

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**

KANSAS CITY TERMINAL RAILWAY COMPANY

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

(a) That the Carrier violated the collective bargaining Agreement of October 1, 1942, amended, between the parties, and particularly the provisions thereof governing the establishment and exercise of seniority rights, when on July 1, 1953, it unilaterally reinstated Mr. Archie A. Brashear to the position of Foreman, Mail and Baggage Department, the position held by the said Archie A. Brashear at the time of his dismissal from the service in November, 1947, and;

(b) That the Carrier further violated the provisions of the collective bargaining agreement of October 1, 1942, amended, when it unilaterally and concurrently with the reinstatement of Mr. Brashear to his former position on July 1, 1953, restored his original seniority date of April 21, 1926, and;

(c) That the Carrier shall therefore remove the name of the said Archie A. Brashear from the seniority roster of the Mail and Baggage Department, and;

(d) That the Carrier shall remove the said Archie A. Brashear from the position of Foreman to which reinstated July 1, 1953, and deny to him any position to which he may be assigned subsequently under a seniority rank and date other than July 1, 1953, and;

(e) That Harold L. Baker, the employee who held the position of Foreman and who was displaced by the said Archie A. Brashear on July 1, 1953, be restored to such position and paid the difference between the rate of pay of Foreman and any position or positions on which he was required to place himself, retroactive to July 1, 1953, and;

(f) That employees, other than Harold L. Baker, displaced as the result of the return of Archie A. Brashear to the service likewise be returned to their former positions as though the said displacements had not taken place and be made whole for any monetary loss resulting therefrom retroactive to July 1, 1953.

man's wrongful discharge, even though there was available to him statutory procedure for settlement of his grievance by National Railroad Adjustment Board, and even though Court might be required in action to construe collective-bargaining agreement." CA Pa. 1951, 191 F. 2d 560.

In *Priest vs. Chicago, R. I. & P. R.R. C. A.* Ark. 1951, 189 F. 2d 813. The Court said:

"Discharged railroad employe may bring action for damages upon claim that he was wrongfully discharged without first seeking adjustment of his controversy through National Railroad Adjustment Board."

In *Wilson vs. St. Louis-San Francisco Ry. Co., Mo.* 1952, 247 S. W. 2d 644. The Court said:

"Although action brought by engineer for wrongful discharge was a matter within the jurisdiction of the National Railroad Adjustment Board, the mere fact that it was a claim growing out of a Railway Labor Agreement and that engineer was a member of the Union did not in itself give the Board exclusive jurisdiction, but the engineer had the right of election to proceed before the Board or to file suit at common law."

In *Watson vs. Missouri-Kansas-Texas R. Co. of Texas*, Tex. Civ. App. 1943, 173 S.W. 2d 357. The Court said:

"An employe's action against Railroad growing out of grievances or out of interpretation of agreements concerning rates of pay, etc., may be brought at the employe's election either in a Court or may be settled by the administrative remedies prescribed by this chapter."

Brashear chose to institute civil suit. In his suit he asserted that his rights under the agreement had been violated and that his discharge was unjust and unlawful. Brashear was reinstated as a part of the Carrier's settlement of his lawsuit. Leniency was in no way involved.

Carrier submits that under these circumstances no seniority rights of the employes displaced by Brashear's reinstatement have been violated. The rule of Award 4195, a leniency case, is not involved in this dispute. Carrier certainly had the right to settle and compromise the lawsuit which Brashear brought, and in so doing, its action comes within the language quoted above from Award 1243 and in the principle upon which the decision in Award 5372 was based. Accordingly, the claim should be denied in whole.

The facts presented in this submission were submitted and discussed in conference on the property.

The Carrier preserves to themselves any rights they may have or have acquired under the Railway Labor Act or decisions thereon and without prejudice to our position with respect to the question of jurisdiction of the Third Division account non-compliance with Section 3 First (j) of the Act.

(Exhibits not reproduced)

OPINION OF BOARD: On September 12, 1947 an altercation took place between Foreman Archie A. Brashear and Assistant Foreman J. W. Shenkel. During this altercation Brashear received a knife wound and was immediately taken to a hospital. He remained in the hospital until September 25, 1947. On September 12 (according to the Organization) or September 14 (according to Carrier), both Brashear and Shenkel were suspended from service. Carrier charged Shenkel with having violated Company Rule "N" and under date of September 18, 1947 he filed a request for an investiga-

tion. On September 22, Shenkel returned to work. On October 22, Carrier wrote to Shenkel setting the date of his hearing as October 31. The hearing was held on October 31 and November 5, 1947.

