

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

H. Raymond Cluster, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES**

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that

(1) The Carrier violated the provisions of the current Rules Agreement on September 10, 1951, by unilaterally reinstating, with full seniority rights, Clerk Phyllis E. Jones, whom the Carrier had dismissed for cause on or about June 4, 1951;

(2) The Carrier make the necessary adjustment in the seniority status of Clerk Phyllis E. Jones; and

(3) Helen Horvath and all other employees adversely affected by the reestablishment of said seniority date and the assignment of Phyllis E. Jones to work in accordance with her former seniority date shall be restored to their former positions and compensated for any and all monetary losses they were caused to suffer.

EMPLOYEES' STATEMENT OF FACTS: Phyllis E. Jones was first employed by this Carrier on May 6, 1943 as a Clerk and is so shown as P. E. Anderson on the Clerks' Seniority Roster, Transportation Department, Gary Division, District No. 9, Line No. 304, issued January, 1944.

She was dismissed from Carrier service on or about May 28, 1951, after an investigation was conducted and the decision was rendered by the employing officer of the Carrier. The decision was accepted, i. e., that Phyllis E. Jones was guilty as charged and that she was dismissed from Carrier service; and her record as an employe was accordingly closed.

No appeal was made by the Organization representatives on basis of merit in connection with this case.

On September 10, 1951, the Carrier permitted Phyllis E. Jones to exercise her seniority over Helen Horvath, incumbent of Position No. 40, who holds a seniority date of January 12, 1949; and, by so doing, gave her preference over Helen Horvath and approximately ninety-eight (98) other employes then in the service holding seniority rights. Concurrent with aforementioned reemployment of Clerk Jones, the Carrier has shown her on the

its thinking with respect to the issues raised by this dispute in order to avoid similar or related situations in the future.

In view of the foregoing, the Carrier requests that if the Board sees fit to sustain the claim in this case, it include in its findings and opinions its responses to the following queries, for the information and guidance of all concerned:

1. Is a discharge in a case like that of Mrs. Jones to be considered final and irrevocable? If so:

a. Award 468 of the Second Division and Award 1243, et al., of the Third Division are upheld, but what is the theory by which the Board explains the host of contrary awards ordering carriers to reinstate employees found discharged for cause to service with seniority unimpaired?

b. What is the present seniority status of employees who have been reinstated with seniority unimpaired by carriers who were ordered to take such action by the various Divisions of the N.R.A.B.?

c. What, if any, appeal procedure may be followed in the future by carriers when discharged employees seek reconsideration of their cases, either by their own initiative or through unions representing them?

d. How may this or any other carrier act to correct a mistaken or unjust discharge in a case in which lesser discipline should have been imposed?

e. What faith may be put in decisions of the United States Supreme Court in cases such as *Moore v. Illinois Central R. Co.*, which held that a discharged employee may elect to treat the discharge as final or to treat it as interlocutory and appeal it?

2. If the discharge is not to be considered final and irrevocable in cases like that of Mrs. Jones, on what theory is the claim of the Organization sustained?

a. Did the Carrier violate the agreement existing between it and the Organization? If so, which provisions were violated? Did such violation wrong the Organization? Other clerical employees?

b. Did the Carrier's improper act consist in its failure to obtain the concurrence of the Organization in the reinstatement of Mrs. Jones with seniority unimpaired? If so, from what source did the Organization obtain the right to participate in such decisions? (The Carrier has explained in this submission the basis upon which it believes such right accrues to management, i. e., the responsibility to the public, the authorities, and other employees, which it has for the conduct of the business, a responsibility which requires for its proper discharge a certain minimum control over the make up and activities of its personnel force.)

All material data included herein have been discussed with the Organization either in conference or in correspondence.

(Exhibits not reproduced.)

