

**NATIONAL RAILROAD ADJUSTMENT BOARD**

**THIRD DIVISION**

John H. Dorsey, Referee

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**PARTIES TO DISPUTE:**

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

**FLORIDA EAST COAST RAILWAY COMPANY**

**STATEMENT OF CLAIM:** Claim of the System Committee of the Brotherhood (GL-5525) that:

1. Carrier exceeded its authority in directing Mr. L. F. McCleery to present himself at an investigation on September 16, 1963.
2. The Carrier's dismissal of Mr. McCleery on September 19, 1963 was improper, unjustifiable, unreasonable and unwarranted.
3. Carrier be required to set aside dismissal of Mr. McCleery, with his seniority and all other rights unimpaired, and that he be compensated for all wage losses that may be sustained as a result of his improper dismissal.

**OPINION OF BOARD:** The issue in this case is whether an employe of a carrier, engaging in a legal strike, is subject to the discipline rules of an agreement within which he is covered.

**I. THE FACTS**

At 6:00 A. M., January 23, 1963, employes represented by Eleven Non-Operating Labor Organizations, of which Clerks is one, called a legal strike against Carrier. At all times material herein the strike continued.

Carrier having been informed that Claimant, a striking employe, while picketing, on July 15, 1963, had thrown rocks at members of a working crew, served the following charge and notice of investigation upon Claimant under date of September 9, 1963:

"You are charged with disloyal, repugnant and offensive conduct unbecoming employes of the Florida East Coast Railway Company, which endangered the safety of the traveling public as well as employes, property and equipment of the Railway, at approximately 1:50 P. M., July 15, 1963, by throwing rocks at members of the crew Train Extra 620 South while that crew was performing service at Frontenac.

Report to the Daytona Beach Plaza Hotel, Monday, September

16, 1963, 10:00 A. M., for formal investigation to develop the facts and responsibility in connection with this charge.

The following rules and instructions of the Railway are involved;

Rules of Conduct for Employes

Rule 27

You may have present at this investigation such representation as you are entitled to under your working agreement."

Under date of September 13, 1963, Claimant responded:

"Referring to your letter of September 9, instructing me to report for formal investigation at the Daytona Beach Plaza Hotel at 10:00 A. M. September 16, 1963.

I am on a legally authorized strike and am not subject to the continuing authority of the Railway during the period of the strike and, therefore, am not obligated to attend the investigation called for September 16."

Carrier after informing Claimant, under date of September 14, 1963, that: "The existence of a legally authorized strike does not automatically excuse striking employes of responsibility for acts which might be committed against the Railway." — and — "Your failure to attend in no way lessens your responsibility should such responsibility be developed by the evidence adduced during the course of the investigation," proceeded to hold the investigation as scheduled. Claimant failed to appear. On September 19, 1963, Carrier addressed the following dismissal notice to Claimant:

"Referring to formal investigation held on Monday, September 16, 1963, commencing at 10:00 A. M., in the Daytona Plaza Hotel, Daytona Beach Florida, at which neither you nor any representative appeared, conducted for the purpose of developing the facts and responsibility in connection with the charge that you did commit a disloyal, repugnant and offensive act unbecoming an employe of the Florida East Coast Railway Company, which endangered the safety of the traveling public as well as employes, property and equipment of the Railway, at approximately 1:50 P. M., July 15, 1963, by throwing rocks at members of the crew of Train Extra 620 South, while that crew was performing service at Frontenac.

For your responsibility for this irregularity, as developed by the formal investigation, you are dismissed from the service of the Railway at once.

Please return to my office promptly any Railway supplies in your possession.

A transcript of the investigation of September 16, 1963, is attached."

Thereafter, Clerks resorted to the appeals procedure prescribed in the Agreement during which it advanced the following contentions:

1. Claimant was not subject to the authority of Carrier during the period

of the strike and Carrier had no legal right to call and hold the investigation on September 16, 1963;

2. Under the circumstances involved Claimant could not receive a fair and impartial investigation because of animosity of those conducting the investigation, as well as witnesses;

3. The transcript of the investigation, held in the absence of Claimant, did not establish adequate proof of the charges; and

4. Upon an Information filed by the County Solicitor, and warrant issued, a jury trial was held on October 29, 1963, as to whether Claimant was guilty of "aggravated assault" for the alleged rock throwing incident. The jury returned a verdict of "Not Guilty." This court proceeding preempted the deciding of the issue as to whether Claimant had thrown rocks.

The appeals having been successively denied on the property, Clerks petitioned this Board to resolve the dispute.

## II. RESOLUTION

### A. The Employer—Employee Relationship

The relationship between an employe engaged in a legal strike and his employer continues to be employer—employe. To hold otherwise would be to reduce the status of the striker to that of a stranger to the employer. It would have, *inter alia*, the effect of stripping the striker of his legally cognizable rights to return to work upon settlement of the strike.

Under the First Amendment of the Constitution an employe on strike is guaranteed the right to engage in peaceful picketing without injury to the employer—employe relationship. But, the books are full of cases, before the courts and the National Labor Relations Board, that an employer is legally justified in denying reinstatement to a striker who engages in violence on the picket line. In such cases the striker is held to have terminated the employer—employe relationship by exceeding the bounds of peaceful picketing.

