

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Fred W. Messmore, Referee

PARTIES TO DISPUTE:

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

**THE ATCHISON, TOPEKA AND SANTA FE RAILWAY
COMPANY—Western Lines**

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

(a) Carrier violated the provisions of the Clerks' Agreement when it removed V. R. Williams from the Carrier's service on June 17, 1952; and,

(b) V. R. Williams shall be restored to Position No. 1297, Cashier, at Carlsbad, New Mexico, with all rights unimpaired; and,

(c) V. R. Williams shall be paid eight (8) hours per day at the regular rate of the Cashier's position at Carlsbad, New Mexico, for each day the position is assigned to work, and Mr. Williams is not permitted to work from 7:00 P. M. June 17, 1952, until violation is corrected.

OPINION OF BOARD: This is a discipline case involving V. R. Williams, employed by the Carrier as a cashier at Carlsbad, New Mexico.

The first issue to be determined is the Carrier's contention that the instant dispute is improperly before this Board and is subject to dismissal for failure of Employees to perfect appeal from General Manager Buchanan's decision in the case within the time limit provided for in Article IV, Section 1-e of the Clerks' Agreement.

Article IV, Section 1-e of the Agreement reads as follows:

"The right of appeal by employees or their representatives in regular order of succession and in the manner prescribed, up to and including the highest official designated by the Company to whom appeals may be made, is recognized. If an appeal is taken, it must be filed with the next higher official in order of succession, and a copy furnished the official whose decision is appealed, within thirty (30) days after date of decision from which appeal is taken."

The record discloses that claimant Williams was notified by Mr. J. H. Blake, on May 29, 1952, as follows: "Please arrange report to Trainmaster's office Carlsbad, 4:00 P. M., June 3rd, 1952, with representative if desired

for formal investigation in connection with your alleged failure properly perform your duties in connection declining accept billing for carload shipment morning May 8, 1952. Please acknowledge receipt this letter."

As claimant's vacation was scheduled to commence May 20, 1952, the Trainmaster, by a second letter of the same date, postponed the investigation until 4:00 P. M., June 16, 1952.

The investigation was held on June 16, 1952. At the conclusion of the same, Trainmaster Blake verbally notified the claimant that he be removed from the Carrier's service. This was confirmed by formal notice June 16, 1952, signed by Trainmaster Blake and approved by the Superintendent. The decision rendered was as follows: "It is recommended that cashier V. R. Williams be removed from service for his failure to accept billing and issue bill of lading to cover carload of scrap about 7:00 A. M., May 8, 1952, violation Rules 34 and 39 of General Rules for Guidance of Employees. Approved by the Superintendent."

The decision was appealed through regular channels to Carrier's highest officer designated to handle such matters, the Assistant to the Vice President, who denied the claim on September 3, 1952. The Carrier contends this declination is final and the appeal should be dismissed.

It appears from the record that subsequent to declining the claim there was further handling of this matter by the parties which dealt only with the possibility of reinstatement of the claimant to his position on a leniency basis. In this connection, the following is pertinent. Carrier's General Manager, G. R. Buchanan, on September 3, 1952, wrote to R. B. Pike, the Brotherhood Vice Chairman. The letter is in part as follows: "I have looked into this case and after doing so regret to advise you that I cannot give favorable consideration to your request that Mr. Williams be reinstated with pay for time lost. If you should care to discuss this case with me, I shall be glad to discuss it with you at any time." (Emphasis added.)

On September 5, 1952, G. R. Buchanan, as designated above, wrote R. B. Pike, as designated above, another letter which reads: "Your H 530, August 13; My letter September 3, and our conference date. I am willing to look into this case a little further, as agreed this morning, and after doing so I will advise you again as to my decision in the matter."

Hereafter, for convenience, we will refer to G. R. Buchanan as General Manager, and R. B. Pike, as Vice General Chairman.

On November 21, 1952, Vice General Chairman R. B. Pike wrote to General Manager G. R. Buchanan as follows: "Referring to our various discussions and exchanges of correspondence concerning the Brotherhood's claim (Subject, Removal from Carrier service V. R. Williams, Cashier, Carlsbad). Reference is hereby made to your letter of September 5, 1952, file 11-261573 in which you advised that you would look into this case further and advise as to your decision. Are you now in a position to give your decision?"

