

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION
Fred L. Fox, Referee

PARTIES TO DISPUTE:

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

THE WESTERN PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of System Committee of the Brotherhood that Carrier violated provisions of the Clerks' Agreement when it refused request of the Brotherhood to hold investigation under the provisions of Rule 47 for the purpose of developing facts concerning unfair treatment being accorded employees in Freight Claim Department and that Vincent Howard, F. O. Bennett, W. R. Sweet, and all other employees who have been adversely affected by such unfair treatment shall be returned to their proper positions and compensated for all wage loss sustained.

EMPLOYEES' STATEMENT OF FACTS: On March 21, 1938 R. M. Robbins, Investigator in the office of Freight Claim Agent was displaced by a senior employee. While in conference on March 22, 1938 for the purpose of discussing his own displacement rights, Robbins was ordered out of the office by the Freight Claim Agent, being told that if he (Robbins) did not get out he would be kicked out.

Upon receipt of this information the Brotherhood requested Vice President and General Manager E. W. Mason to hold an investigation under the provisions of Rule 47 for the purpose of determining facts. After his own inquiry, Mr. Mason requested this Brotherhood to withhold request for investigation, assuring the General Chairman that no such condition would occur again. With this assurance, we held our request in abeyance.

Since that time conditions have become more and more intolerable. Employees have declined to make specific complaints, fearful that any action taken would bring about persecution.

During the month of February 1942 these conditions came to a head. Several of the employees asked the General Chairman to advise them as to their rights and a meeting was held, at which all but one employee was present. The employees were unanimous in their statements that they were being continually unfairly criticized concerning the performance of their work and that all had been falsely accused of laying down during the absence of the Freight Claim Agent.

After having been assigned to position of Investigator on February 7, 1942, Vincent Howard was given about two hours' instruction by one of the other employees. He then performed the work as instructed. Upon reviewing the work, Freight Claim Agent Barry informed Howard he was performing the same by an incorrect method. However, Mr. Barry gave no advice

in order that you may be in possession of complete information, the following facts are stated:

W. R. Mowbray entered the service of the Claim Department on January 19, 1920, and in May, 1938, his health became so bad as a result of a kidney condition that he could not work for long periods of time. Because of his many years of experience and efficiency in Claim Department clerical work, the freight claim agent, of his own accord, prevailed upon the Management to create an additional position exclusively for Mowbray's occupancy at a rate which was agreed to between the Clerks' representative and Carrier, and Mowbray was permitted to work on this especially created position, which was in effect for four years, only at such times as he desired. For example, when Mowbray's health was such that he felt he could work, he would report on the job, and when he did not feel able to work, he did not show up at the office. There was no obligation on the part of Carrier to create such a position of convenience, and certainly the freight claim agent was not obligated to prevail upon the Management to authorize such an arrangement. Mowbray has at all times been treated fairly and Carrier emphatically denies that freight claim agent has in any manner mistreated him. On the contrary, this official has gone out of his way to further the interests of Mowbray.

Carrier contends:

(1) Rule 47 does not provide for a hearing of the description demanded by the clerks in this dispute.

(2) V. J. Howard, although proved beyond reasonable doubt not to be qualified for position of Loss and Damage Investigator, voluntarily removed himself from the position and is not entitled to any award by your Board.

(3) The schedule gave the Carrier the right to remove Bennett and Sweet from excepted positions.

The claim of the employes should be declined.

OPINION OF BOARD: This dispute arises out of the refusal of the Carrier to conduct an investigation of certain alleged grievances suffered by the principal petitioners, who were at one time employes of the Carrier in its Freight Claim Department in San Francisco, California, as well as other employes, and existing conditions in said department. The demand for the investigation is made under Rule 47 of the current agreement, but Rule 46 being referred to, paragraphs 1 and 2 of that rule, and the whole of Rule 47 will be quoted at this point.

"RULE 46. An employe who has been in the service more than six months, or whose employment has been approved formally, shall not be dismissed nor disciplined except where fault is apparent beyond reasonable doubt, without thorough investigation by proper officials. At a reasonable time prior to the hearing, he shall be apprised of the charge against him. Ordinarily such investigation will be held within ten days after the alleged offense has been committed, at which hearing he shall have reasonable opportunity to secure the presence of necessary witnesses and may be represented by counsel of his choice. However, he may be held out of service pending such hearing. A decision shall be rendered within ten days after the completion of the investigation.

