

C O P Y

ORG. FILE K-36-8
CARRIER FILE R-12569
NRAB FILE CL-8440

AWARD NO. 2
CASE NO. 2

SPECIAL BOARD OF ADJUSTMENT NO. 194

PARTIES The Brotherhood of Railway and Steamship Clerks,
 Freight Handlers, Express and Station Employees
TO

DISPUTE St. Louis-San Francisco Railway Company

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

(1) The Carrier violated the terms of the currently effective agreement in its treatment of Mr. Elmo W. Thompson when on February 9, 1955, it arbitrarily dismissed him from service, which dismissal was sustained by the Carrier on February 18, 1955, after formal investigation on February 15, 1955.

(2) Mr. Thompson be reimbursed for all time lost February 9 to July 20, 1955, inclusive, by reason of this erroneous dismissal.

FINDINGS: Special Board of Adjustment No. 194, upon the whole record and all the evidence, finds and holds:

The Carrier and Employees involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act as amended.

This Special Board of Adjustment has jurisdiction over this dispute.

Claimant was dismissed from service February 18, 1955, after investigation held February 15, 1955, upon a charge in writing dated February 11, 1955, which read:

"Please report at my office at Lindenwood Yards 9:00 A.M., February 15, 1955 for investigation in connection with your alleged insubordinate conduct February 9, 1955 and for absenting yourself from duty after 2:00 P.M., February 9, 1955 without proper authority in violation of Rules 702 and 717, respectively, in the rules of the Transportation Department.

"You may have representative as specified by agreement rule, if one is desired."

Rule 702 in the Book of Rules of the Transportation Department reads:

"702. Employees who are insubordinate, dishonest, immoral, quarrelsome or otherwise vicious, or who do not conduct themselves in such a manner and handle their personal obligations in such a way, that the railroad will not be subject to criticism and loss of good will, will not be retained in the service . . ."

Rule 717 in the Book of Rules of the Transportation Department reads

"717. Employees must not absent themselves from their duties, exchange duties with nor substitute others in their place, without proper authority."

In the handling on appeal it was mutually agreed that Claimant would be reinstated "without prejudice to his rights to submit his claim for time lost to the Third Division N.R.A.B." He was reinstated July 21, 1955.

The only portion of the claim before us, therefore, is Item 2.

Claimant held the position of motor operator (fork lift or "pusher") at a freight house. He worked generally under the supervision of a General Agent, an Assistant Agent, a Foreman (all of whom were excepted supervisory employees) and immediately under the supervision of an Assistant Foreman (covered by the Agreement).

The type of l.c.l. merchandise handled varied in weight and volume; but, considering the investment in the machine, the Carrier apparently had concluded that the position should reasonably handle a tonnage of around 50,000 pounds per shift. On February 8, 1955, Claimant's gang handled only 24,000 pounds, whereas the day before they had handled 60,000 pounds.

On February 9, 1955, the Assistant Agent called in the Assistant Foreman, advised him of the low tonnage handled the day before and gave him specific instructions about how the pusher gangs should handle loads so as to avoid low tonnage per shift. The Assistant Foreman conveyed these instructions to the two pusher gangs working on the platform and he also told Claimant that the Assistant Agent was complaining about the low tonnage handled by Claimant's gang the day before, to which Claimant responded, "I am not working on a tonnage basis," notwithstanding both Claimant and the Assistant Foreman well knew that the low tonnage handled the day before was accounted for by the fact that Claimant's pusher worked only $3\frac{1}{2}$ hours that day during Claimant's shift by reason of hand work required to be performed on stowing perishables during which the pusher went to the shop for service. Nonetheless, the Assistant Foreman reported Claimant's remark about "not working on a tonnage basis" to the Assistant Agent, but he did not report the fact that the pusher did not work more than $3\frac{1}{2}$ hours that day because, as he testified at the investigation, "I didn't think of it, to be honest about it."