On December 1, 1952, General Manager Buchanan wrote to Vice General Chairman R. B. Pike: "Your H 530, November 21, I am sorry but in the absence of a recommendation from the Division people I cannot consistently give favorable consideration to the reinstatement of Mr. V. R. Williams at Carlsbad. I shall be glad to discuss this case with you again at our mutual convenience." (Emphasis added.)

On December 3, 1952, R. B. Pike, Vice Chairman, wrote to G. R. Buchanan, General Manager, in which he referred to a telephone conversation with Buchanan on December 2, 1952, further regarding the instant claim, and setting forth certain subject matter contained in a letter written

by Sidney A. Stallman to V. R. Williams, claimant, dated October 8, 1952, which we will refer to later in the opinion. This letter further said: "This file has been in your hands since the latter part of August of this year which seems to be sufficient time for you to have completed your investigation. Therefore, this is to request that you please give me a definite conclusion as to whether or not you are willing to pay this claim as filed, at your earliest convenience."

On December 19, 1952, General Manager Buchanan wrote to R. B. Pike, Vice General Chairman as follows: "Your letter regarding the case of former cashier V. R. Williams of Carlsbad. You will recall from our previous correspondence and discussions of this matter that I have indicated a willingness to return Mr. Williams to the service as a matter of leniency provided he would meet certain requirements in the matter of being able to adjust himself to service conditions at the station of Carlsbad. This he has not done, and under the circumstances, I am not willing to go beyond favorable consideration in the matter of permitting him to re-enter our service on a leniency basis at some point other than Carlsbad, and I would go that far, but I am not willing to return him to our service with pay for time lost as requested by you, as there can certainly be no doubt as to his dereliction of duty which resulted in his removal from service."

On January 2, 1953, R. B. Pike, Vice General Chairman, wrote to General Manager, G. R. Buchanan, in part as follows: We set forth the part thereof bearing on the issue under consideration. "Your letter of December 19, 1952, regarding the case of V. R. Williams at Carlsbad, New Mexico. I am sorry that I cannot agree to close this complete file on the basis outlined in your letter of December 19, 1952, above referred to, however, I am agreeable to your returning V. R. Williams to the Carrier's service under the conditions as outlined in your letter * * * in order to dispose of a portion of section (c) of this claim from the date that V. R. Williams is returned to the Carrier's service until the claim is disposed of in its entirety. This agreement contemplates the return of V. R. Williams to Carrier's service under the provisions of Article III, Section 12 of the current Clerks' Agreement.

"It will be the further position of the Brotherhood that V. R. Williams shall be reimbursed for actual traveling and living expenses during the period that he is required to perform work at a point other than Carlsbad, New Mexico, which is the headquarters point for his regular position * * *."

"This is to respectfully advise that under the conditions as outlined above that an appeal from your decision will be made."

The Brotherhood General Chairman did appeal to the assistant to the Vice President on January 9, 1953.

On January 20, 1953, General Manager Buchanan wrote to Vice General Chairman R. B. Pike as follows: "Your file H-530 regarding the case of former cashier V. R. Williams, Carlsbad, New Mexico. It is noted under date of January 9, prior to my reply to your letter of January 2, this case was appealed to Mr. Kirkpatrick by your General Chairman, Mr. John Byrne. To complete the record please be advised that my offer to return Mr. Williams to some position still holds good, but I am not willing to reimburse him for traveling and living expenses as requested by you, as I cannot agree that Carlsbad is any longer headquarters point for his position."

On February 16, 1953, the assistant to the Vice President wrote the General Chairman of the Brotherhood. We set forth a part thereof. "I have now completed my investigation of this dispute and while I would ordinarily wish to withhold my decision pending discussion of your claim in conference, as is usually our practice, it seems unnecessary to further delay my decision since my investigation develops that your claim was not made within

the thirty days prescribed in Article IV, Section 1-e of the current Clerks' Agreement, which has the effect of barring your claim from further consideration. Therefore, without consideration to the merits, if any, of your claim in behalf of Mr. Williams, your appeal is respectfully declined."

In the light of the foregoing, we believe the following to be pertinent.

"Rules limiting the time within which action must be taken or rights will be cut off are desirable, in order to expedite procedure and prevent unnecessary delay, but they are not intended to prevent full negotiation of the matter on the property while the parties are seeking a settlement thereof and until such negotiations, or attempts to further negotiate made within the time so limited, have finally terminated and resulted in a final decision the limitation on the time within which an appeal must be filed does not commence to run." See Award 4473.