"When a decision is rendered, if employe believes it unjust, he may take up his case on appeal within ten days from date of such decision, submitting in writing his reasons therefor, to the next higher official in authority, whose decision shall be subject to appeal."

"RULE 47. An employe who considers himself otherwise treated unjustly, shall have the right of hearing and appeal as provided in Rule 46 if written request is made to his immediate superior within ten days of the cause of the complaint."

The demand for investigation being made under the terms of the agreement, must be tested thereunder, and the agreement can only be applied to

employees covered thereby. At the outset, we are met by the contention of the Carrier that, as to petitioners Bennett and Sweet, the agreement specifically excepts them from the terms and provisions thereof. No such contention is made as to petitioner Howard. The contention as to Bennett and Sweet is attempted to be met by them by the claim that they were dismissed from the positions they occupied on account of their alleged activities in pressing for an investigation of the conduct of the Carrier's Freight Claim Agent, and these dismissals are alleged to be in violation of Section 2 of the Railway Labor Act. To this contention the Carrier replies that they were dismissed in the exercise of proper managerial authority, and solely on account of inefficient work. The Carrier denies that petitioner Howard was dismissed, and says that, while he would at least probably, have been disqualified for lack of ability to perform the work assigned to him, he, in advance of such action, bid for and was assigned to another job, and contends that the claim of each of the petitioners should be denied. While the claim is filed specifically on the part of Bennett, Sweet and Howard, it, in general terms, is made to cover "all other employees who have been adversely affected" by the unfair treatment alleged, and the demand is that they "be returned to their proper positions and compensated for all wage loss sustained."

The alleged grievances complained of are of long standing. In the year 1938 the General Chairman of the Clerks' Brotherhood requested of the Carrier's General Manager that an investigation of its Freight Claim Department be made, based upon alleged mistreatment of one R. M. Robbins, who had been displaced as an Investigator. The demand was made under Rule 47. The General Manager, without questioning the procedure, requested the Brotherhood to withhold the request for an investigation, upon the assurance that the conditions complained of would not be permitted to continue. It is claimed by the petitioners that, notwithstanding this assurance, conditions in the office of the Freight Claim Department became intolerable, and specific complaints are made as follows:

Petitioner Bennett was an Adjuster, and seems to have occupied a position second only to that of the Freight Claim Agent; and petitioner Sweet was Chief Clerk in the Freight Claim Department, and both had occupied these positions for many years. While, as alleged by the petitioners, conditions in the office were not satisfactory to the employees, by reason of the continuing harsh and unjust criticism of their work by the Freight Claim Agent, matters did not reach a head until about February, 1942. Late in 1941 the Claim Agent was forced to absent himself from his office by reasons of health, and Bennett and Sweet were left in charge. The Claim Agent returned to his work, temporarily, early in February, 1942, and, according to his statements, found the office in a chaotic condition, of which he promptly made complaint, charging both Bennett and Sweet with being responsible therefor, and threatening to dismiss them from their positions. It is probable that the Claim Agent included many other employees in his criticism, and an unfortunate situation developed. On February 7, 1942, the Claim Agent assigned to petitioner Howard the position of Investigator, after a discussion between them as to whether Howard could qualify for the work. Rule 30 of the Agreement provides, among other things, that:

"It is understood that an employee with sufficient fitness and ability may not always be acquainted fully with the work of the position bid in. The officer in charge and employees will co-operate, lending all assistance possible in order to give the employee a fair opportunity to qualify."

