

**NATIONAL RAILROAD ADJUSTMENT BOARD**  
**THIRD DIVISION**

**Harris L. Danner, Referee**

**PARTIES TO DISPUTE:**

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

**TEXARKANA UNION STATION TRUST**

**STATEMENT OF CLAIM:** "Protest of the System Committee of the Brotherhood, against the establishment of seniority date of November 16, 1926, for Otto Howell on the January, 1939 Mail and Baggage Handlers' Seniority Roster, and further claim that all employees adversely affected by the establishment of said date and assignment of said Otto Howell to work in accordance with said date shall be compensated for all monetary losses suffered."

**EMPLOYEES' STATEMENT OF FACTS:** "Otto Howell was first employed by this carrier on November 16, 1926. He was dismissed from the service on October 18, 1935, after an investigation was conducted and decision thereon was rendered by the employing officer of the carrier.

"The decision that Mr. Howell was guilty as charged and that he was dismissed from the service was accepted, and his record as an employee was accordingly closed.

"On January 5, 1939, the Carrier permitted Mr. Howell to re-enter its service and assigned him to a position of mail handler in preference to some 14 or 15 employees then in the service holding seniority rights.

"Concurrent with aforementioned re-employment of Mr. Howell the Carrier corrected the January, 1939 Seniority Roster by showing Mr. Howell thereon with a seniority date of November 16, 1926, despite the fact that Mr. Howell had been definitely dismissed and removed from service on October 18, 1935.

"The Carrier has since January 5, 1939, continued to permit and assign Mr. Howell to work in preference to employees who were in the service on January 5, 1939, and holding seniority rank below the date of November 16, 1926, causing such employees to suffer wage losses."

**CARRIER'S STATEMENT OF FACTS:** "Otto Howell, a mail handler at Texarkana, was dismissed from the service October 18, 1935 account violation of Rule 'G,' being intoxicated on the station platform and baggage room at Texarkana Union Station night of October 16, 1935.

"Rule 'G' reads:

"The use of intoxicants by employees while on duty is prohibited. Their use, or the frequenting of places where they are sold, is sufficient cause for dismissal."

"It is affirmed that all data submitted herein in support of our position has been heretofore presented to the Organization and is hereby made a part of the question in dispute.

"Management desires opportunity to have representative present at the hearing."

There is in evidence an agreement between the parties bearing effective date of September 8, 1933.

**OPINION OF BOARD:** There is little dispute as to the facts in this case. Otto Howell entered the employment of the Carrier November 16, 1926. He was charged with violation of Rule "G" October 16, 1935. An investigation was had under the rules of the current agreement, Howell being represented at the hearing. He was discharged from service October 18, 1935, the letter of dismissal reading in part:

"You are hereby dismissed from service."

No appeal was taken from the order of dismissal and same became effective, dismissal in this case being synonymous with discharge.

Howell again entered the service of the Company January 6, 1939, or a period of three years, three months, 19 days after his discharge.

Obviously, Howell was not an employe of the Carrier during the above-mentioned period, and his former place on the roster was taken by another employe.

The January, 1939 seniority roster shows Howell's name with a seniority date of November 16, 1926, same being the date that he first entered the service of the Carrier.

The reinstatement or reemployment of Howell by the Carrier was done without notice to the petitioner, or without any consent or agreement by the parties that Howell would again enter the service of the Company with a seniority date of November 16, 1926.

The placing of Howell's name on the January, 1939 seniority roster, and giving him a seniority right as of November 16, 1926, affected the seniority rights of all employes then in service having a seniority date later than November 16, 1926.

The question of the right to hear this matter without notice to Howell has been previously disposed of by Award No. 1193, of this Division, and this matter is now before the Division solely on the merits of the controversy.

The Carrier claims that it has the right at any time without the consent of the Petitioner to reinstate an employe. It maintains that it is the best judge as to what applicants are best fitted for the furtherance of its business, and that in as much as it has the responsibility to operate the business it should be the sole judge as to what parties it employs or reinstates. It claims that Howell was reinstated on a "leniency basis"; that it felt that Howell had been sufficiently punished during the interim that he was not an employe of the Company and that from the time of his reinstatement he would be a valuable employe.