Suffice it is to say that there certainly were negotiations had on the property to endeavor to adjudicate this claim, as above indicated. We conclude that the appeal made by the Brotherhood General Chairman on January 9, 1953, was within thirty (30) days after date of the decision from which the appeal is taken, namely, December 19, 1952.

The contention of the Carrier above stated cannot be sustained.

We are now obligated to determine the merits of the case.

The record discloses that about 7:30 A. M., May 8, 1952, one of the Carrier's patrons, Mr. S. A. Stallman, offered the Claimant, V. R. Williams, cashier, a billing on a carload of scrap, N. Y. C. 714701, destined Houston, Texas, and requested bill of lading to cover. Williams told Mr. Stallman that he did not know if there were any embargoes or permits required on a car of scrap; that he did not know anything about it; and that if he could come back at 8:00 A. M. when the agent was there, or at 9:00 A. M. when the chief clerk was there, they would have all the information, and if that was all right with him, Williams would appreciate it if he would do that. Mr. Stallman said it was all right. It is Williams' understanding that it is a cashier's duty to accept shipments of freight and bills of lading to cover the same. His reason for not doing so in this instance was because he did not know if there were any embargoes or permits required. He did not have that information. He had never had any carload billings of that type. The Chief Clerk always handled it. Williams testified further that he did not recall of previously accepting shipments similar to this one from Stallman—he just accepted them from other shippers possibly, but not by himself at the time. Bills of lading were handed to this witness for his inspection. They are exhibits appearing in the record, sixteen in number issued by the claimant since January 1, 1951, representing a period of about eighteen months. Of these three (3) covered shipments of scrap, Williams mentioned one of the bills of lading caused him some trouble for accepting it. He described the circumstances as follows: "It shows on there it was for export, and as I remember they had to have a permit to make any export shipments of scrap, so I was informed after I had accepted, and the Chief Clerk came to work, and he told me not to take any more billings on scrap." "I was told I should not be accepting billings on that because you have to have a permit and I was not furnished any permit and did not know anything about a permit. I never had been furnished any information as to permits that are required and embargoes that were in effect on carload shipments." He later accepted billing on the car in question on instructions of "Mr. Engel". He does not know where the embargo files are kept. The chief clerk takes care of embargoes, and he had no occasion to inquire as to where they were kept.

During the investigation Carrier's Trainmaster, Mr. Blake, who conducted the investigation, asked the claimant if he was familiar with Rules for the Guidance of Employees. He replied that he was. Rules 34 and 39 were then quoted. Rule 34 reads:

"Employees whose duties require them to conform with instructions issued by various departments must familiarize themselves therewith and be governed thereby. They must render promptly all reports required of the several departments, observing instructions shown on forms."

Rule 39 reads:

"Employees are required to be respectful and considerate in their dealings with patrons, giving them politely any information to which entitled, and use every endeavor consistent with the rules of the company to contribute to their pleasure and comfort."

When asked why he did not comply with that rule on May 8th in connection with accepting scrap shipment, as pertains to the last portion of that sentence (apparently Rule 39) he replied that he tried to do just that, by telling the man to come back when the supervisor was there.

When questioned by Mr. Pike, Williams testified that he did not ordinarily issue bills of lading if any one else was in the office; that if anything came up in the office that he was not familiar with, it was customary to contact the supervisor for instructions; and that when he accepted the bill of lading on February 18, 1952, on a carload of scrap steel marked for export only, the supervisor raised a question regarding the acceptance of such shipments in the future. Chief Clerk Heston, after this date, advised him not to accept such shipments without ascertaining whether embargoes or permits were in effect on such shipments.

The Chief Clerk, G. C. Heston, testified that a permit is not required to be furnished for a carload of scrap to a point within the United States; and that he never did instruct Williams not to accept shipments. He explained the practice of handling embargoes. The embargoes are placed in a box or binder in the same manner bills of lading and way bills are filed, are kept on a shelf back of the rate clerk, and have been for several years. The binder is marked to indicate what it contains by being stencilled with ink in letters about 1 to 1½ inches large "Embargo File" and is accessible to any member of the office force. After a bill of lading was issued on car of scrap May 8th, he looked at the embargo file. There was no embargo on scrap to this particular point. Apparently when embargoes are received, they are read by the Chief Clerk and Rate Clerk and are filed away. He further testified that ordinarily when something comes up to be handled that the clerks in the office do not understand, they ask the agent what to do about it. The Rate Clerk, this witness, the Assistant Cashier, and the Cashier ordinarily accept bills of lading.