Howard claims that this rule was violated in that no substantial effort was made to instruct him in his work. Early in March, 1942, Howard's work was reviewed by the Claim Agent, was by him found unsatisfactory, and Howard was given an additional week in which to qualify, but told, in effect, that he would be disqualified. Howard, apparently not being willing to take the risk of a disqualification, bid for and was assigned to a clerical position carrying a lower rate of pay and never was in fact disqualified. At this point the

General Chairman of the Brotherhood again steps into the picture. A number of the employees had requested his advice as to their rights. A meeting of the employees, attended by all but one, was held on March 14, 1942, and immediately following this meeting written statements were made by various employees outlining their grievances, which statements are a part of this record. Just who called this meeting and who, if anyone, requested the attendance of employees and their statements above mentioned is not entirely clear. The General Chairman was present, as were Bennett, Sweet and Howard, and both Bennett and Sweet took an active part. On March 9, 1942, the situation was discussed by the General Chairman, and Assistant to General Manager Fegley, in which Fegley was told that unless the Carrier took steps to correct conditions, a demand for an investigation would be made under Rule 47. On March 12, 1942, the General Chairman, not being satisfied with any action being taken by the Carrier, addressed a letter to the General Manager in which he made a general complaint as to conditions in the Freight Claim Department, and specifically charging that the Freight Claim Agent was continually criticizing employees concerning their work, threatening some with disqualification or dismissal, and that he had publicly insulted a female employee. In this letter the complaint of petitioner Howard is also set up, and request is made as follows:

"Under the provisions of Rule 47 of the Clerks' Agreement we hereby respectfully request that an investigation be made into the conditions in the office of the Freight Claim Agent as stated above."

Subsequent to this letter, petitioners Bennett and Sweet were dismissed from their positions, and on March 23, 1942, the General Chairman addressed another letter to the General Manager, in which he said:

"This is supplementary to previous letter to you under date of March 12th concerning working conditions in Freight Claim Department."

"Shortly after receipt of my letter of March 12th addressed to you Mr. Barry made his own inquiry among employees of Freight Claim Department."

"Subsequent to his inquiry Mr. Barry removed F. O. Bennett as Adjuster and W. R. Sweet as Chief Clerk. Apparently this was done account Mr. Barry's being informed that these men had allegedly associated with their fellow workers for correction of a condition which they considered to be unjust treatment."

"For the record we hereby advise you it is the position of this Brotherhood that through the action stated above the Railroad has violated the 'General Purposes' and other provisions of the Railway Labor Act."

The General Manager, in reply to this letter, stated that "the sole reason for the removal of Mr. Bennett and Mr. Sweet was their failure to properly perform their duties." This somewhat extended statement of the background of this dispute seems necessary to a full understanding of the several questions presented.

One of the positions taken by the Carrier is that Rule 47 does not call for an investigation of the character requested. The rule provides that an employee who considers himself otherwise unjustly treated,—and by that expression we think is meant some character of treatment not covered by Rule 46,—shall have the right to a hearing and appeal as provided in Rule 46, if he makes written request therefor to his immediate superior within ten days of the cause of his complaint. We see nothing in this rule calling for a general investigation of the department of which complaint is made. The right of hearing and appeal carries with it, of course, some character of investigation, but, we think, only to the extent necessary to determine whether the employees' rights under the agreement have been violated. Petitioners' request is for an investigation of the conditions in the office of the Freight Claim Office, and, in our opinion, goes beyond anything contemplated by the rule involved.

Another position of the Carrier is that any complaint under Rule 47 must be made by the employe in writing, and in person. With this position we cannot agree. In our opinion, the broad principles of collective bargaining, and those which entitle an employe to be represented by a representative of his own choosing, call for a holding that this complaint and request for hearing may be made on his behalf by the representative of the Brotherhood whose office is to urge the claims of individual members thereof. Treating the complaint as one made for the purpose of a hearing thereon, we think the letters of the General Chairman, written on behalf of the employes mentioned, was within the letter and spirit of the rule.

But a complaint made by a representative of an employe must be filed in the same manner, and with the same official, as if filed by the employe in person. The rule says that to entitle an employe to a hearing and appeal there must be a request therefor in writing, made to "his immediate superior" and within ten days of the cause of his complaint. The requests of petitioners Bennett, Sweet and Howard, were made in writing, and within the prescribed time; but they were not made to the immediate superior of either, but to the Carrier's General Manager. As to the other employes, no pretense is made that their complaint or requests were made within ten days from the cause of their complaints, or to their immediate superior. This being true, they have no standing under the rule invoked, and their claims need not be further considered.

