

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 19601
Docket Number CL-19413

Robert M. O'Brien, 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-6959)
that:

1. Carrier violated the provisions of the Clerks' Rules Agreement at Milwaukee, Wisconsin when it notified employees of the Material Department to report for an investigation on non-precise matters and subsequently assessed disciplinary measures against them.

2. Carrier's actions in holding investigations with the following employees shall be declared null and void and each employee's record shall be cleared of the disciplinary measures assessed against him or her:

H. Bahr	C. Royce	T. Taugher	M. Higgins
N. Bakken	S. Soulier, Jr.	J. Zingler	H. Janke
R. Banholzer	R. Spors		J. Kempinger
R. Beyer	J. Thekan	E. Augustin	P. Klisanic
F. Braun	A. E. Volke	W. Backes	R. P. Krol
F. Brieger	J. Weigert	A. Pazrowski	S. J. Laday
W. Deering	R. Winter	J. J. Crotty	J. Lipinski
W. Drobac		H. Ferkenes	K. Matous
W. Finney, Jr.	V. Amick	J. Grossman	K. Meister
G. Gunsolley	A. Babich	W. O. Kaebisch	F. Motola
J. Jenkins	R. Becker	R. Kraft	R. Peters
R. Kane	F. Blando	C. Kret	F. M. Reed
A. Kirchoff	P. Conklin	R. Lewis	L. Schmeling
T. Kitchkume	V. Fobes	J. F. Parks	H. Schulenberg
R. Knabel	S. Greenwood	R. Ramer	S. H. Sheff
F. Koch	H. Meyer	C. Ros	H. G. Tesch
G. Lang	E. J. Paik	A. Steinbrenner	K. Van Ess
R. Matuzak	S. Powalisz		A. Wenninger
E. McDonald	Wm. Scale	E. L. Bentley	J. R. Wolf
V. Riordan	V. Sliwinski	A. Cefalu	L. E. Kerlin

(3) Carrier's actions in holding investigations with the following employees shall be declared null and void, and each employee's record shall be cleared of the disciplinary measures assessed against him or her:

J. E. Baum
D. L. Grayson
G. C. Nelson
M. M. Heltsley
T. H. Wagner

OPINION OF BOARD: Although there was an order outstanding from the U. S. District Court, District of Columbia, restraining all shopcraft unions of the nation's railroads from striking until February 21, 1970, a strike occurred at Carrier's shops in Milwaukee on February 11, 1970. Claimants, employees of Carrier's Material Department at the Milwaukee shops, were not on strike. However, since the strikers had set up picket lines on this date, the claimants refused to cross the picket lines and thus did not report to their assignments on February 11, 1970. Following an investigation, claimants were found guilty failing to protect their assignments on February 11, 1970 and were each assessed either 10, 5, or 3 days deferred suspension. Appeal from the assessment of discipline was duly progressed with Carrier's final decision upholding the discipline coming on May 22, 1970. The within claim was filed on June 3, 1970.

The Carrier contends that the claim is barred in that it was not filed within the 60 day period prescribed in Rule 36-1(a). That Rule is taken from the August 21, 1954 National Agreement. Following the investigation, March 23, 1970 was the last day on which any disciplinary assessment was made. And since the claim was not filed until June 3, 1970 Carrier contends Rule 36-1(a) was violated. However, claimants appealed the assessment of discipline in accordance with Rule 22 and on May 22, 1970 Carrier rendered a final decision upholding the assessment of discipline. Since the claim was filed within 60 days of Carrier's final decision the Organization contends Rule 36-1(a) was complied with.

The procedural issue raised herein is not novel. Award 17595 of this Division, involving the same parties herein, upheld the Organization's position and concluded: "We do not believe it a proper construction of the two rules to require Claimant to abandon his remedy under Rule 22 and require him to initiate a new claim under Rule 36 when he has not obtained a final decision from the Carrier within 60 days of the initial action taken by the Carrier under Rule 22. Nor do we believe it is the intent of the parties that an employee maintain concurrent claims or grievances under Rules 22 and 36 arising from the same act of Carrier, seeking the same relief and from the same officer of the Carrier." We subscribe to the reasoning therein and find that the "occurrence" referred to in Rule 36-1(a) was the final decision made May 22, 1970 upholding the assessment of discipline and the claim was filed within 60 days of that date and thus not barred. We will proceed to the merits of the claim.

At the investigation most of the claimants testified that the reason they would not cross the picket lines was their fear of safety for themselves, their families and their property had they crossed to protect their assignments. They did not know it was an illegal strike. Some testified that upon arriving at the scene police told them to turn back and go home. Many did not even know who was on strike. Many of the claimants are elderly. Most feared either immediate physical harm or subsequent reprisals to their person or property if they attempted to protect their assignment.

Carrier believes that since the strike was illegal, there was no violence at the scene, the strikers were peaceful and there was adequate police protection, there was no reason for claimants' refusal to cross the picket lines.

We cannot agree with Carrier's actions. It is undisputed that the claimants did not take part in the picket line. Nor did they know whether the strike was legal or illegal. And even if they did know, it is highly unlikely that they could distinguish the two adequately so that they could guide their actions accordingly. It is immaterial that in retrospect it developed that the strike was illegal and there was no violence at the picket line. Hindsight is not enough. It is the subjective belief of claimants on the morning of February 11, 1970 that is the determining factor as to whether or not they were justified in refusing to cross the picket lines.

From the investigations it was shown that on the morning of February 11, 1970, claimants' fear was well founded. From all the circumstances surrounding the picket lines, we feel that claimants were justified in not crossing them and when Carrier subsequently disciplined claimants for this action it acted arbitrarily and unreasonably. The discipline imposed cannot be allowed to stand.

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

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That the Agreement was violated.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: E A Killen
Executive Secretary

Dated at Chicago, Illinois, this 14th day of February 1973.