Meanwhile, Brashear received no notice that he was suspended from service or that he was charged with any violation. He appeared as a witness at the hearing held for Shenkel, but was not informed that he was subject to any discipline as a result of his appearance at that investigation. On November 15, 1947 both Brashear and Shenkel were notified in writing by the Carrier that they were discharged for violation of Rule "N", as brought out by the investigation held on October 31, 1947 and November 5, 1947. Shenkel appealed his dismissal and this appeal was handled on the property during the period from November 17, 1947 until September 7, 1948, at which time it was finally declined.

It does not appear that Brashear ever filed an appeal from his discharge. His statement in the record is:

"On Nov. 15, 1947 I received a letter from the Carrier that I had been discharged for violation of Rule 'N' as brought out at Shenkel's investigation. This was a complete surprise to me and my protest (sic) to the Carrier and the Brotherhood were ignored. The Carrier told me that I had received an investigation under the agreement and the Brotherhood refused to help me or do anything to protect my seniority and job rights in any way. As a result, I was foreclosed from any recourse to this Board and was compelled to employ a lawyer and file a lawsuit for wrongful discharge. It was my contention from the beginning of this dispute that I had not violated any rule of the company and had given the company no reason to discharge me; that I was not given an investigation as required by the agreement and was entitled to reinstatement. I instructed my attorney that I wanted reinstatement and that I wanted my job and seniority with the Carrier restored to me . . ."

On March 10, 1949 Brashear filed suit against the Carrier in the Circuit Court of Jackson County, Missouri, for damages for wrongful discharge and damages for the injury sustained in the fight with Shenkel. Numerous motions and other procedural steps followed, but the matter never came to trial. Brashear and the Carrier settled the case on May 29, 1953. One of the terms of the settlement was that Brashear was to be returned to service as Foreman of the Mail and Baggage Department with his seniority rights restored. He was so returned to service effective July 1, 1953.

Brashear's attorney states that he was retained by Brashear on December 2, 1947 and was told that Brashear desired reinstatement by the Carrier without loss of his 21 years of seniority. He states:

"The lawsuit itself was filed March 10, 1949 after every possibility of securing Mr. Brashear's reinstatement by negotiation had been exhausted . . ."

"During all of the time that the loss was pending, periodic efforts were made to secure Mr. Brashear's reinstatement. The Carrier repeatedly refused to do so, until June of 1953 at which time it was agreed to reinstate Mr. Brashear with seniority."

Brashear's attorney then goes on with the following statement:

"A dilemma of the first order was inherent in Mr. Brashear's desire for reinstatement. He was an employe with 21 years seniority with a good work record and had been discharged after being criminally assaulted by a fellow employe. He had not been suspended from service, but had been discharged as the result of an investigation of charges of rule violation against the employe who had assaulted him. He wanted reinstatement, but had been abandoned by his union. His employer had taken the position that he had had an investigation and his immediate superiors had told him that there

was nothing that they could do for him. The time in which he could prosecute his administrative remedies had lapsed. He could obtain damages at common law, but the courts lacked the jurisdiction to order his reinstatement. My belief from the outset was that he had been unjustly discharged and that I could ultimately persuade the Carrier to reinstate him for that reason, to remedy the injustice done."

When Brashear was reinstated, the Organization protested on the ground that this was a violation of the seniority provisions of the Agreement. After the usual handling on the property, the claim reached this Board. In addition to claiming the violation, compensation is demanded for the employee displaced by Brashear and all other employees who were consequently displaced.

Claimant's contention is that this case is similar to Award 468 of the Second Division and Awards 1243, 1419, 2093, 4195 and 7419 of this Division. It is claimed that Brashear was not reinstated as a matter of exoneration after following the appeal procedure set forth in the Agreement, but that his reinstatement was a matter of convenience for the Carrier, enabling it to avoid the consequence of the lawsuit which Brashear had filed against it. It is argued further that when Brashear elected to sue for damages in the Missouri Court, he lost any rights he may have had to reinstatement under the Agreement. Having been finally discharged, with no right of reinstatement under the Agreement, he could be rehired only as a new employee.

