conductor on the roster, and when reinstated his seniority was restored to him. Tracey's seniority date is March 13, 1948. The 1949 and 1950 rosters show the above seniority dates.

The gist of the claim is that when the Carrier reinstated Kane on January 9, 1950, his seniority should not have been restored and that in

fact, for seniority purposes he was junior to Tracey. It follows that if the Carrier was correct in reinstating Kane with his seniority restored that the claim must fall.

The Employes' position briefly stated is that the dismissal of an employe terminates his seniority status, and that once the right of seniority has ceased to exist, it cannot, as against other employes who have continued in service and continued to accumulate seniority in the meantime, be restored except as provided in the Agreement, or by mutual agreement between the parties to the Agreement.

The Carrier denies that its action in returning Kane to the service was in violation of the Agreement and states that hundreds of dismissed employes have been reinstated with seniority unimpaired when the discipline imposed has served its purpose.

The relevant provisions of the Agreement with reference to discipline and grievances are as follows:

"RULE 39. HEARING AND DECISION

Except as provided in Rule 44, a conductor disciplined or who considers he has been unjustly treated, may elect to present his grievance for hearing and decision as hereinafter stated, provided written request is presented by him within sixty (60) days from the date of the action complained of, except that in cases where the employe is suspended or discharged written request for hearing must be presented within thirty (30) days from date of suspension or discharge, following which he shall be given a fair and impartial hearing.

In suspending, discharging or disciplining a conductor he will be notified in writing as to the specific charge or charges which resulted in such action."

"RULE 40. RIGHTS TO APPEAL

Presentation to be made (1st) to the Superintendent Sleeping and Dining Cars; failing in satisfactory adjustment within thirty (30) days, (2nd) to the Assistant to Vice President; failing in satisfactory adjustment within thirty (30) days, (3rd) in accordance with the provisions of the Railway Labor Act."

"RULE 41. APPLICATION AND DECISION IN WRITING

Applications for all hearings and appeals and all decisions rendered thereon shall be in writing."

"RULE 42. REPRESENTATION AT HEARINGS

At each hearing and appeal the conductor may present his grievance or claim either personally or through his duly accredited representatives."

"RULE 43. RECORD CLEARED OF CHARGES

If the final decision sustains the contention of the conductor, the records shall be cleared of the charges if any have been made against him and he shall be returned to his former position or to that for which he is contending and compensated for any wage loss suffered by him."

Under Rule 42, the conductor may present his grievance or claim at each hearing and appeal either personally or through his duly accredited

representatives. Kane was not at any of the times mentioned above and so far as the Board knows is not now a member of the Conductors' Organization. He chose to present his grievance personally. There is no question he requested and was accorded a hearing under Rule 39 within 30 days of his dismissal. The decision confirming his dismissal after hearing was made on November 16, 1949. He then had 60 days to exhaust his right to appeal to the Carrier, and failing in such an appeal, could resort to this Board for relief.

The Carrier states that Kane and friends on his behalf made repeated appeals to the Carrier. Whether such appeals were made in writing is not clear from the record. The Organization made a demand for the material relating to dismissal, the transcript of hearing and the appeal taken by Kane. The Carrier refused to make the material available in a letter which makes reference only to the material relating to the dismissal on the ground that since there was no question that Kane was dismissed, the letters and documents having to do with his dismissal have no bearing on the Carrier's right to reinstate. The Carrier has offered to make such material available to this Board if it believes the material is relevant.

The Employes make several contentions.

First, it is suggested that so far as the Organization knows, the appeal of Kane for leniency was not in writing, as required by Rule 41. Rule 41 is a procedural rule. It is intended as a protection to both the grievant and the Carrier. Assuming that the appeal was verbal and not in writing, only the Carrier can complain of this fact. Certainly the grievant is not injured thereby, nor can we see any harm to the employes.

Second, it is argued that the time limits of Rule 40 were not complied with. The record shows that Kane was reinstated on January 9, 1950, within a period of 54 days of confirmation of his dismissal, and within the 60 day period provided for appeals in Rule 40. We do not have to pass on the issue as to whether the Carrier may waive the time limit specified in Rule 40. It should be stated in passing, however, that unlike Rule 41, the time limit provided in Rule 40 exists not only for the protection of the Carrier, but their application has a direct effect on the seniority rights of other employes.

