

**Award No. 2880**

**Docket No. CL-2812**

**NATIONAL RAILROAD ADJUSTMENT BOARD**

**THIRD DIVISION**

**Henry J. Tilford, 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 the System Committee of the Brotherhood of Railway Clerks that W. R. Sweet, O. S. & D. Investigator in Freight Claim Department be reinstated to service with seniority and other rights unimpaired and that he be compensated for all wage and other losses sustained account of action of Carrier in dismissing him from service without just cause and in violation of rules.

**EMPLOYEES' STATEMENT OF FACTS:** Through bulletin of Freight Claim Agent dated March 23, 1942 W. R. Sweet was assigned to position of O. S. & D. Investigator, rate \$7.29 per day. On August 6th, 1942 an investigation was held in office of Freight Claim Agent for the purpose of determining whether W. R. Sweet was performing his work properly. The investigation showed definitely that there was nothing wrong with the quality of work performed by Sweet and that the quantity of work performed was sufficient for the requirements of the position. However, in transcribing the stenographic notes certain testimony favorable to Sweet was omitted. Carrier then decided to hold further investigation on August 24th, 1942.

As a result of investigation held August 24th for the purpose of determining whether or not Sweet was performing his work with reasonable efficiency Carrier dismissed Sweet from the service on August 29, 1942.

**POSITION OF EMPLOYEES:** The following rules are cited from agreement on rules and working conditions between the parties bearing an effective date of October 1, 1930:

**"Rule 30:** An employe who bids for and is awarded a bulletined position but who fails to qualify, shall lose all rights to the position bid in as well as the position occupied previously. He shall retain all seniority rights and may bid on any other position bulletined, but shall not displace a regularly assigned employe.

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

Employes desiring promotion should make every effort to acquaint themselves with the work of other positions in order that they may be qualified when opportunity for advancement occurs."

Inasmuch as Sweet has voluntarily obtained an annuity under the Railroad Retirement Act the claim here in dispute is restricted to that of a financial penalty against the Carrier for the period from August 29, 1942 to January 1, 1944.

Carrier contends that the record does not justify any penalty; that Sweet was properly dismissed, and that the claim of the employees should be declined.

**OPINION OF BOARD:** The facts in this case are: W. R. Sweet entered the services of the Carrier in 1918. He left the service on December 31, 1920, and returned July 22, 1925. On April 1, 1929, he was promoted to the position of Chief Clerk to the Freight Claim Agent, a position excepted from the scope of the applicable agreement. He continued to serve as Chief Clerk until demoted by the Freight Claim Agent in March 1942, whereupon he exercised his seniority rights and acquired the position of O. S. & D. Investigator, which position he continued to occupy until discharged from service on August 29, 1942.

On August 6, 1942, the Carrier held an investigation to determine whether the Claimant was performing his work as O. S. & D. Investigator with reasonable efficiency. As the proceedings of this investigation were not properly transcribed, the Carrier first endeavored to have the General Chairman, the employee's representative, agree to certain corrections therein. This could not be agreed upon and on August 24, 1944, the Carrier held another investigation for the same purpose as the one held on August 6th, and in order to have a correct written record thereof, employed a court reporter to report the proceedings, which were captioned as follows:

"Investigation to determine whether or not Mr. W. R. Sweet has and/or is, with reasonable efficiency, performing the duties now assigned to him, held in office of Mr. T. B. Barry, Freight Claim Agent, 526 Mission Street, San Francisco, California, on Monday, August 24, 1942, at the hour of 2 o'clock P. M."

It is contended by the Petitioner that the sole purpose of the investigation held on August 6th and August 24, 1942 was, as contemplated by Rule 30, to determine the qualifications of Sweet for the position he then worked; that at least Sweet had the right to so believe since he was not formally notified of any charge against him which would justify his being disciplined or dismissed; and that in any event failure to give such notice, as required by Rule 46, deprived the Carrier of the right to discipline or dismiss him. It is also contended by the Petitioner that if the proceedings could be regarded as properly initiated under the provisions of Rule 46, the action of the Carrier in dismissing Sweet was ineffective because it was not taken within ten days after the hearing of August 6th; but this latter contention we regard as without merit since it is apparent that both parties were dissatisfied with the manner in which the investigation of August 6th had been reported by the stenographer and that the hearing of August 24th was in part a repetition and, in effect, a continuation of the hearing held on the former date.

The Carrier contends not only that the charge against Sweet justified his dismissal but that the proceedings by which the charge was established were substantially in accordance with the requirements of Rule 46, and furthermore that Rule 30 confers no rights on an employee who has obtained his position by exercising his seniority privilege of "bumping."

After careful consideration of the record we have reached the conclusion that Sweet was not guilty of any offense or conduct which justified his dismissal from the service, from which it follows that it is not necessary to determine whether the proceedings employed to bring about that end were properly initiated or conducted. In reaching this conclusion we have not lost sight of the thoroughly established rule of this Board that the action of a carrier in dismissing an employee will not be disturbed unless it appears that the Carrier acted in bad faith, arbitrarily, capriciously or upon a funda-

mentally wrong basis. (See Award 2866.) While, as above pointed out, the purpose of the investigation was stated to be: "To determine whether or not Mr. W. R. Sweet has and/or is, with reasonable efficiency, performing the duties now assigned to him," the specific charge on which his dismissal is sought to be justified is that he wilfully failed and refused to turn out the quantity of work of which he was capable; and it is apparent that only by substantiating that charge could the Carrier justify its action in proceeding against him under Rule 46, and thus deprive him of the benefits of Rule 30, assuming that the benefits of that rule are available to an employee who has obtained the position solely by the exercise of seniority rights.

