

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 21890
Docket Number CL-22031

Don Hamilton, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and
Steamship Clerks, Freight Handlers,
Express and Station **Employees**
(Chicago **and** North Western Transportation Company

STATEMENT OF CLAIM: Claim of the System Committee of **the** Brotherhood
GL-8370, that:

"1. Carrier violated the current **Agreement** Rules, particularly Rule 21 (Discipline), when under date of January 28, **1976**, it dismissed from service Mr. **M. W. Gillman**, time sorter clerk at **Ravenswood**, account of investigation held on January 22, **1976**; and

2. Carrier shall required to reinstate **Mr. M. W. Gillman** to the service of the Carrier, **and** compensate him for **all** time lost from January 28, **1976** forward, until such time as the violation is **corrected**."

OPINION OF BOARD: The **Claimant** had been an employee for two years and four months, but at the time of the investigation was on indefinite furlough due to force reduction.

The Claimant, Mr. **M. W. Gillman**, was discharged from the service of the Carrier for allegedly refusing to obey a direct order issued to him by the Personnel **Manager**.

The first **witness** called at the investigation was J. W. Popescue, **Manager**, Office Services. He testified as follows:

"Mr. Hayes: Mr. Popescue, would you now explain the basis of your letter **of charges**?"

Mr. Popescue: The basis of my letter of charges is **that** considering the circumstances as related to me by Mr. Zickefoose, it appears **Mr. M. W. Gillman** refused to obey a direct order of **an** officer **of** the carrier, therefore resulting in insubordination. I therefore felt an investigation should be scheduled to develop all **the** facts."

The second witness was D. C. Zickefoose, Personnel Manager, and he testified as follows:

"Mr. Hayes : Would you please state for the record what transpired between yourself and Mr. Gillman on the morning of January 14, 1976.

Mr. Zickefoose: At approximately 8:10 A.M. on January 14, 1967, I observed Mr. Gillman distributing copies of a leaflet entitled 'The Semaphore' to incoming employees in the South vestibule in the Ravenswood Building. I approached Mike and requested that inasmuch as he had previously been warned and counseled about the distribution of 'The Semaphore' that he go out on the public sidewalk off of the Company property for the distribution of this document. Mike made a response something to the effect that it was cold out. I then responded that we do not need any additional problems, if you want to distribute this, just go out on the public sidewalk. It was apparent to me that Mike felt he had a right to distribute this leaflet on the property, so I then stated that I am giving you a direct order to leave the premises if it is your intent to pass out 'The Semaphore'. Do not pass it out on company property and if you fail to comply it will result in disciplinary action. At that point Mike made a comment that I shouldn't get mad. I did respond that I wasn't mad. I assume the reason Mike felt I was mad was because I did raise my voice - I did so with the intent to insure that he did not misunderstand exactly what I was saying as there were employees chatting as they were filing in the door. I was also stern, as I did not want him to misinterpret the importance of the direct order I was giving him. Mike responded something to the effect that an NLRB ruling gave him the right to pass out a leaflet such as 'The Semaphore' on the property providing it was passed out prior to his hours of assignment and not in an immediate work area.

I then called Mr. Prank Parker, **Kane** Security Guard, from his post at the First Floor stairwell, and reiterated my order to Mr. **Gillman**. Mike and I stood there for several minutes during which period of time people were filing **into** the building. He asked **how** he could appeal my decision or his right or whatever, I suggested **that** he see his union **representative**. Subsequent to that few minutes of discussion, Mr. **Gillman** in the vestibule of the South Wing of company property, began passing 'The Semaphore' out to employees filing in the door. I identified at least one individual, to whom Mr. **Gillman** gave a copy of 'The **Semaphore**' subsequent to my direct order. **That** individual was Mr. J. W. Lester, of the Auditor **Freight** Divisions.

Mr. Zickefoose also testified in regard to prior incidents:

"Mr. Hayes: Mr. Zickefoose, to your knowledge did Mr. **Gillman** receive **any** previous warnings about distributing literature on **company** property?

Mr. Zickefoose: In June or July of **1975** upon receipt by me of the **initial** publication of 'The Semaphore', I **called Mike** to my office and explained to him that though it was not my intent to prevent him from exercising his rights to freedom of speech, that the distribution of this type of leaflet would not be considered appropriate on **company** property. At a later date, on entering the Ravenswood Building, **Mike** was distributing the leaflets on the steps leading to the South Door of the **Ravenswood** Building, I requested of him to move on out to the public **sidewalk** for the distribution of 'The Semaphore' and he complied."

On cross-examination, the following **testimony** was elicited from Personnel Manager Zickefoose:

"Mr. Stir-ton: Mr. Zickefoose, when reviewing the charge as documented in the letter of January 14, 1976, isn't it correct that this entire incident took place before the assigned working hours of Mr. Gillman and other first-shift employees?

Mr. Zickefoose: That is correct.

Mr. Stir-ton: Isn't it also correct that the actual geographic location that he was handing these pamphlets out might be described as the doorways comprising the South entrance of the building which could be described as an area which is prior to the general admission or working areas of the building.

