

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 21591
Docket Number CL-21208

Walter C. Wallace, Referee

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

PARTIES TO DISHJTR: (

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

STATEMENT OF CLAIM: Claim of the System **Committee** of the Brotherhood
(GL-7856) that:

1. **Carrier** violated the Clerks' Rules Agreement at **Chicago, Illinois** when it arbitrarily **and** capriciously withheld **employee** T. J. Curley from service on April 17, 1974 and then failed to hold the investigation within seven (7) days of the time held from service.
2. Carrier **shall** now be required to declare the investigation **and** decision resulting therefrom suspending **employee** Curley from actual service for 30 days **null** and void.
3. Carrier shall now be required to clear the record of **employee** Curley **and** pay him for all time lost, including eight (8) hours pay at the pro rata rate of his position for April 17, 1974.
4. Carrier **shall**, in **addition** to the monetary **claim** in Item 3, be required to pay **claimant** interest at 7% per annum compounded **annually** on the anniversary date of the claim.

OPINION OF BOARD:

The question presented here is whether or not **Claimant** was held out of service on April 17, 1974 pending investigation of charges against him for failing to protect his assignment on the prior night, April 16, 1974. Rule 22 of the applicable agreement deals with Discipline **and** Grievances and provides in pertinent part:

"(d) Investigations shall be held within seven (7) days (earlier if possible) of the date when charged with the offense or held from service . . ." (**Emphasis** added).

The notice of investigation submitted to the Claimant **made** reference to the infraction of April 16, 1974 and set a time **and** place for investigation

on April 30, 1974. Under the above quoted rule, if **Claimant had** been withheld from service on April 17, 1974 the subsequent investigation on April 30, 1974 **was** outside the time limits.

The investigation conducted on the property developed testimony by the **Claimant and** the Carrier representatives whom he contacted by telephone on the night of the central incident, April 16, 1974. That testimony is in conflict. The Carrier witnesses are in **substantial agreement**: **Claimant** was due to work the third shift, 11:00 p.m. to 7:00 a.m. and he called in about 10:50 p.m. and **explained** he was at home and he **had** car trouble and he would **be an** hour or au hour and a half late. He **was** not told to mark off for the night, instead he was instructed to come **in** to work. Then arrangements were made with en on-shift employee to remain over until **Claimant** arrived. According to **Claimant, the facts are different**: he called in and explained he would be late and was told, in effect, not to come in and to mark off for the shift, thereby losing a day's pay. **Claimant** did not show **up** for work that night but reported for work the next night in **advance** of his shift. At that time he **was** told to go home as **arrangements** had already been made to work his shift by someone else. **Apparently**, Claimant worked e&h **day** thereafter **up** to and including the day of the hearing. Carrier's witnesses emphatically deny that Claimant was given permission to mark off **and** remain home on April 16, 1974. It is their contention that **Claimant's** failure to report at **all** on April 16, 1974 involved a **failure** to protect his assignment. According to Carrier witnesses his position was ambiguous on April 17, 1974. Insofar as the job in question **had** to be protected each day **and** each shift, it was essential that **arrangements** be made to fill that job in advance which was done. In effect, Claimant's **failure** to report at **all** on April 16 prevented **Claimant from** getting back on his shift the next night. According to the Carrier what happened on April 17, 1974 related to **Claimant's** voluntary act **and** did not involve a withholding from service under Rule 22.

During the investigation Claimant testified that on prior occasions when he **called** with a legitimate **reason** for being late he was marked off for the entire date. The Carrier's witness denied this was a policy of the Carrier. No additional evidence **along** these lines was submitted on the property. In the Organization's submission in the panel discussion before this Board, reference is made to **several awards** of this Division; **Awards 20227, 20148, 20014, 19910** dealing with the same parties which/is offered as confirmation of Claimant's testimony that it is the **rule with** this Carrier to mark **employees** off for a day when they are late over fifteen **minutes**. We believe the time for such evidence is passed and even assuming their relevance, that was a matter for development on the property. This Board has no authority to consider arguments **or** evidence for the first time.

The investigation on the property resulted in the finding that Claimant had failed to protect his assignment on April 16, 1974 and he was suspended from service for thirty days. This finding was based upon substantial evidence. It is not the province of this Board to substitute its judgment for the Carrier in discipline cases such as this. Award 17914 (Quinn); Award 16074 (Perelson); Award 13168 (Ables). The hearing officer chose to believe the version of the facts set forth by the Carrier and chose not to give credence to Claimant's version of what occurred. On this basis there is no justification for his absence on April 16, 1974. Moreover, the explanation provided by the Carrier that this job must be manned every shift and it followed the prudent arrangement of planning ahead for April 17, 1974, was not challenged on the property. In addition, there is no evidence or explanation that contradicts Carrier's claim that Claimant was free to work everyday until the investigation other than the date in question. We have some difficulty with Employee Exhibit "G" which purports to be a letter from Kenneth L. Morhardt (a witness at the hearing). Whether this document is properly a part of the record we cannot determine. It is dated subsequent to the investigation. It is sufficient to point out that its lack of clarity casts considerable doubt on its value as proof.

The Claimant's case is based upon the allegations of his representatives that he was held out of service pending the investigation. This is not a substitute for evidence. Award 921.3 (Weston). In order to satisfy the burden of establishing that he was held from service within the meaning of the rule here, something more would be needed. We do not find it in this record and we are required to conclude that Claimant was not withheld from service pending the investigation. On this basis the Awards of this Division dealing with the propriety of holding an employee out of service pending an investigation have no applicability here. See Award 20305 (Blackwell) and Award 19601 (O'Brien).

The Organization places some reliance upon Third Division Award 16632 (Heskett) where it was held a hearing that was void ab initio could not be a basis for further charges. We find this award has no application here. The very question in issue is whether the time limit rule had been violated and insofar as the investigation had properly held it had not; there could be no question of making Claimant suffer because of Carrier's wrongful acts."

We conclude Carrier did not conduct an investigation outside the time limits and on this basis all portions of this claim are denied.

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

The claim is denied in accordance with the opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

A. W. Paulson
Executive Secretary

Dated at Chicago, Illinois, this 17th **day** of June 1977.