

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number **19708**
Docket Number CL-19604

Irwin M. **Lieberman**, Referee

(Brotherhood of Railway, Airline and Steamship Clerks,
(Freight Handlers, Express and Station **Employees**

PARTIES TO DISPUTE: (

(Chicago, Milwaukee, St. Paul and Pacific Railroad Company

STATEMENT OF CLAIM: Claim of the System **Committee** of the Brotherhood (GL-7031)
that:

1) Carrier violated the Clerks' Rules Agreement when the Superintendent accepted a request for fair and impartial hearings, held **them** and then rendered a decision concurring in the discipline assessed when he had already acted as a Carrier witness at these investigations, thereby denying these employees a fair and impartial hearing.

2) Carrier's action in assessing discipline of fifteen (15) days' deferred suspension with one year probationary period against employees R. R. Johnson, M. R. **Gilman** and R. J. Maietta was vindictive, arbitrary and capricious.

3) Carrier shall now be required to clear the records of employees R. R. Johnson, M. R. **Gilman** and R. **J. Maietta** of the charges made and the discipline assessed.

OPINION OF BOARD: Claimants were part of Carrier's third trick clerical force at the St. Paul, Minnesota Yards whose responsibilities related to the movement of freight through that Yard. In all there were five clerks, a janitor and a Chief Yard Clerk; an Ice House Laborer and a Perishable Freight Inspector. Between 1:00 A.M. and **1:30** A.M. on the morning of September 15, 1970, all the clerks and the janitor became ill and asked **permission from** the Chief Yard Clerk to go home ill, and were granted permission. At about the same time the Ice House Laborer also became ill and asked permission from his superior, the Perishable Freight Inspector, to leave and go home, which permission was granted. All of the above employees were represented by the Organization herein, in two different Districts. The carrier, assisted by the **two** supervisors, **some** executives and two day employees who agreed to **come** in and help, managed with some difficulty to get through the night till the day crew reported for work.

It should be noted that midnight September 14, 1970 had been the **dead-**Line for a nationwide strike of four unions (including the Organization herein). At **11:50** PM on September 14, 1970 a Federal District Judge in Washington, D. C. issued a restraining order forbidding the four Unions, including their officers, agents and members, from engaging in any selective strikes, **or** work stoppages **or** picketing until September 23, 1970.

On September 25th Carrier preferred charges against the seven men on three grounds: for participating in a premeditated and concerted work stoppage; for failing to protect their assignment on the night in question; and for fraudulently alleging sickness of an undisclosed nature that night. Individual investigations were held on September 30 and October 1, 1970 and six of the seven employees, including Claimants herein, were found guilty and were each assessed fifteen days deferred suspensions. This decision, with respect to the three Claimants only, was appealed by letter of October 15, 1970 to Superintendent Plattenberger, requesting an appeal hearing under the provisions of Rule 22. **After** an exchange of correspondence, appeal hearings were held on November 3, 1970 before Superintendent **Plattenberger** and on November 9, 1970 he sustained **the** prior conclusions and awarding of discipline.

On November 25, 1970, the Organization wrote to the Vice-Resident Labor Relations of the Carrier requesting an appeal hearing on behalf of the three Claimants under the provisions of Rule 22 (d). The appeal hearings were held on December 18 and on December 23rd the prior decisions were sustained by the **Vice-President**. On **December 18th**, by letters presented to the Vice President by the Organization, the position was first enunciated that Claimants did not receive fair hearings from the Superintendent, since he had acted as Carrier witness at the original investigations.

Part 1 of the Claim in this matter deals with the allegation that Claimants were denied a fair and impartial hearing since the Superintendent had accepted the request for an appeal hearing, held the hearing and rendered a decision upholding the previously assessed discipline when he had acted as a Carrier witness at the earlier hearings. Rule 22 (c) in pertinent portion states:

"An employee dissatisfied with the decision may have a fair and impartial hearing before **the** next higher officer, at which such witnesses as are necessary and duly accredited representatives, as specified in Rule 52, may present the case"

With respect to this portion of the Claim: 1) Petitioner has presented no evidence of abuse of due process by the Superintendent during the course of the appeal hearing; 2) There is no evidence that **Potitioner** objected to the Superintendent holding the hearing when it was **scheduled** (in fact the appeal was directed to the Superintendent) and also no objection at the time of the hearing; 3) there is nothing in **the** Rules prohibiting an officer **who** acted as **a** witness from serving as an **appeals** officer. There appears to be no evidence or support in the Rules for the contention that the functioning of the Superintendent as the presiding officer, **after** appearing as a witness in the earlier investigation, in any way impaired the rights of the Claimants (See Awards 6986, 13179, 13672, 16074 and 8893). **We shall** therefore deny Part 1 of the **Claim**.

In its submission, Petitioner contends that the suspending of the discipline which had been assessed was in violation of **Rule 22**. We find no support in the Organization's arguments for this position; further, we do not find, after careful study, that there is any language in Rule 22 (or other **Rules**) **which** prohibits Carrier **from** assessing deferred discipline.

With respect to Parts 2 and 3 of the Claim, we have long adhered to the principle that this Board will not substitute its judgment for that of the Carrier in discipline cases where the record discloses substantial evidence in support of the charge. This was well stated in Award 3149 as follows: "We are committed to the rule that it is not a proper function of this Board to weigh the evidence and if the evidence is such, that if believed, it supports the findings of the Carrier, it **will** not be disturbed."

The record of the investigations reveals the following essential evidence: 1) All the events on the property took place in the shadow of an impending national walk-cut, which was called off at the **11th** hour, just an hour or so before the actions of Claimants herein. 2) All of the employees (seven in number) below supervisory rank, members of the Organization, left work within a 15 to 30 minute period on the night of September 14th. 3) All the employees claimed to be ill at the same time, **claiming** inability to work. 4) The testimony of the security patrolman at the investigations with respect to the conversation he overheard, was neither refuted nor denied. 5) None of the Claimants was permitted to testify at the investigations with respect to prior discussions or agreements concerning stoppages. It **would** strain the credulity of reasonable men, under all the circumstances, to believe that the sudden illness of all the employees was coincidental. It is our conclusion that the record of the three investigations **contains** substantial evidence to support the decision reached by Carrier. Further, the discipline meted out by Carrier was not unreasonable. We shall deny the Claim.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all **the** evidence, finds and holds:

That the parties waived oral hearing;

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;

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That the Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

E. A. Killian
Executive Secretary

Dated at Chicago, Illinois, this 13th day of April 1973.