



Award No. 5743

Docket No. 5636

2-L&N-CM '69

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee John H. Dorsey when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 91, RAILWAY EMPLOYEES'
DEPARTMENT, AFL-CIO (CARMEN)**

LOUISVILLE AND NASHVILLE RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYEES:

1. That the removal of upgraded Carman Helper R. L. Kirk from his assigned position by Special Services employes effective December 22, 1966 at 5:15 A.M., and the subsequent withholding of him from service, was and is improper under the provisions of the current Agreement, and
2. Accordingly, the Louisville and Nashville Railroad should be ordered to—
 - (a) Restore him to service with seniority rights unimpaired,
 - (b) Compensate him for all time lost as a result of his dismissal, and
 - (c) Pay all premiums for his hospital, surgical, medical and group life insurance benefits for the entire time he is withheld from service.

EMPLOYEES' STATEMENT OF FACTS: The Claimant, R. L. Kirk, was employed at DeCoursey, Kentucky, as a Carman Helper by the Louisville and Nashville Railroad, hereinafter referred to as the Carrier, on November 1, 1965. He was 24 years of age at the time he was removed from his assignment by Special Services employes and was working in an upgraded capacity as Car Inspector.

At 11 P.M. on December 21, 1966, the Claimant reported for service on his regular assignment as Car Inspector in the DeCoursey Train Yards, at Location No. 78. After beginning his tour of duty, he assisted other Car Inspectors in performing the necessary servicing and inspection work on several trains. Then, upon returning to the Inspectors' shanty during early morning hours on December 22nd, he was contacted by two L&N Special Services employes and was told that they wanted him to "take a little ride with them." They did not tell the Claimant where they were going to take him but in reply to a question, told him he would not need his inspector's

arrest, and that the allegations made in his affidavit of January 3, 1967, relative to being frightened, intimidated and coerced into resigning are unwarranted, unfounded and untrue. Carrier further submits that claimant Kirk and his representatives certainly should have attended the hearing, as they were requested to do, in order that claimant Kirk could have testified and been cross-examined and he and his representatives could have cross-examined the other witnesses. Their reluctance to do so is readily understandable in view of the straightforward and convincing testimony of the various Special Services Officers as to what actually transpired.

In conclusion carrier submits that the accusations made against it in handling of this dispute on the property, as shown by the correspondence attached as its Exhibit "AA", are entirely unfounded and untrue; that the claim as presented to this Board is entirely lacking in merit or agreement support; and that the claim should be denied in its entirety.

(Exhibits not reproduced)

FINDINGS: The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

On December 21, 1966, Claimant who was hired as a Carman Helper, was working in the upgraded capacity of Car Inspector in the Carrier's yard, DeCoursey, Kentucky. After the completion of certain tasks he returned to the Inspectors' shanty at approximately 2:00 A.M. December 22, 1966, at which time he was approached by two Special Service employes (police). At the request of the police he accompanied them in their car to the Special Service offices, Latonia, Kentucky, where he was accused of stealing whiskey and was subjected to interrogation by four Special Service employes, including the two aforementioned. At approximately 5:15 A.M. he signed a resignation. At about 7:00 A.M. he executed and delivered a retraction of the resignation in which he alleged that under duress he was coerced to sign the resignation and requested a hearing on the charge. Carrier responded in a letter addressed to the Local Chairman under date of February 21, 1967:

LOUISVILLE & NASHVILLE RAILROAD COMPANY
Office of Master Mechanic
Decoursey Yard, Box 868
Covington, Ky. 41045
February 21st, 1967

Mr. E. E. Burnside
Local Chairman
c/o Car Shops
Decoursey, Ky.

Dear Mr. Burnside:

Departmental Foreman Crouch has referred to me a letter written you and him on December 22nd, 1966 by Upgraded Carmen

R. L. Kirk and R. G. Barnett asking that their resignations be cancelled and requesting a hearing on this charge. Mr. Crouch has also furnished me with the letters you have written him concerning this case. It is my understanding that Messrs. Kirk and Barnett voluntarily resigned from the service of this company and were not coerced or intimidated into doing so. We are not agreeable to permitting them to withdraw their resignations or to permitting them to return to the service of this company, and the claims which have been presented by you that this be done are respectively declined.

We are, however, in accordance with your request and that of General Chairman Bailey, willing to grant Messrs. Kirk and Barnett a hearing in connection with their contentions that their resignations were improperly secured. Please arrange to appear in this office with these two men at 9:00 A.M., March 6th, 1967, for this hearing. This will not be a disciplinary hearing under Rule 34 since these men have simply resigned from our service but it will be for the sole purpose of developing facts in connection with the circumstances under which their resignations were submitted.

Yours truly,

/s/ R. L. Agee
R. L. Agee
Master Mechanic

Cys: Mr. R. L. Kirk
6111 Groves Rd., Latonia Lake
Covington, Ky.

Mr. R. G. Barnett
4445 DeCoursey Avenue, Covington, Ky.