Mr. Zickefoose: I would describe the area as private property owned by the Chicago and North Western Transportation Company.

Mr. Stir-ton: Yes, we do not dispute that, however so that the area can be identified if I made the statement that the area that he passed these documents is not a location that is considered a working area where duties are performed, this would be correct or wouldn't it?

Mr. Zickefoose: It would be correct to define this area as not an immediate work area."

The Claimant, M. W. Gillman, was the third witness. He testified as follows:

"Mr. Hayes : Mr. Gillman, on January 14, 1976, at approximately 8:20 a.m., were you standing in the South entrance vestibule distributing a publication called 'The Semaphore' to fellow employees?

Mr. Gillman: At approximately 8:20 a.m. on the morning of January 14, 1976, I was standing within the vestibule -which is a non-work area, which at

"that time was before the working hours of myself and of the other employees entering the building. I was at that time distributing copies of 'The Semaphore' which is the voice of the rank and file action committee which is a caucus within our union fighting for a strong and democratic union.

Hr. Hayes : At that time, were you approached by Mr. D. C. Zickefoose and requested that you leave the premises if you wished to distribute this document?

Mr. Gillman: At approximately 8:10 on that morning, Mr. Zickefoose entered the building and requested a copy of 'The Semaphore'. I informed Mr. Zickefoose that this paper was meant for the clerks in this building and that if he wished one he could obtain it through whatever manner he wished but I would not give him one. Approximately five minutes later, Mr. Zickefoose returned to the vestibule in an agitated manner and requested that I no longer hand out the leaflet. I informed Mr. Zickefoose that under a Supreme Court decision, which is cited as National Labor Relations Board v. Magnavox Company of Tennessee, referred to at 94 S. Ct. 1099 (1974), that employees have the right to distribute union-related literature on non-working hours in non-working area, and that I do not feel that his order was just and right-ful. * * *

* * *

Mr. Stirton: Mr. Gillman, when you passed out these circulars or leaflets, known as 'The Semaphore' on the morning of January 14, 1976, this distribution was limited to a time period prior to your tour of duty and the tour of duty of those individuals that you passed these papers out to, isn't that correct?

"Mr. Gillman: To the best of my knowledge, that is correct.

Mr. Stirton: And also, when you did pass out these papers, you passed them out at the doorway or entrance to the building because of inclement weather and these documents were not passed out in any of the offices or actual work locations, isn't that correct?

Mr. Gillman: That is correct.

Mr. Stirton: Now reference is made in the letter of charges to insubordination and would it be correct for me to assume from the prior testimony that you had no wish to be insubordinate, but that you felt that because of your knowledge of certain court decisions and NLRB decisions, that you were within your right to distribute this information?

Mr. Gillman: That is correct.

* * * *

Mr. Hayes: I have just a couple of questions of Mr. Gillman. Mr. Gillman, were you given a direct order by Mr. Zickefoose as previous testimony has indicated on the morning of January 14, 1976?

Mr. Gillman: Mr. Zickefoose did give me a direct order - the question arises as to whether it was justified and lawful for him to give that order?

Mr. Hayes: Did you obey this order or did you continue to subsequently distribute the publication, 'The Semaphore'?

Mr. Gillman: Mr. Zickefoose and I discussed this for several minutes, at which time Kiss M. Murawski, Member of the Protective Committee, entered the building and requested a copy from me at -which time I gave it to her, at which time Mr. Zickefoose left the area, saying that I had made my decision and that it did not matter anymore, at which point I got the feeling that, if that was his position, I would continue to utilize my lawful rights and continue to hand out this publication.

"Mr. Hayes : Did you continue to hand out the publication?

Mr. Gillman: Yes, I did.'!

The evidence further indicated that the Claimant was the Chairperson of the Unemployed Committee of Brotherhood Lodge 863, and that "The Semaphore" was published and distributed by his committee.

The Carrier then recalled Personnel Manager Zickefoose, who denied that he threatened the Claimant with expulsion from the property by use of the local police. He then further testified:

"Mr. Hayes : Did you threaten Mr. Gillman with expulsion from company property by anyone?

Mr. Zickefoose: I gave him a direct order to leave the property if it was his intent to pass out 'The Semaphore.'"

These were the only witnesses presented at the hearing.

The Carrier argues that the question is quite simple, i.e., did the Claimant refuse to comply with a direct order from an officer of the Company?

The Union takes the position, first of all, that it was improper for the Personnel Manager to give the order involved herein, and that he could not have reasonably expected said order to be obeyed. The Union urges that the distribution of the pamphlet is protected by the First Amendment and comes within the guidelines established by the Supreme Court of the United States in that the pamphlet was distributed prior to assigned working hours in an area not defined as an immediate work area.

