

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 officer." 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 this 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 Claimant 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 seems to be that the Claimant 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 Claimant. 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 Claimant 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. Paulos
Executive Secretary

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