Organization contended that Claimant had a contractual right to a Rule—34 Discipline hearing. Carrier responded that Claimant had “voluntarily resigned” and thereby had terminated the employer-employee relationship and divested himself of contractual recourse to Rule 34.

Organization challenged Carrier’s right to conduct the hearing on March 6, 1967, in the manner which it unilaterally prescribed. It declined to appear at the hearing. Carrier proceeded with the hearing *ex parte* and from the record made therein found that Claimant had “voluntarily resigned.”

This Board’s jurisdiction is confined to interpretation and application of the Agreement. Whether Claimant’s Constitutional rights were invaded is not within the purview of this Board’s statutory adjudicatory processes.

In the record before us, made on the property, Organization has made a *prima facie* case that Claimant’s resignation was obtained under duress and by coercion. NOTE: This is not a finding that this was the fact. But, it creates an issue of fact and law as to whether Claimant had “voluntarily resigned.”

If Claimant’s resignation was obtained by duress and coercion it is null and void and did not terminate the employer-employee relationship;

and, Claimant stood continually vested with the contractual rights prescribed in the collective bargaining agreement which include:

"Rule 34. DISCIPLINE

No employe shall be disciplined without a fair hearing by designated officers of the carrier. Suspension in proper cases pending a hearing, which will be prompt, shall not be deemed a violation of this rule. At a reasonable time prior to the hearing, such employe and his local chairman will be apprised to the precise charge and given reasonable opportunity to secure the presence of necessary witnesses. If it is found that an employe has been unjustly suspended or dismissed from the service, such employe shall be reinstated with his seniority rights unimpaired, and compensated for the wage loss, if any, resulting from said suspension or dismissal." (Emphasis supplied)

8 The Rule is pertinent in that if Claimant's resignation was not voluntary he was, in violation of the Agreement, "disciplined without a fair hearing by designated officers of the carrier" and was not apprised of "the precise charge" against him.

9 On the record before us, made on the property, this Board can make no findings as to whether Claimant's resignation was voluntary or obtained by means of duress and coercion. Consequently, we can make no finding relative to the existence or non-existence of an employer-employee relationship as of the time Claimant retracted the resignation and requested a hearing on the charge—theft of whiskey, of which he was accused by the police; nor, can we make a finding as to the merits of the accusation in the absence of a due process hearing in compliance with Rule 34.

10 Unquestionably, Claimant's retraction of the resignation raised a mixed question of laws and fact as to the legal efficacy of that document and a corollary confrontation relative to the existence of an employer-employee relationship.

1 Rules such as Rule 34 are designed to enjoin a carrier from unilaterally arbitrarily, capriciously or unreasonably disciplining an employe. The due process prescriptions of such rules and penalties for violation are the employes' Bill of Rights. The rules must be liberally construed to protect the Rights.

2 It cannot be controverted that if Claimant's resignation was brought about by coercion and duress on the part of the police he was in fact and in law disciplined—dismissed from service—in violation of the contractual rights vested in him by Rule 34. Claimant's allegation that the resignation was so obtained, therefore, brought the issue within the ambit of Rule 34—DISCIPLINE. Consequently, Carrier's refusal to comply with the Rule's due process mandates, as requested by Claimant and demanded by Organization, violated the Agreement. We, therefore, will sustain paragraph 1 of the Claim.

3 The penalty for Carrier's violation of Rule 34 is prescribed in the last sentence of the Rule. We sustain paragraph 2 of the Claim to that extent.

A W A R D

Claim sustained to the extent set forth in the Findings, *supra*.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division**

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 27th day of June, 1969.

CARRIER MEMBERS DISSENT TO AWARDS 5743 AND 5744

The only premise on which Awards 5743 and 5744 were decided was whether the Carrier granted claimants a fair hearing.

The majority held that the discipline rules must be liberally construed and further held that if claimants resignations were brought about by coercion and duress they were then in fact disciplined—dismissed—and thus covered by Rule 34—Discipline.

The majority did not find that the claimants did resign under such conditions, however, the claims were sustained for the reason Carrier failed to conduct a hearing under Rule 34.

The claimants had voluntarily resigned their positions in the presence of witnesses. They had no charge placed against them by the Carrier nor were they disciplined for any reason.

A hearing was granted, as requested, and Carrier advised that the purpose of the hearing was to develop facts in connection with the circumstances under which the claimants resignations were submitted.

In scheduling the hearing, advance notice was given; the hearing was scheduled during regular working hours on a regular work day; an opportunity was given to the organization to attend; bring any witnesses; present any evidence and interrogate Carriers' witnesses. A record was made and furnished the Organization. The hearing procedures were the same as those conducted under Rule 34.

We believe that the evidence of record when viewed most favorably for the claimants does not support the conclusions of the majority and an unreasonable Award is imposed upon the Carrier.

For these reasons we dissent.

/s/ P. R. Humphreys
P. R. Humphreys

/s/ H. F. M. Braidwood
H. F. M. Braidwood

/s/ F. P. Butler
F. P. Butler

/s/ H. K. Hagerman
H. K. Hagerman

/s/ W. R. Harris
W. R. Harris