For industries other than those subject to the Railway Labor Act the issue as to whether a striker has by his actions terminated the employer—employe relationship does not usually arise until settlement of the strike. This case differs in that under the Agreement, Rule 28, Carrier must furnish an employe charged with an offense with a letter setting forth the charge within sixty (60) days of Carrier acquiring knowledge and information upon which to base the charge. The only exception to this time limitation is confined to "an employe on leave of absence or vacation"—Claimant was not within either of these categories. Then, once the charge is filed, Rule 29 of the Agreement requires that as to Claimant, an employe with more than sixty (60) days service, the investigation must be held within ten (10) days of the date when charged and decision must be rendered within ten (10) days of the completion of the investigation. Time limitations such as these are strictly construed by this Board in the interpretation and application of agreements. Consequently, Carrier had no alternative but to satisfy the time limitations in initiating and processing disciplinary proceedings against Claimant.

### B. The Effectiveness of the Agreement

Neither party herein avers that the Disciplinary Rules of the Agreement

were and are involved in the dispute which remains unsettled after compliance with Section 6 of the Act. We must assume, therefore, that those Rules continue in force and effect.

### C. Court Proceedings vs. Agreement Rules

The court proceeding, which we have referred to above, charged Claimant with a crime—"aggravated assault." This being a criminal offense the State had to prove its case beyond a reasonable doubt. This is not required in civil cases. In civil cases only a preponderance of evidence is required.

The jury in the criminal case was concerned only with whether the Claimant was guilty of the crime with which he was charged. It was not concerned with interpretation and application of the Rules of the Agreement. It was not possessed of the expert knowledge recognized as necessary by the Congress when it reserved to the parties to the Agreement the right to seek settlement of disputes on the property with appeal, exclusive, to the Railroad Adjustment Board. The jurisdiction vested in the Board cannot be preempted by the courts. We hold, therefore, that the decision of the court in the criminal case is not material.

### D. Fair and Impartial Hearing

One of the contentions of Clerks is that Claimant would not be given a fair and impartial hearing while the strike continued. This is a speculative conclusion. The Claimant had no right to prejudice the course of the hearing. He was given the opportunity to appear, to make such motions as he considered necessary, to adduce evidence in his defense, to cross-examine Carrier's witnesses, opportunity to appeal on the property, and finally, recourse to the jurisdiction of this Board. Claimant, by absenting himself from the hearing, has placed this Board in the position of determining from the transcript of the hearing whether it was conducted in a fair and impartial manner. We find that it was.

### E. Adequacy of Proof

In our consideration of a disciplinary case we sit with the limited jurisdiction of an appellate forum. We do not weigh the evidence *de novo*. Our function is deciding whether or not the finding in the disciplinary hearing is supported by substantial evidence. Even in cases in which we find conflicting evidence the test is whether there is material and relevant evidence, which if believed, supports the finding. We find from our study of the transcript in this case that there is substantial evidence to support the findings that Claimant was guilty as charged.

## CONCLUSIONS

1. As between Claimant and Carrier, the employer—employee relationship continued during the course of the strike unless terminated voluntarily or for cause;
2. At the time of the incident giving rise to the charge here involved, Claimant and Carrier were both contractually obligated to comply with the Rules of the Agreement;
3. Claimant received a fair and impartial hearing. His absenting himself from the hearing was at his peril.

4. The record shows that the finding that Claimant was guilty as charged is supported by substantial evidence.

We will 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 Employes involved in this dispute are respectively Carrier and Employes 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 Carrier did not violate the Agreement.

#### AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of THIRD DIVISION

ATTEST: S. H. Schulty  
Executive Secretary

Dated at Chicago, Illinois, this 11th day of December 1964.

#### LABOR MEMBER'S DISSENT TO AWARD 13127 (DOCKET CL-14758)

The Referee erred when he denied the claim based on the following conclusions:

“1. As between Claimant and Carrier, the employer—employee relationship continued during the course of the strike unless terminated voluntarily or for cause;

2. At the time of the incident giving rise to the charge here involved, Claimant and Carrier were both contractually obligated to comply with the Rules of the Agreement;

3. Claimant received a fair and impartial hearing. His absenting himself from the hearing was at his peril.

4. The record shows that the finding that Claimant was guilty as charged is supported by substantial evidence.”

Regarding the first conclusion: The Claimant was not an employe as that term is defined in Section 1, Fourth, of the Railway Labor Act, as he was not “subject to its (Carrier’s) continuing authority to supervise and direct the manner of his service” (parenthesis supplied). He was not working for the Carrier inasmuch as he, along with a vast majority of the Carrier’s employes, were on a legally authorized withdrawal from Carrier service in accordance with the Railway Labor Act.

Regarding the second conclusion: The Claimant was not performing service for the Carrier, hence the Carrier could not apply the provisions of the working Agreement to him regardless of his conduct.

Regarding the third conclusion: It was a definite impossibility for the Claimant, or any other individual under similar circumstances, to receive a fair and impartial hearing from the Carrier, inasmuch as Claimant had been on a legally authorized strike against the Carrier for nearly 6 months prior to the date of the alleged offense.

Regarding the fourth conclusion: The Carrier apparently had the Claimant arrested and he was tried in the Civil Courts. The Court dismissed the charges against the Claimant for lack of proof. How, then, can the Referee include in his Opinion statements that the Claimant was found guilty when a jury in a Civil Court returned its verdict of not guilty?

The Carrier had its day in Court and lost; thereafter, rather than appeal its case to a higher Court, Carrier resorted to the working Agreement rules and the Referee found the Claimant guilty when the record before the Referee plainly states that a Civil Court had previously found him not guilty.

It is quite evident that the Referee erred: and for the above reasons, I most vigorously dissent to this Award.

C. E. Kief,  
Labor Member

CEK/bjs

Labor Member's Dissent to  
Award 13127 (Docket CL-14758)  
January 8, 1965