

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Frank M. Swacker, Referee

PARTIES TO DISPUTE:

**THE ORDER OF RAILROAD TELEGRAPHERS
THE CHICAGO, BURLINGTON & QUINCY RAILROAD CO.**

STATEMENT OF CLAIM: "Claim of the General Committee of the Order of Railroad Telegraphers on the Chicago, Burlington & Quincy Railroad, that, G. F. Howard, regularly assigned to the position of Agent-Telegrapher at Oberlin, Kansas, discharged on October 5th, 1932, be reinstated to former position with all seniority rights restored; and, that he be retroactively reimbursed for all monetary loss sustained."

STATEMENT OF FACTS: Claimant was discharged October 5, 1932, after an investigation on charges of a rules violation.

No further hearing was held but an appeal was progressed through usual channels on a leniency basis and reinstatement denied. Thereafter, in January, 1934, he filed suit in the Decatur County, Kansas, court for damages denying the original charge and alleging it was the outgrowth of a conspiracy against him, that he was denied a hearing, deprived of his seniority and reinstatement in violation of the rules, and was damaged in the amount of \$3,000.00.

The case was tried in October, 1936, and a special verdict rendered in his favor in the amount of \$500.00, as for loss of seniority rights, but nothing as for actual damages.

POSITION OF EMPLOYEES: The employe claims he did demand a hearing—after the investigation—and that it was not granted, and he also claims he was not furnished a full copy of minutes of the investigation, as the rules required.

He further claims that the effect of the judgment of the Kansas court was to find him not guilty of the original charge, and that such being the case he is entitled to be reinstated with pay for time lost, and with seniority unimpaired.

POSITION OF CARRIER: The Carrier denies ever receiving the alleged request for a hearing, and points to the fact that there is no claim of any follow-up or any mention of the failure to grant the request and that it had no knowledge of any claim in that respect until the Kansas suit.

That in any case claimant elected to proceed as he did at law for damages for alleged breach of the agreement, recovered judgment which was satisfied, and that he is, therefore, now barred from further proceeding either before this Board or elsewhere on the cause of action; that the whole matter is res judicata.

OPINION OF BOARD: In respect to the Carrier's contention that the Kansas action is a bar to this proceeding, petitioner claims that that action rested on alleged violation of Rules 30 A and 30 E, which relate to hearing and transcript of hearing, while the present action is under Rule 30 F, which provides that if the charges are not sustained, the employe will be reinstated with pay for time lost; that the actions are for separate breaches and that consequently separate actions can be maintained. Claimant further shows that at

the time he instituted his suit at law there was no system or regional or other adjustment board to which he could go for reinstatement under Rule 30 F, and that he could not have sought it in the Kansas action, because the courts will not grant specific performance of an employment contract. While it is not necessary to decide whether he was without remedy in the courts, equivalent to reinstatement, it should be borne in mind that the amended Railway Labor Act was enacted five months after he filed his Kansas suit, and he did not bring the suit to trial for two years after that. At any time during this interval he could have discontinued or stayed the Kansas suit in order to prosecute this proceeding.

It must be held therefore that he made an election of remedies, and that he is bound thereby.

The contention that Rule 30 F was not involved in the Kansas suit is not borne out by an examination of the complaint. Paragraph 6, thereof, expressly alleges as one of the breaches of the contract for which damages were sought, the defendant's refusal to reinstate the plaintiff. Furthermore, the whole basis of this proceeding is that the verdict of the Kansas court vindicated or cleared him of the original charge. But this is pure assertion and directly contrary to the reasonable inference from the special verdict which was for "loss of seniority rights," with the question as to actual damages unanswered. From this and the amount allowed, it is more reasonable to assume that the jury concluded he had asked and been denied a hearing, or that he had been refused a full copy of the transcript of the investigation, than that they considered the charges unfounded. Had the latter been the jury's conclusion, it is inconceivable how they could have failed to allow him the full amount sued for as he could show loss of time exceeding that.

The conclusion of the Board is that the cause of action was indivisible, that claimant made an election of remedies, recovered judgment which has been satisfied, and that consequently the present proceeding is barred. Manifestly, he cannot recover for loss of seniority—that which entitles him to the position—and then recover the position also. The merits, therefore, are not open to consideration.

It should be noted that the claim progressed before the management was not in substance the same as that presented to this Board. Here the claim is for alleged violation of the rules through failure to accord hearing alleged to have been requested, and failure to furnish a full transcript of the investigation held by the superintendent, and a demand for reinstatement with pay for time lost. No such claims were presented to the management. Accordingly, this claim does not conform to the requirements of the Act.

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 employe involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act, as approved June 21, 1934; and

That the Board is without jurisdiction.

AWARD

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 7th day of April, 1938.