Carrier, on the other hand, asserts that this case differs from those cited in two important aspects. First, in each of those cases the discharge occurred after a proper hearing; and second, in each of those cases the reinstatement was on the basis of leniency, whereas here the reinstatement was as the result of a continuing claim by Brashear that he had been wrongfully discharged, which claim had been prosecuted in the courts rather than under the Agreement, but was not any less effective as a claim of right on the part of Brashear.

This is an unusual case in many respects. Ordinarily, a claim based upon discipline without proper hearing is advanced by the Organization on behalf of a discharged employee who is seeking reinstatement; and technical arguments to the effect that the employee lost his rights by failing to comply with time limits or other similar requirements of the rules are advanced by the Carrier. Here, we have the Organization advancing such arguments to defeat an employee's right to a hearing, and the Carrier freely admitting that it flagrantly violated the Agreement and the requirements of due process in discharging the employee without a hearing. The discharged employee claims that the Organization which represented him at the time of his discharge refused his requests for help.

The Organization flatly denies that it was ever asked to help him or that it refused to help him.

Were this case before the Board on a claim filed by Brashear demanding that he be reinstated with full seniority because he was discharged without a hearing, and the facts before us were limited to the facts presented in this record, it appears likely that his claim would be sustained under the awards of this Division. However, the claim is not before us in that posture. Brashear never filed a claim with this Board. It appears from the record that he felt that he was unable to do so. He says that he was "foreclosed from any recourse to this Board". His lawyer says that "every possibility of securing Mr. Brashear's reinstatement by negotiation had been exhausted", and that "(h)is employer had taken the position that he had had an investigation and his immediate superiors had told him there was nothing that they could do for him. The time in which he could prosecute his administrative remedies had lapsed." Under the Agreement and the Railway Labor Act, however, Brashear had a right to carry his claim that he had been discharged without a hearing to the highest officer of the Carrier designated to deal with such claims, and failing a remedy there, to file the claim with this Board. The Board is the final arbiter of such questions as whether Brashear's

claim was barred by any time limitation in the rules, and whether he received a proper hearing or not.

We are not unmindful of the difficulties faced by an inexperienced employe and any attorney unversed in Adjustment Board procedures in processing such a claim; particularly if, as Brashear alleges, the Organization was acting against his interest. However, we must decide the case on the basis of what his rights were, not on the basis of what he thought they were. Brashear, unwittingly or not, failed to pursue his asserted right to reinstatement under the Agreement to a conclusion by filing a claim with this Board. Instead, he filed a suit for damages in the Missouri State Court. It is clear, *and not contested by any party, that had he continued that suit to a successful conclusion*, he could not have obtained reinstatement from the Court. We think it was too late in July, 1953 for him to obtain such reinstatement by means of a private settlement with the Carrier.

It is difficult to balance the rights of Brashear, deprived of 21 years of seniority apparently without a hearing, and the rights of the other employes whose seniority rights were disturbed by the reinstatement of Brashear nearly six years after his original discharge. We can only try to carry out the Agreement provisions affecting the rights of all employes, as we understand them. It appears to us that the subject of reinstatement of employes after dismissal for disciplinary reasons is specifically covered by Rule 24 of the Agreement. This rule provides that a dismissed employe shall be reinstated and paid for all time lost "if the final decision decrees that charges against the employe were not sustained". The "final decision" referred to is the final decision in a procedure set forth in Rules 19-21, which, under the Railway Labor Act, terminates in an appeal to this Board. In this case, there was no such appeal and thus there was no final decision or exoneration under the rule. The equity of Brashear's position is appealing; however, to permit his reinstatement with original seniority after six years during which he followed a different procedure than the one provided in the Agreement and the Act to secure such reinstatement, cannot be justified. We do not know what reasons impelled the Carrier to deny reinstatement to Brashear for six years, but it is difficult to believe that after that length of time, Carrier suddenly saw the light and reinstated him as a matter of right. In our view, in July of 1953, Brashear no longer had a "right" to reinstatement under the Agreement. His situation, therefore, was similar to those in the awards cited, *and under the reasoning of those awards the claim should be sustained*. Brashear is, however, entitled to a seniority date of July 1, 1953, the date on which he last returned to the service of the Carrier.

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

That the Agreement was violated, in accordance with the Opinion.

AWARD

Claim sustained, in accordance with Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 5th day of December, 1956.