The Carrier relies largely upon the undisputed fact that Sweet was thoroughly qualified by previous experience to turn out a much larger quantity of work than he was accomplishing at and prior to the time the investigation was held, but fails to show any motive for contumacy on Sweet's part. In view of this failure, we think it reasonable to assume that his advanced age—63 years—and physical infirmities, clearly shown by the record, were the causes of his inefficiency. He testified, without contradiction, that his Doctor had told him that his heart was not pumping all the blood out of his lungs; that it made him very weak and short-winded, and that his physician had instructed him to take it easy and go home early. We quote the following from the stenographer's report of the questions asked him by Mr. Barry, Freight Claim Agent, who initiated the investigation:

"Q. Now, Mr. Sweet, I have made some notes from time to time, and my notes indicate that I spoke to you on June 18th about your failure to keep up your work; do you recall my speaking to you on or about that date?

A. I don't recall that particular day.

Q. You do, however, recall my speaking to you.

A. Yes.

Q. My notes show you made in substance the following answer: 'I am following doctor's orders, was told not to overdo, therefore, am pacing myself.' Do you recall making those statements?

A. Not 'pacing myself' but I was going as fast as possible without overdoing myself; I was not trying to hold down to any particular pace.

Q. You returned to work on what date after being off on account of illness?

A. Well, I don't remember.

Q. About what date?

A. It seems to me like I returned on—the first time on April 3rd; it was a Monday, but I cannot recall—

Q. You mean May 3rd or April 3rd?

A. Yes, that would be May 3rd, yes.

Q. May 3rd?

A. Yes.

Q. Mr. Sweet, my records show that I spoke to you again on July 28th about your failure to keep up your work; do you recall my calling you into my office on that date?

A. Yes.

Q. Now, my notes also indicate that I asked you if your health was the cause of your failure, and your reply was 'No,' but stated there was too much work for one person?

A. No, I didn't reply 'No.'

Q. What was your reply?

A. I don't think I made any direct reply to that statement, except possibly to say that I was feeling better now than I was before.

Q. My records show you also stated 'A younger person could possibly do the work.' Do you recall that statement?

A. Yes, I probably made that, but I don't—but I also stated he might possibly do so, but I didn't think so.

Q. The notes that I made also show that I asked you if you meant to imply that your failure was due to age and health, and you answered 'No.' Do you recall that?

A. How is that?

Q. I say, my notes show that I asked you if you meant to imply that your failure was due to age and health, and you answered 'No.'

A. Well, I don't think I answered 'No' but it was partly the cause of not being able to do as much as I would be expected.

Q. You were also told at that time, were you not, that you would be given a reasonable time to improve your work, and if no improvement was made it would be necessary to remove you from the position?

A. That is true, yes.

Q. Your reply being, 'Do as you like, I will be governed accordingly.'

A. Yes.

Q. On August 4th you were again told that your work was unsatisfactory, and I asked you if you wanted a hearing?

A. What day was that? August 4th?

Q. I will have to look. Yes, it was on a Tuesday.

A. Yes, that is true."

In seeming recognition of the fact that if Sweet's inefficiency was occasioned by age and bodily infirmities he should not have been dismissed from the service and thus deprived of the opportunity to obtain a position which he was capable of filling satisfactorily. In behalf of the Carrier it is insisted that his testimony shows that Sweet stated that his physical condition, state of health and age had nothing to do with his failure to produce a reasonable volume of work, and that he had made no effort to increase the volume and had offered no excuse for his failure. We have quoted the major portion of the testimony upon which these assertions are based, and we do not think that it adequately supports these contentions.

The argument for Carrier also cites Award 2281 and suggests that its contents, together with those of Award 2240, cited by the Petitioner, disclose the reason for the Claimant's apparent lack of interest in the warnings of his superiors and for not endeavoring to increase his output. Again, we are compelled to disagree. Award 2281 involved a controversy over the salary to which Sweet was entitled as Chief Clerk. Award 2240 denied a claim that the Carrier had violated provisions of the Clerks' Agreement when it refused a request of the Brotherhood to hold an investigation under the provisions of Rule 47 for the purpose of developing facts allegedly constituting unfair treatment accorded employees in Carrier's Freight Claim Department. True, the opinions in these awards show that ill feeling in that department had existed for a long period, but with equal propriety it might be argued that this ill feeling prompted the Carrier to dismiss Sweet from the service instead of merely disqualifying him from holding the position of O. S. & D. Investigator.

Assuming that we had found that Sweet was properly notified of the charge against him we would have denied the claim in the absence of an exculpatory explanation of his conceded failure to turn out the proper volume of work. In our opinion, his age, illness and physical condition afforded such an explanation, and the Carrier proceeded against him "upon a fundamentally wrong basis."

**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 Agreement as contended by the Petitioner.

#### AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

ATTEST: H. A. Johnson  
Secretary

Dated at Chicago, Illinois, this 6th day of April, 1945.