

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 22081

Docket Number CL-22062

Don Hamilton, Referee

PARTIES TO DISPUTE: ((Brotherhood of Railway, Airline and
(Steamship Clerks, Freight Handlers,
(Express and Station Employees
(Union Pacific Railroad Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood
(GL-8352) that:

(1) Carrier violated the Rules Agreement, effective May 1, 1955, and amended July 15, 1967, particularly the discipline rule 45 when it removed Claimant R. H. Bourg from service on October 21, 1974, without fair and impartial hearing or appeal, thus denying him due process.

(2) Claimant should be immediately restored to service of the Carrier with all rights unimpaired.

(3) He should be compensated for each work day, commencing on October 21, 1974, and continuing until adjusted, in addition to any and all overtime he would have worked had he remained in the employ of the Carrier, subject to a check of Carrier's records, and the amount of interest allowable by law on any monies that have been or will be deprived him account improper dismissal from the service of Carrier.

(4) All Agreement rights should be restored, including the premiums for Travelers Group Insurance Policy GA-23000 and the Union Pacific Railroad Employees Hospital Association. He should also be reimbursed for any medical expenses accruing to him and his dependents while so improperly withheld from Carrier's service.

(5) His personal records should be cleared of the erroneous, false libelous statements contained in Carrier's letter to the Organization dated October 21, 1974, file 46.33.10, 46.91.20.

OPINION OF BOARD: In the initial submission, the Organization alleges :

That the Claimant, R. H. Bourg, was employed by the Carrier August 16, 1946, and until the instant incident had performed some 27 years of exemplary service.

That the Claimant was the incumbent of the **position** of Stores First Helper at the **Omaha** Stores Department.

That while at work September 26, 1974, Claimant received a telephone **call** from his wife.

That the Claimant obtained the permission of his supervisor to leave his **assignment** and that he went home where he was confronted by several **Omaha** policemen and arrested.

That some time between September 27 and September 30, 1974, the Claimant talked with his **immediate** supervisor and was advised that the supervisor would **send** him some documents to sign.

That on or about October 1, 1974, an employe appeared at the home of the Claimant and handed him a resignation form.

That on October 18, 1974, the Carrier abolished the position of Stores First Helper.

That under Rule 17 of the Agreement, the Claimant had ten days to either displace a junior employe or elect to **furlough** himself.

That prior to permitting Claimant to exercise his option as set out above, the Carrier, on October 21, 1974, removed Claimant from service pursuant to Rule 22.

That on February 3, 1975, charges were dismissed against the **Claimant** by the Municipal Court of the City of **Omaha**.

That on **March** 20, 1975, the initial claim was filed by the Local Chairman with the Storekeeper.

That on **March** 25, 1975, the Storekeeper declined the initial claim.

That on **March** 26, 1975, the **Local** Chairman advised that the declination was unacceptable and would be appealed to the next highest officer.

That on April 7, 1975, the General Chairman appealed the claim to the General Storekeeper.

That on April 30, 1975, the General Storekeeper declined the claim.

That on May 27, 1975, the General Chairman responded to the declination and requested a **time limit** extension until a conference could be held.

That on June 10, 1975, the General Storekeeper granted **permission** to discuss the **matter** in conference and extended the **time limit** for further appeal to **60** days from the date of the conference.

That on August 28, 1975, the General Storekeeper **advised** that as a result of the conference held **on** August **6**, 1975, the **claim** was denied.

That on August 29, 1975, the General **Chairman** advised the General Storekeeper that his rejection was unacceptable and would be appealed.

That on **September** 20, 1975, the General **Chairman** **appealed** the **claim** to the Director of Labor Relations.

That on **November** 21, 1975, the Director of Labor Relations declined the **claim**.

That on **December** 17, 1975, the General **Chairman** advised that the declination was unacceptable and requested a conference and an extension of **time** for further appeal to **commence** 60 days **from** the date of the proposed conference.

That on **December** 31, 1975, the Director of Labor Relations advised that he **was** willing to discuss the **matter** in conference and extended the **time** for further **appeal 60** days **from** the date of the proposed conference.

That on January 6, 1976, the General **Chairman** challenged the Carrier to reveal any other cases that had been handled under Rule 22 in the **manner** alleged in the instant case.

That on January 22, 1976, the Director of Labor Relations responded by advising the names of **three** other **employees** who had been **removed** under **similar** application of **Rule** 22.