While the Assistant Foreman apparently took Claimant's remark about "not working on a tonnage basis" in stride beyond reporting it to the Assistant Agent, the Assistant Agent considered it to be "a very poor attitude and remark toward the Assistant Foreman." Accordingly the Assistant Agent called Claimant

to his office about 11:30 A.M. "to talk to him to see if we would get on a better understanding of cooperation between him and the foreman and to get his side of the story of what happened." When the Assistant Agent told Claimant what he wanted to talk about, Claimant assumed that he was being charged with insubordination and he refused to answer any questions unless he could call in a representative, whereupon the interview terminated.

After lunch the General Agent sent for both Claimant and the Assistant Agent in an effort to compose the difficulty between Claimant and the Assistant Agent and to ascertain all of the facts. But the matter reached the same impasse that it had in the Assistant Agent's office. The General Agent asked Claimant what his trouble was and Claimant replied that he didn't have any trouble. The General Agent then asked Claimant "about his remark toward Mr. Matthews (the Assistant Agent) questioning his authority to call a man into his office to talk to him." Claimant then stated that he would not talk unless he had a representative present. The General Agent then stated that it was unnecessary for Claimant to have a representative since he was not being investigated. Claimant then stated that he would not stay in the office unless he had a representative. He turned to leave and, as he reached the door, the General Agent remarked, "If you go out that door, you might as well keep walking." Claimant then reported to the Foreman's office, informed the Foreman that he had been dismissed and left to talk to his representative. When Claimant returned later, another employe had been assigned to his pusher.

First. The Carrier has the authority to direct the working force and an employe is not entitled to argue about instructions or to disobey them or to absent himself from his duties without proper authority for the purpose of reporting supposed violations of the Agreement to his accredited representatives merely because he considers a position taken by a supervisor to be unwise or unauthorized by the Agreement. The responsibility for the operation is the Carrier's alone; and the remedy for an unauthorized instruction is performance first and grievance afterward, and not argument or refusal or departure from duty.

By the same token discussion and criticism of work performance is a necessary part of the direction of a working force. If the criticism is unfounded in fact, supervision is entitled to know the facts. And if an employe's performance is unsatisfactory, he is entitled to hear about it.

The Assistant Foreman not only instructed Claimant about how pusher gangs should handle loads but he also communicated the Assistant Agent's criticism of the low tonnage handled the day before. There is no showing that Claimant indicated any refusal to perform the instructions but, instead of responding to the criticism with the constructive fact the pusher had worked less than half a day the day before, he made an irrelevant remark not designed to further the business at hand which simply was to ascertain why the tonnage handled was low the day before.

Second. Under Rule 26 an employe cannot be disciplined or dismissed without investigation. There can be no "investigation" within the meaning of the Rule unless prior to the investigation the employe has been advised in writing of the

precise charge or charges. At such an investigation the employe is entitled to representation if he wants it.

It is clear that the interviews in the offices of the General Agent and the Assistant Agent were not "investigations" within the meaning of Rule 26, because Claimant had not been advised in writing of any charge or charges against him. It follows that nothing in Rule 26 gave Claimant the right to have a representative present at either of these interviews.

Most disputes undoubtedly are, and should be, settled on a platform level; and while this involves mutual obligations of frank and open discussion, circumstances might exist in which an employe would be justified in standing mute in which event the Carrier would be put to the necessity of acting without the benefit of the employe's version of the facts.

In view of the Claimant's reinstatement, the questions presented as to whether he resigned or was dismissed on February 9 are moot.

In view of all of the foregoing considerations the conclusion is that anything in excess of a 90-day suspension was unreasonable.

A W A R D

Item 2 of the claim is sustained for all time lost from May 1, 1955, to July 20, 1955, inclusive, less any amounts earned in other employment during that period.

/s/ Hubert Wyckoff
Chairman

/s/ T. P. Deaton
Carrier Member

/s/ F. H. Wright
Employe Member

Dated at St. Louis, Missouri November 14, 1957.