The theory of the Carrier would seem to be that the Claimant had a duty to obey the order and then to file a grievance urging that the Personnel Jaeger did not have the authority to issue the order. Some arbitrators have offered support for this theory and perhaps none have more succinctly made the point than did Umpire Harry Shulman, In the Matter of the Arbitration of Ford Motor Company, 3 IA 779, 780-781 (1944):

"Some men **apparently** think that, **when** a violation of contract seems clear, the employee may refuse to obey and thus resort to self-help rather **than** the grievance procedure. That is an erroneous point of view. In the first place, what appears to one party to be a clear violation may not seem so at all to the other party. **Neither** party **can** be the final judge as to whether the contract has **been** violated. The determination of **that** issue rests on collective negotiation through the **grievance** procedure. But, in the second place, **and** more important, the grievance procedure is prescribed in the contract precisely because the parties anticipated that there would be claims of violations which would require adjustment. That procedure is prescribed for **all grievances**, not merely for doubtful ones. **Nothing** in the contract even **suggests** the idea that only doubtful violations need be processed through the grievance procedure and that clear violations can be resisted through individual self-help. The only difference between a 'clear' violation and a 'doubtful' one is that the **former makes** a clear grievance and the **latter** a doubtful one. But both must be handled in the regular prescribed manner.

* * * *

"**When** a controversy arises, production **cannot** wait for exhaustion of the grievance procedure. **While** that procedure is being pursued, production must go on. And someone must have the authority to direct the manner in which it is to go on until the controversy is settled. That authority is vested in supervision. It must be vested there because the responsibility for production is also vested there; and responsibility must be accompanied by authority. It is fairly vested there because the **grievance** procedure is capable of adequately recompensing employees for abuse of authority by supervision."

There are others who believe that **exceptions do exist**. it is **suggested** that **before** an employee has a duty to **follow an** order, it must be an order the **employer** was entitled to **give** and one that the employer could **reasonably expect** to have obeyed.

Dr. Elkouri, in "How Arbitration Works," at Pages 154 through 156, says:

"Arbitrators often deny or limit requested relief, notwithstanding the merits of the original complaint, where the **grievant** has resorted to self-help rather than to the **grievance procedure**. Many arbitrators have **taken** the position that **employees** must not **take** matters into their own hands but must obey orders and carry **out** their **assignments**, even if believed to violate the agreement, then turn to the grievance procedure for relief.

The fact that employees acted by 'advice of counsel' has been held not to provide a defense or **justification** for self-help. Nor is a **refusal** to obey management's orders immunized by the fact that the employee **was** 'caught in the middle' between company and union, though this fact might be reason for **reducing** the penalty. In regard to reducing the penalty, the offense of disobeying orders has sometimes been considered to have been mitigated somewhat where the initial **refusal** to obey was followed by obedience.

An important exception to the general rule against resorting to self-help exists where obedience to orders would involve an unusual **health** hazard or similar sacrifice.

Some arbitrators have recognized other possible exceptions to the duty to obey orders, as where the order commands the **performance** of an immoral or criminal act; or where the order violates the rights or domain of the union itself by interfering with the union's **contractual** right to investigate and process grievances; or where an order interferes with the employee's proper use of the grievance procedure; or where the order commands a skilled craftsman to perform work wholly unrelated to his craft; or where the **order** 'is quite clearly and indisputably beyond the authority of' the company. * * *

Mr. Zickefoose was the Personnel **Manager** and had been an employee of the **Company** ten years. He should have **known** the rights of the **employees** in regard to distributing material on the **property**. He may have made a serious **error in judgment in** directing the Claimant not to **distribute** the literature prior to assigned **working** hours in an area not identified as an immediate **work** area.

The Company elected to avoid a confrontation on the question of the right of the Claimant to distribute ~~the~~ literature and chose instead to discipline the Claimant for ~~willful~~ refusal to obey the direct order of ~~the~~ Personnel Manager.

The ~~Grievant~~ did not elect to pursue a grievance in regard to the order of ~~the~~ Personnel Manager, but ~~chose~~ to invoke self-help by violating the order.

The ~~Grievant~~ urges this Board to decide that the actions of the Carrier constituted a subterfuge and, therefore, the Carrier was ~~permitted~~ to do indirectly ~~what~~ it was prohibited from doing directly.

The evidence is clear and convincing in support of the charge that ~~the Claimant~~ refused to comply ~~with~~ a direct order from an officer of the Compsny.

The Claimant has failed to prove that the order ~~falls~~ within a recognized exception to the general rule ~~against~~ resorting to self-help.

We find that in the instant case the Claimant should have obeyed the order of ~~the~~ Personnel Manager and then pursued his grievance remedies if he believed the order to be in error.

Although in this case we adopt the obey and grieve theory, we hasten to add that in a proper case where an established exception ~~was~~ proven, ~~we~~ would not hesitate to ~~grant~~ relief.

However, in this case, the Claimant was simply distributing literature ~~and was~~ ordered to cease and desist. None of the recognized exceptions for invoking self-help were proven herein and we hold that the carrier acted properly in dismissing the Claimant for ~~refusing~~ to comply with a direct order of a company officer.

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;

That this 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:

A. W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 15th day of February 1978.