That on **January** 29, 1976, the **claim** was discussed in conference.

That on February 12, 1976, the Director of Labor Relations again denied the claim.

That on November 24, 1976, the Organization requested an extension for further **appeal** to January 31, 1977.

That on December 2, 1976, the Director of Labor Relations granted the **extension** to January 31, 1977.

The Organization argues that this case is one involving a disciplinary problem and should have been handled by the Carrier under Rule 45, which provides, "No **employee** will be disciplined or dismissed without a fair hearing by a supervising office?." The Organization **further** alleges that the purported use of Rule 22 was **improper** in this case. Rule 22 provides in part:

"An **employee** voluntarily leaving the service, or who has absented **himself** except in case of illness or other physical disability, without proper leave of absence, which **must** be in writing if in excess of ten (10) working days, will **terminate** his service and **seniority** rights."

In the first submission filed with the Board by the Carrier, it is alleged:

That on September 26, 1974, Claimant absented **himself** from the service of the Carrier without **permission**.

That subsequent to said date, Claimant did not **make known** his whereabouts, did not contact or **consult** with any **person** in authority, and did not report for duty on his **assignment**.

That on October 21, 1974, the General Storekeeper advised the General **Chairman** that the **Claimant** had **terminated** his seniority under the provisions of Rule 22.

That the Carrier did not hear **from** the **Claimant** or the Organization for five **months**.

That on **March 20**, 1975, the Local **Chairman** filed a **claim** with the Storekeeper on behalf of the **Claimant**.

It is the position of the Carrier **that** Rule 22 applies because it is alleged that the **Claimant** absented **himself** from service without **permission** and without contacting the Carrier, thereby **voluntarily terminating** his seniority.

The Carrier further argues that neither the Claimnt nor the Organization requested a hearing within the time **limits** set forth in Rule 22.

The Carrier further alleges that this is not a discipline case and that Rule 45 is, therefore, not applicable.

Briefly summarized, the argument of the Organization seem to be that the Claimnt had **permission** to leave work and go home; that he further had **permission to remain** off of the job; and that he was under the **impression** that he was to **remain** off the job until such time as a disciplinary hearing was scheduled by the Carrier. After the **criminal charges against the Claimant were dismissed**, he filed the instant **claim** alleging that he had been removed **from** service without a fair and **impartial** hearing under Rule 45.

Briefly stated, the Carrier asserts that the **Claimant** went home from work **September 26, 1974**, at which time he was arrested; that he did not return to work and, therefore, he voluntarily **terminated** under Rule 22; that several **months** later, after he won his **criminal** case, he then filed his **claim**.

We view this as a case of acquiescence on the part of the Claimnt. The **Claimant** was a veteran of 27 years with the Carrier. He **knew** the rules and procedures used by the **Carrier and the argument** that he **was** waiting all of those months for the Carrier to schedule a disciplinary hearing is **simply** not credible. The **simple** fact is that the Claimnt did nothing until after the **criminal charges were dismissed**, and then he filed a **claim** in an effort to retrieve his job, hoping that the fact of his acquittal would be persuasive.

In How Arbitration Works, Third Edition, Frank Elkouri and Edna Asper Elkouri, it is said at Page 349:

"Especially **common** in arbitration is that **species** of waiver known in law as 'acquiescence'. This **term** denotes a waiver which arises by tacit consent or by failure of a person for an unreasonable length of time to act upon rights of which he has **full** knowledge. Arbitrators have frequently held that where one party, with actual or constructive knowledge of his rights, stands by and offers no protest with **respect** to the conduct of the other, thereby reasonably inducing the latter to believe that his conduct is fully concurred in, the

"~~matter~~ will be treated as closed insofar as it relates to past transactions; but repeated violations of an **express rule** by one party or acquiescence on the part of the other ordinarily **will** not affect application of the **rule** in future operations."

In this case, the Carrier elected to proceed under Rule 22. The **Claimant** did not ~~timely~~ challenge that procedure and, therefore, ~~the Carrier~~ was led to believe that the **Claimant** had acquiesced in the action taken by the Carrier. To **permit** the **Claimant** to do nothing until the **termination** of the **criminal** case and then grieve against the Carrier for failure to properly discipline ~~him~~ would create a grossly inequitable situation which this Board does not condone.

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. Pauls
Executive Secretary

Dated at Chicago, Illinois, this 31st day of May 1978.