At first blush, it would seem that the provision of Rule 47, requiring that a request for a hearing be filed with the employes' immediate superior, could not in justice be held to apply where the complaint itself is directed at such "immediate superior." Whether that situation existed here is not clear, but it is clear that the General Manager of the Carrier was not the immediate superior of any one of the petitioners. When we consider the matter carefully, the reason for this requirement becomes clear. Carrier officials, like other persons, make mistakes; and, assuming that, as a class, they are willing to correct their mistakes to the same extent as the average man, they are entitled to an opportunity to do so. In courts of law it is common practice to require that the trial judge be given opportunity to correct errors in the trial before an application for a writ of error to an appellate court can be made. This furnishes one good reason for the provision of the rule. True, the superior thus appealed to may refuse to correct his mistake, if he has made one; but he is not the final judge of his own actions. He merely has a chance to reconsider his actions. When he declines to do so, the employe has the right of appeal to higher officials, as provided for in Rule 46. Another reason for the rule is that mistakes corrected at the source tend to establish amicable relations between all ranks of officials and employes, whereas, the by-passing of lower grade officials in the presentation of grievances develops the opposite. We are, therefore, of the opinion that the failure of the petitioners to file their requests for a hearing and appeal with their immediate superior was a mistake of substance, and deprives them of any right to a hearing on their complaint, much less to the general investigation requested. The Carrier and the employes agreed on Rule 47; its language is explicit; and we have no right or power to change its clear meaning.

But, going to the merits of the claims, we will consider the situation presented with respect to petitioner Howard. It is said that he was unjustly disqualified. We do not think he was, in fact, disqualified, but it seems clear that, had he not bid for and accepted another job, he would have been. It may be that had more care been taken to train him for the position of Investigator, he would have qualified. But who can say that he would? Surely some discretion must be vested in the Freight Claim Agent to select his subordinates. The rule is that such discretion will not be interfered with unless its exercise is abused through fraud or arbitrary or capricious conduct. It is clear that Howard made many mistakes. The character of the work assigned to him required accuracy and good judgment. He was given a thirty-day trial, and offered another week's chance. Apparently, fearful of the final out-

come, he bid for another job in the service of the same company, and in the same office. Later on, he again attempted to qualify as an Investigator, and again failed. Evidently his talents did not run along that line of work. We see no violation of any rule in his disqualification. This is not the case where an old employe in a particular line of work is not given a fair opportunity to qualify, as was the case in Award No. 2225; but a case where a wholly inexperienced man was given an opportunity of which he was unable to take advantage. His claim is denied on its merits.

Admittedly, petitioners Bennett and Sweet held positions which were excepted from the agreement. Their positions were important, and, during the absence of the Freight Claim Agent on account of illness, they operated the Freight Claim Department. When the Claim Agent returned he lost no time in severely criticizing both employes for their conduct of the department, and at that time threatened to dismiss them. They were afterwards dismissed, as the Carrier insists, solely because of their "failure to properly perform their duties." Whether that was the sole cause of their dismissal, we do not know. Between the date when the Freight Claim Agent criticized their work, in February, 1942, and their dismissal in March, following, the employes of the Department held their meeting, in which Bennett and Sweet participated, and the General Chairman of the Clerks' Brotherhood had discussed matters with the Assistant to the General Manager, and had requested an investigation of conditions in the Freight Claim Department. These developments may have had something to do with the dismissals. The Carrier says not. How can we say to the contrary? Had these employes been dismissed in February, when complaint was made of their work by their superior, who will say that they would have been warranted in making any complaint? Can we say, on the record before us, that because of developments in the meantime what would have been valid in February becomes illegal in March? We do not think so. Not being within the agreement, it did not protect them in their jobs, and they held them at the will and pleasure of their superiors. If the provisions of the Railway Labor Act protect them against dismissal solely on account of union activities, such as are shown in this case, a question we do not decide, doubt exists as to whether that question can be considered in a case dependent on and filed under a specific agreement to which the complainants are not parties, nor in any sense protected thereby. For this reason, and the further reason that we cannot say that Bennett and Sweet were dismissed for any reason other than that averred by the Carrier, and, if dismissed for that reason, was within the proper exercise of managerial authority, their claims will 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

That in refusing to hold the investigation requested under Rule 47 of the current agreement, there was no violation of the rule.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 4th day of August, 1943.