OPINION OF BOARD: Phyllis E. Jones was employed by Carrier as a clerk on May 6, 1943. She was dismissed from Carrier's service on June 4, 1951 after having been charged with and, after investigation, found guilty of failure to report for duty on certain dates. On September 5, 1951 she

was reinstated to employment with her original seniority, and on September 10, by the exercise of this seniority, she displaced H. Horvath in Position No. 40. It is the position of the Clerks' Organization that when Jones was discharged, she lost any seniority which she had acquired under the Agreement, and that when Carrier unilaterally restored her seniority, it was a violation of the Agreement and adversely affected all those employees holding less seniority than Jones. Claim is made on behalf of Horvath and all other employees adversely affected that they be compensated for all monetary losses due to the exercise by Jones of her old seniority date after her reinstatement.

The basis of the claim is that upon Jones' discharge, she ceased to be an employee of Carrier and her seniority rights under the Agreement were terminated. When she was returned to the service of the Carrier, it was as a new employee and her seniority under the terms of the Agreement should have dated from the time her pay started after her return to service, absent a mutual agreement to the contrary between the Organization and the Carrier, the parties to the Agreement. It is urged that the Division has upheld this position specifically in Awards 1243, 1419, 2093 and 4195.

Carrier maintains that it has the right to reinstate and restore the seniority of an employee whom it has discharged. It makes no difference whether Carrier's action is taken as the result of an appeal by the employee—with or without representation by the Organization—under the appeal procedure of the Agreement; as the result of a plea for leniency by the employee—with or without representation by the Organization; or as the result solely of the Carrier's own decision. Carrier does not concede the correctness of the cited awards, but contends that in any case they do not support the present claim, since those awards were based upon reinstatements on a leniency basis, whereas in this case the reinstatement followed an appeal by the employee under the Agreement. This latter statement is in dispute, the Organization claiming that no appeal was filed by Jones and that her reinstatement was on a leniency basis.

The question of whether a Carrier unilaterally may reinstate discharged employees with their original seniority intact on a leniency basis has been decided consistently in the negative by this Division in a series of cases beginning with Award 1243, which was based in part on Award 468 of the Second Division. Award 1243 was followed by Awards 1419, 2093 and 4195. In each of these cases, an employee was discharged, and there was a specific finding that he was reinstated with his previous seniority solely on a leniency basis. In all but one case, there is a finding that no appeal was filed; in that case, Award 2093, there was some doubt as to whether an appeal was filed, but the Board held that even assuming there had been a proper appeal, the employee did not win the appeal but was reinstated solely on a leniency basis. In the only case brought to our attention which involved a similar factual situation and in which the claim was denied, the ground was that the Carrier and the discharged employee treated the interim between his discharge and reinstatement as a suspension and that it was considered so by both parties in good faith; and further, that his name appeared on the new seniority roster posted during this period and was not protested by the Organization within the time required by the rules. The effect of the other cases cited is in no way diminished by this case. See Award 2015. Award 6950, cited by Carrier in this connection, does not involve the right of the Carrier to reinstate an employee. It deals with the rights of an employee after he has already been reinstated with seniority unimpaired.

The principles established by these cases may be stated briefly. Where an employee has been discharged and later reinstated by the Carrier, not as a matter of right by virtue of successfully prosecuting an appeal, but as a matter of managerial grace or leniency, the Carrier may not unilaterally restore his original seniority date at the time of his reinstatement, since this is an infringement upon the contractual seniority rights which accrued to other employees during the period when the discharged employee was not employed by the Carrier. However, if the employee is reinstated as the result of insti-

tuting and winning an appeal, he must be reinstated with his original seniority date, since his discharge was void from the start.

Applying these principles to the case before us, we are met with the problem of deciding whether Jones was reinstated as the result of a decision on appeal that discharge was not justified, or merely on the basis of leniency. Although Rule 27 requires that an appeal be in writing, there is no copy of the appeal or its disposition included in the record. We are therefore left without exact knowledge of the nature of the appeal and the decision thereon. Carrier's submission contains various statements descriptive of Jones' discharge and reinstatement. In its statement of facts, Carrier first says that

"Mrs. Jones was reinstated to the service of the Carrier with seniority unimpaired, and with no pay for time lost, upon the Carrier's conclusion that the disciplinary purposes of the Carrier had been served adequately in Mrs. Jones' case by the period of non-employment which she had endured."