The Agent, A. V. Engel, testified to the embargoes in effect May 8th as being C. S. D. No. 31, 4-30-52, various firms in Birmingham; B & O embargo No. 128, against Detroit Steel Corporation at Portsmouth, Ohio; and N & W No. 2-156, of April 30, against Detroit Steel Corporation at Portsmouth, Ohio. He did not instruct Williams not to accept billing on carloads of scrap, or criticize him in any way. He further testified that Mr. Stallman came in the office about 8:15 A. M., and said he would like to have a bill of lading on a car of scrap. "I said 'Mr. Williams will fix you up on it.' He said 'He won't.' I said, 'Why not?' He said 'I don't know.' I said 'Well come on out and we will get it.' I walked to the counter and I said 'Rex, how about it.' I don't believe I asked him about it, he volunteered the information that he had not given him the bill of lading account of the embargoes in effect to Houston Texas. I said 'There is no embargo to and Houston, Texas, give him a bill of lading and fix him up on it.' I turned around and went back to my office." He further testified that Mr. Stallman said he had been down there before that morning and could not get a bill of lading, and wanted to get it and get back to work. When he talked to Stallman the second time he said he had men working out there and that he did not want to leave there and go into town. He further testified

he always encouraged his entire staff to come to him with their trouble and for advice; that his position is that of a supervising agent, and he is considered available for duty at any of the 24 hours of the day. He frequently gets calls at home.

The above constitutes a summary of the evidence taken at the investigation. In addition thereto there is a letter written by Sidney A. Stallman, bearing no date but apparently written October 8, 1952, to V. R. Williams, wherein he said "That morning of May 8—52 I was not inconvenienced, insulted, or otherwise put out * * *." While the Carrier requests that this letter be disregarded, perhaps due to the fact that the writer of the letter did not testify at the investigation, under the circumstances it may be considered for what it is worth in and of itself. It certainly would be insufficient to determine the case.

The dominant factor in this case is, did the claimant violate any rule. After reading all the evidence, we fail to find that he did. In the absence of such a showing, no other course is left open to this Board than to hold the Carrier acted in an arbitrary manner in exacting the discipline as it did in the instant case. Citation of authority becomes unnecessary under the circumstances of this case. However, where it is shown that the discipline is unwarranted, or the Carrier acted arbitrarily without sufficient evidence or just cause, then the Carrier's exaction of discipline cannot stand. See Awards 6116, 6056, 5787, 5543, 4325.

We sustain the claim that the Carrier's assessment of discipline imposed was arbitrary and without just cause and award compensation for time lost, if any.

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 Adjustment Board has jurisdiction over the dispute involved herein; and

That the Carrier violated the Agreement.

AWARD

Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 3rd day of December, 1954.

DISSENT TO AWARD NO. 6827, DOCKET NO. 6720

This Award is in serious error.

The majority correctly say:

"It appears from the record that subsequent to declining the claim there was further handling of this matter by the parties which dealt only with the possibility of reinstatement of the claimant to his position on a leniency basis."

The majority erroneously rule out Carrier's defense, namely, that the claim for reinstatement with pay for time lost had not been appealed within the time limit specified in Article IV, Section 1-e, on the basis of Award 4473. That Award clearly affords no basis for such inordinate action, as a review of the quoted paragraph shows that the Board was there referring to negotiations in connection with the subject matter of the claim, and was not referring to negotiations outside the subject matter of the claim as in the instant case.

That the Board has been consistent in its dealings with this subject—Time Limits for Appeals—is shown in its Award 5158.

Therein it was held:

"The Organization contends that there was a further oral handling on or about May 5, 1949. The record discloses that the General Chairman discussed with Mr. Peek the possibility of reinstating claimant because of claimant's good record while on probation after pleading guilty to the commission of a felony. This was an attempt to obtain leniency and was not a decision of the highest official designated within the meaning of Rule 29 (d). The final decision of the case was clearly made by the highest official designated on July 26, 1948 or October 25, 1948."

Furthermore, the majority correctly say:

"Williams told Mr. Stallman that he did not know if there were any embargoes or permits required on a car of scrap; that he did not know anything about it; * * *."

Such an admission constitutes an acknowledged violation of Rule 34 which required claimant to familiarize himself with and to be governed by the instructions in connection with embargoes or permits on cars of scrap.

For the foregoing reasons we dissent.

/s/ J. E. Kemp
/s/ R. M. Butler
/s/ E. T. Horsley
/s/ C. P. Dugan
/s/ W. H. Castle