

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 22389
Docket Number MW-22435

George S. Roukis, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(
(Missouri Pacific Railroad Company
((Former Chicago & Eastern Illinois R.R.)

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

(1) The dismissal of Machine Operator R. L. Arnold because of justifiable absenteeism from October 11 through October 25, 1976 was unwarranted, without just and sufficient cause and was arbitrarily and capriciously imposed (System File K 214-83).

(2) The claimant shall be restored to service, with pay for time lost and with all other benefits prescribed in Agreement Rule 34(d)."

OPINION OF BOARD: Claimant was charged with being absent without proper authority from October 11, 1976 through October 25, 1976.

An investigative hearing was held on November 5, 1976 at which time he was found guilty of the charge and dismissed from service, effective November 15, 1976.

While this decision was being processed through the appropriate grievance steps, Claimant unilaterally negotiated a separate understanding with Carrier, which provided that he submit a letter requesting reinstatement with seniority rights unimpaired, but without compensation for time lost. Accordingly, Claimant wrote this letter on April 18, 1977 which was received by Carrier on April 20, 1977. It read:

"I am writing this letter to request reinstatement to my job.

I would very much appreciate a chance, and I would do my best to uphold my end of the bargain.

I would like to return, with my seniority and rights not to be impaired."

It did not contain, however, any reference to waiver of payment for time lost.

Carrier immediately reminded him of this omission and he submitted a second letter inadvertently dated April 22, 1976, rather than 1977, which was received by Carrier on April 25, 1977. It was directly related to his April 18, 1977 letter and stated:

"As per request, I am writing this letter in addition to other correspondence.

I would willingly relinquish any and all claim to pay for time lost since my release on 11-16-76; in hopes to expedite my return to work."

On September 6, 1977, approximately five (5) months later, Claimant was restored to his position, with his seniority rights intact, but without back pay.

The Organization later filed notice on December 30, 1977 that it intended to proceed with this case to the National Railroad Adjustment Board.

In this dispute, we are faced with a particular course of conduct that renders academic, the Organization's contention that Claimant's individual settlement was inconsistent with its agreement vested administrative rights.

While we have carefully reviewed our decisional law on this point and recognize the import of Third Division Award 20832, we find in this case a particular set of circumstances, which indicate that the Organization was aware that Carrier was going to investigate the possibility of reinstating Claimant on a leniency basis without back pay.

In Carrier's letter to the General Chairman, dated March 31, 1977, approximately three weeks before Claimant requested leniency restoration, it noted:

". . . you were advised during conference that we would further investigate to determine if consideration is being given to Mr. Arnold's reinstatement on a leniency basis without pay for time lost. We will advise you in connection with this matter as soon as we have completed our investigation."

Inasmuch as Carrier was under an obligation by this letter to report its result to the Organization, the Claimant's efforts and the long silence between April 22, 1977 and September 6, 1977 indicate de facto waiver and acquiescence.

While recognizing that our holding in Award 20832 would appear to sanction Claimant's unilateral settlement initiatives, we feel that the Organization should have continued its processing of the grievance shortly after Carrier's March 31, 1977 letter (supra) or protest sooner the impropriety of Claimant's action. It must have been aware of these developments.

Moreover, while we are somewhat perplexed by Carrier's long delay in restoring Claimant to his position, we must conclude by logical inference that all the parties accepted this state of affairs. Neither the Claimant nor the Organization posited any question or challenge during this time.

It is indeed unfortunate that Claimant wasn't returned to his position early, but he agreed to the conditions of reinstatement and the Organization did not contest this arrangement between April, 1977 and September, 1977.

Consequently, under these unique circumstances and fact patterns we must deny this 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 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.

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Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

A. W. Paulson
Executive Secretary

Dated at Chicago, Illinois, this 27th day of April 1979.