Later on, in the same statement of facts, Carrier states:

"Appeal was made and prosecuted by Mrs. Jones pursuant to the provisions of Rule 27, following the investigation and hearing and her subsequent dismissal as a result of the findings of the hearing officer. Consonant with the practice which had prevailed on the property throughout the past, the hearing officer, to whom the appeal of Mrs. Jones was addressed, looking favorably upon the appeal, reinstated Mrs. Jones with seniority unimpaired, after a period of three months of loss of time, but with no pay for work lost during that period.

"Mrs. Jones progressed and pleaded her own appeal and was not represented in the appeal proceedings by any person connected with the Organization, in an official capacity or otherwise."

During the course of its argument in its submission, Carrier indicates that this case was an example of

"the not uncommon practice of reinstating certain discharged employees to service with seniority unimpaired; the discharge in each case amounted, in effect, to suspension, and the reinstatement with seniority unimpaired amounted, in effect, to termination of the suspension period."

At another point in the submission, Carrier stated the facts thus, after reciting the circumstances of her discharge:

"Her superior, L. W. Awe . . . caused Mrs. Jones to remain out of service for a period of three months. He then reinstated her to service with seniority unimpaired, as it always had been the practice to do in such cases, when it appeared to him that the discipline purpose had been adequately served."

The Organization filed a Rebuttal Brief in answer to Carrier's submission and also a Surrebuttal Brief in answer to Carrier's Statement in Oral Argument. In neither of these documents did it attempt to refute Carrier's assertion in its submission that Jones had filed an appeal; in fact, no mention of any kind was made of the point. At the oral argument by the parties before the Board with the Referee sitting as a member, the Organization representative stated that the dispute had been handled on the property on the ground that Jones was reinstated on a leniency basis, and that the fact of her having filed an appeal was never raised by the Carrier. Carrier representative indicated that he did not think the question of appeal was the basic question in the case, but took the position that since the Carrier's statement in its submission had gone unrefuted by the Organization, it must be accepted as true by the Board.

At the panel argument before the referee, attention was drawn, in support of the Organization's position that the matter was handled on the property on the basis that Jones had been reinstated on a leniency basis, to a letter from Assistant Vice President Brandt of the Carrier to General Chairman C. E. Kief of the Organization. This letter, dated May 1, 1952, appears as an exhibit in Carrier's submission, and reads in part as follows:

"Please refer to your letter of March 19, 1952, concerning your Case No. J-335 in which you appealed to me a claim in behalf of Helen Horvath and other clerical employees who might be adversely affected by the carrier's action in reinstating Miss Phyllis E. Jones to its service on September 10, 1951, on a leniency basis following her dismissal from service on June 4, 1951.

"At our conference on March 26, 1952, we discussed this case and you alleged that the carrier had violated the existing agreement between your organization and the carrier in two ways. First, you contended that the carrier did not have the right unilaterally to reinstate Miss Jones without the permission of your organization and, secondly, that the carrier should not have permitted Miss Jones to exercise the seniority thus restored to her in displacing Helen Horvath. We discussed this matter at length and I explained to you my position that the carrier alone has the power and the right to grant a discharged employe reinstatement and that such power and right are in no way dependent upon the permission or acquiescence of employe representatives. Therefore, I feel that the carrier did not violate the agreement with your organization in reinstating Miss Jones."