We agree with the Carrier that it had the right to reinstate Howell.

However, the above is not the main point of dispute in this case. The question we are called upon to decide is; Did the Railroad have the right to reinstate or reemploy a discharged employe, Howell, and restore him to former seniority rights to the detriment of those who have acquired seniority rights later than November 16, 1926, same being the date that Howell originally entered the service of the Carrier.

Seniority means that an employe who has served longer is entitled to a preference as respects to a continuance of employment in a certain class of work. It means one who is hired last is laid off first. Once seniority is

established it cannot be arbitrarily destroyed and is entitled to protection. Conversely, once the right of seniority has ceased to exist it cannot, as against others who have acquired seniority in the meantime, be restored.

The action taken by the Carrier here affects three parties. (a) Howell, the party whose violation of Rule "G" started the train of circumstances which finally found its terminus in this Division. (b) all the employees on that particular seniority roster who have acquired a seniority date later than November 16, 1926, and, (c) the Carrier, who must bear the burden of making reparation in the event it is found that seniority rights were wrongfully restored to Howell.

The question of Discipline and Grievances under Rule 16 of the current agreement is no part of the contention here. We briefly touch on this rule for the sole and only purpose of showing that the only place in the current agreement where reinstatement is mentioned is where an employe has taken an appeal from a decision rendered against him and he is successful in his appeal. The rule reads:

"\* \* \* If the case shall at any time be decided in his favor he shall be reinstated and be compensated for the wage loss, if any, suffered by him."

As before noted, Howell was not reinstated as result of winning a decision in his favor on appeal, but was reinstated solely on a "leniency basis."

Rule 2 provides:

"Seniority begins at the time employe's pay starts on the seniority district and in the class to which assigned."

We have been furnished with precedents by the Carrier which uphold its contention that it has a right to reinstate an employe on a leniency basis. The Carrier has also furnished us examples of practice on other properties where employes have been frequently reinstated on the ground of leniency. We have also been furnished with precedents by the Employes which hold that such a practice is not embraced within the terms of the current agreement.

We believe that from all of the facts and circumstances as shown by the record herein that a proper interpretation of the rules is that the seniority of Howell is now fixed at the time of the last employment of Howell. Here was a break in the continuity of service of Howell for a period of over three years. During this period the rights of all those junior to him were increased in that when Howell stepped out another employe stepped into his place, and on down the line. The rights of seniority gained by these parties must be protected, and the Carrier cannot arbitrarily act so as to destroy these rights which were acquired while Howell was not in the employment of the Carrier and which rights existed in these employes at the time the Carrier attempted to restore Howell to his original seniority standing. This attempted reinstatement of Howell not only gave Howell the rights he had at the time he was discharged but also gave him the benefit of time when he was not in the employment of the Carrier.

We might quote from Award No. 468 of the Second Division, dated June 25, 1940:

"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."

We hold that the Carrier had the right to reinstate or reemploy Howell, but that it could not arbitrarily give Howell a seniority date of November 16, 1926. To do this would affect the seniority rights of all other employees who were in service on the sixth day of January, 1939, and whose seniority dates were later than November 16, 1926. It may be assumed that these employees have suffered a diminution of their earnings on account of the reinstatement of the seniority date of Howell as of November 16, 1926, and that if any employees have suffered a decrease in their earnings because of this action they should be compensated for such loss.

The protest and claim 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 carrier violated the rules of the agreement and adversely affected the seniority rights of the employees involved when carrier arbitrarily gave to Otto Howell seniority standing or rights as of November 16, 1926; that the correct seniority date of Otto Howell is January 6, 1939 as he reentered the service of the carrier on that date, and protest and claim of the petitioner will therefore be sustained.

#### AWARD

Protest and claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

ATTEST: H. A. Johnson  
Secretary

Dated at Chicago, Illinois, this 2nd day of December, 1940.