Third, it is contended that Rule 43 was violated by the Carrier in the following particulars: (a) Kane's record was not cleared of charges; and (b) Kane was not "returned to his former position" in that he was put on the extra list, the first assignment of a junior conductor. These contentions, as well as the contention that return on the basis of leniency does not restore an employe to his former seniority standing, are bottomed on the assumption that the only favorable disposition of an employe's appeal is under Rule 43.

Rule 43 fixes the rights of an employe who has successfully contested the Carrier's disciplinary action. In general it determines the rights which this Board must accord to an employe if it finds that a Carrier's action was unwarranted. In numerous cases, however, this Board had upheld the Carrier's action but has, because of mitigating circumstances modified the penalty imposed. Rule 43 does not preclude such action. Nor does it prevent the Carrier from giving recognition on its own initiative to mitigating circumstances. In fact, in many cases employe organizations during the processing of a grievance will request modification of a penalty and Carriers have frequently yielded to such requests.

It is highly important that the manner of handling discipline cases be kept flexible. Discipline may vitally affect the careers and families of employes. It is desirable that to the maximum extent possible that disciplinary actions be taken in such a way as to salvage an employe and not to injure him. Thus, for example, in cases involving employes who drink

on the job, drastic action initially may serve to shock the employe into realizing the full consequences which may result from his course of conduct. When the employe has determined to change his way of living, he should be given the opportunity to do so.

Treatment of a considerate character is far more important than punishment. Discipline which regards each employe as an important member of society, and considers disciplinary action not as a mere incident or episode to an employe, but as an action which may have a profound effect on his development is to be preferred. This approach to discipline may prevent another casualty, another burden to the community. It may turn the employe toward a course of conduct which will make it possible for him to support himself and his family and to make a contribution to society. This approach to discipline operates both for the welfare of the Carrier and its employes.

This Board will be slow to freeze the disciplinary process. There can be no serious question that if the Organization represented Kane that his reinstatement on the same terms as are involved herein, in response to the Organization's appeal would not be a violation of Rule 43. We do not beileve that a different result follows because the employe chooses to represent himself.

The basic issue is whether the Carrier's action violated the seniority rights of the other conductors on the roster. The seniority roster itself was never changed, but it is a fact that for a period of 54 days employes junior to Kane moved up one place on the list, and when Kane was reinstated, they were moved back to their original positions. The Employes rely on several Awards but these involve situations which are clearly distinguishable: Award 1243, Third Division, where reinstatement took place more than three years after discharge; Award 4195, Third Division, where the employe was reinstated after 81 days but took no appeal from the order of dismissal; Award 468, Second Division, where boilermaker was reemployed six months after dismissal as a laborer on a job not covered by the Boilermakers' contract; and Award 4461, Third Division, where the employe contracted with the Carrier contrary to the provisions of the collective bargaining Agreement. Reliance is also placed on **R. D. Langhurst, et al., Plaintiff v. Pittsburgh and Lake Erie R.R. Co., et al., Defendant,** 17 CCH Labor case 76, and **Virginia Ry. Co. v. System Federation,** 40, 300 U. S. 515. These decisions delineate the rights of the organizations in question as collective bargaining representatives. They are not in point of view of Rule 42, which gives the individual employe the right to handle his own grievance.

The Carrier cites Award 1184, Second Division, in which the Board declined to upset a reinstatement made within 60 days of dismissal without evidence of appeal; and Awards 1697 and 5018, First Division, in which the Board without referee permitted reinstatements of employes after 2 years to stand.

The Awards cited to us show no consistent pattern. We are governed by the Agreement between the parties. The provisions relating to Seniority (Rules 24-38 inclusive) and those relating to Discipline and Grievances (Rules 39-44 inclusive) must be considered together. Every discharge case results in a step-up in seniority for employes junior to the employe discharged if the discharge stands. But the discharge may not stand, and this is contemplated by the Agreement which as has been pointed out provides not only appeal rights to the Carrier but to this Board. To give effect to all provisions of the Agreement we must hold that employes junior to an employe discharged do not move up in seniority if an appeal is taken by the discharged employe within the time provided in the Agreement, until the Carrier acts on the appeal.

Accordingly, it is our opinion that the claim in this case should be denied.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes 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

The Agreement was not violated by the Company.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 20th day of June, 1951.