As the first point in our consideration of this case, we feel that we are bound by the principles enunciated in Awards 1243, 1419, 2093 and 4195. The same arguments made by Carrier in this case were advanced in those cases and were rejected. A series of such consistent findings over a long period of time, with no contrary awards, are entitled to great weight and we see no reason to depart from the principles to which they have adhered. Thus, if the reinstatement here was made on the basis of leniency rather than as a matter of right after appeal, the claim should be sustained. As set forth in Second Division Award No. 468, upon which the cited awards are based, and as recognized in numerous awards of the Division, there are two grounds for appeal of a discharge from which reinstatement with seniority unimpaired may result as a matter of right, as distinguished from leniency. First, the appeal may be on the ground that the employe was not guilty of the offense with which he was charged. If an appeal on this ground is sustained, the Carrier is required under the usual rules—in this case, Rule 32—to place the employe back in the position he would have been in had the discharge never occurred. It is clear that no appeal was progressed or granted on such a ground in this case.

The other ground is that, although the employe was proved guilty of the offense charged, the punishment of discharge was excessive—meaning it was arbitrary, unjust and improper for the Carrier ever to have imposed it, so that as a matter of right, the employe is entitled to reinstatement with seniority unimpaired and to be given a punishment less severe than discharge. If Jones was reinstated as the result of appeal rather than leniency, it must have been on this latter ground. The varied practices and attitudes on this and other carriers with regard to discharges make it difficult indeed in any particular case to pinpoint the motive for reinstatement. An apparently common practice, described by Carrier in its submission as being applicable to this case, is to discharge an employe found guilty of an offense, with the private intention of reinstating such employe within a particular period—30, 60 or 90 days perhaps. In such a case, the intention is to accomplish a suspension, nothing more, and it is urged that the discharge and reinstatement be so regarded. Does the Carrier admit, in such a case, that its initial action in discharging the employe was arbitrary, unjust and excessive, and that it had no right to discharge the employe in the first place? We do not under-

stand that such is the Carrier's position in this case. We understand that Carrier insists that it did have a right to discharge Jones and then later on, in its own discretion, rather than by the application of any yardsticks such as arbitrariness or unjustness, to decide that Jones had suffered enough and that the penalty should be reduced. In other words, it was not a matter of setting aside a penalty improperly imposed, but a matter of the Carrier's exercising its own discretion to reduce a penalty rightfully imposed, on the basis of whatever reasons indicated such action in the Carrier's opinion.

Whether or not an appeal was filed, within the meaning of Rule 27, is a doubtful question on this record. However, even assuming that an appeal was filed, we do not think, on the basis of the whole record, that Jones was reinstated as the result of such appeals being upheld; but rather on the basis of leniency as that term is generally used and understood in situations of this kind. We do not mean to imply that there may not be situations where a Carrier has reinstated and will reinstate discharged employees on the basis of a finding on appeal that the original discharge represented an arbitrary and excessive punishment. In such cases, the right to reinstate with seniority unimpaired is clear. But this is not such a case, nor in our opinion is any other situation where it is determined in advance to discharge and later reinstate so as to produce, in effect, a suspension. If the Carrier suspends an employee, well and good; the employee receives a definite punishment and does not lose his seniority under the rules. But under rules such as those in the Agreement here, and under the principles declared in Awards 1243 and those following, if the Carrier chooses to discharge the employee and reserve to itself the right to decide when and under what circumstances the employee will be reinstated, he may not unilaterally be reinstated with his original seniority.

At the panel argument before the Referee, it was urged on behalf of Carrier that the claim was barred by Rule 33 of the Agreement and by laches. We do not think Rule 33 is applicable in this case; and, in the absence of a time limit in the Agreement, we will not in this case bar consideration of the merits of the claim because of the delay in bringing it before the Board.

Since Jones has been discharged permanently from the service of the Carrier since the claim was filed, no adjustment in her seniority status as requested in paragraph (2) of the claim is necessary and that paragraph is dismissed. Paragraphs (1) and (3) are sustained.

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 Employees involved in this dispute are respectively Carrier and Employees 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

That the Agreement was violated.

AWARD

Paragraph (2) of the Statement of Claim is dismissed, paragraphs (1) and (3) thereof are sustained, as per Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 1st day of October, 1956.