NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 23587
THIRD DIVISION Docket Number CL-23759

A. Robert Lowry, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes
(The Denver and Rio Grande Western Railroad Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-9350) that:

(1) Carrier violated and continues to violate Rule 25 of the current Agreement when it failed to grant Ms. Madeline Ssntos unjust treatment hearing requested by her in her letter of May 29, 1979.

(2) Carrier shall now be requested to grant Ms. Santos said hearing and/or compensate her for any time lost as a result of the arbitrary action taken by the Carrier in violation of rights afforded Ms. Santos in the aforementioned rule.

OPINION OF BOARD: Ms. Madeline Santos, the Claimant, with a seniority date of September 11, 1978, was employed by the Carrier as a Clerk on the Extra Board at Pueblo, Colorado. On May 22, 1979, Claimant resigned from the service of the Carrier. On May 29, 1979, Claimant filed a written request with the Carrier's Agent, Mr. C. A. Beal, for an unjust treatment hearing in accordance with Rule 25 of the Agreement. The Carrier never responded to this request. The Organization on June 22, 1979, filed claim in behalf of Claimant contending she was coerced into resigning and demanded that she be given a hearing as-required in Rule 25 and to compensate her for time lost. Claim was progressed through all appeal stages on the property without success.

The Carrier holds to the position that Claimant was not entitled to a hearing under the rule as she was no longer an employe and, therefore, the rule does not apply to her. It also took the position that the claim was not timely filed. It argues that Claimant should have filed her request for hearing in accordance with Carrier's instructions of March 31, 1976, which required initial claims for Station and Yard Office employes covered by the Clerk's Agreement at Pueblo to be presented to the Terminal Trainmaster, Pueblo. The Organization's claim was not filed with the Terminal Trainmaster until June 22, 1979, beyond the ten day tine limit provided in Rule 25.

Rule 25 of the Agreement reads as follows:

> "For grievances other than discipline an employe who considers himself unjustly treated shall have the same right of hearing and appeal as provided above, if written request is made to his immediate superior within ten calendar days of cause of complaint."

Rule 25 can only be changed by agreement between the parties as provided in Rule 68 of the **Agreement. The Carrier cannot** by directive change any rule of the **agreement.** Therefore, the request for an unjustly treated hearing must be filed with the employe's "immediate superior". 'The Organization contended that Agent Beal was Claimant's "immediate superior" which was not refuted by the Carrier. Thus, the request was timely filed as were the subsequent **claims.**

This Board has dealt many times with the status of an employe resigning under questionable conditions such as are present here, and it has ruled both for and against the employees. Those awards against the employes take the hard line that once an employe resigns under any conditions he loses all rights under the agreement and severs all connections with the Carrier. Those awards holding in favor of the employes, in this Board's opinion, gives more meaningful and more realistic application to the unjust treatment rules found in the clerical agreements in the industry. We especially lean towards Referee Edward F. Carter's reasoning and theory on this issue in his Third Division Award 3053, when he said:

> "We do not question that an employe may resign his position by action or conduct indicating clearly an intent to so do. But where the Carrier concludes from conflicting evidence that any employe did in fact resign, and the employe feels himself unjustly treated by such decision, he is entitled to an investigation when the request therefor is timely made. Otherwise the carrier by the simple expedient of finding that tine employe resigned rather than was discharged even though the evidence thereon was in hopeless conflict or predominated in favor of the employe, could by its unilateral action remove an employe from the protection of the collective Agreement. The carrier cannot compel an employe to accept its conclusion on conflicting evidence that employe terminated the employer-employe relationship by resignation and escape the effect of the investigation rule if the employe feels he has been thereby unjustly treated. 'When the Carrier declined to recognize as true her assertions that she had no intention to and did not resign, and felt that she had been **unjustly** treated, Mrs. Thornhill, the Claimant, was entitled to an investigation if requested in the manner provided for in the Agreement. An affirmative award is required."

Referee Harold M. Weston in Third Division Award 8710 confirms and fully supports Referee Carter's theory. Referee Curtis G. Shake in Third Division Award 3100 sets forth logical reasoning on the question of the employe's status after resigning under questionable conditions. He stated:

> "Neither can we subscribe to the Petitioner's contention that the Claimant is without the protection of the Rule quoted above because, hating resigned, he is no longer an employe. If, as the Petitioner contends, the resignation signed by the Claimant was procured by coercion and intimidation, it is null and void and the Claimant's status as an employe still obtains. Petitioner's theory is, therefore, inconsistent with its demand."

We are influenced by this award since it was a denial award and, therefore, the theories advanced therein must have been subscribed to by the Carrier members of the Board.

This Board interprets these awards to mean that an employe who feels that he or she has been unjustly treated is entitled to a hearing under the rule. This principle also applies to an employe who has resigned under questionable circumstances, providing the request is made within the prescribed time limits. The Carrier, by denying the request, without benefit of all the facts developed in a hearing, would be unilaterally determining the fate of the employe, denying the employe the contractual right to "due process", and therefore, frustrating the meaning and intent of the rule. The rule was designed to protect the employe and the Carrier cannot deny the employe of this protection simply by ignoring her request for a hearing.

The facts in this case are in dispute. The Organization contends Claimant was coerced into resigning under duress. Carrier contends she resigned under her own free will without any pressure from her supervisors. The only means available to resolve these disputed facts is through a hearing as the negotiators provided in Rule 25. For this reason this Board will sustain the claim and orders the Carrier to accord Claimant a hearing under the rule. The Carrier had an opportunity to resolve these factual differences by holding the hearing promptly when Claimant requested same. It chose, however, to completely ignore the employe's request. This Board, because of this, and in the application of the time limit principles agreed to by the parties in the handling of claims and grievances, finds that Carrier defaulted by failing to respond to the request within the same time limits applicable to the employe filing the request. For these reasons we sustain that part of the claim calling for compensation for any time lost, less outside earnings.

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 Employes involved in this dispute are respectively Carrier and Employes 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 violated.

A W A R D

Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: Acting Executive Secretory'
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 10th day of March 1982.

DISSENT OF CARRIER MEMBERS
TO
AWARD 23587 (CL-23759)
(Referee Lowry)

Dissent to this decision la mandated, not only because the dis-position was made in contravention of the facts of record, but also because it is in opposition to the long and consistent position of this Board with regard to the validity of resignations.

On May 22, 1979, Claimant advised the Carrier in writing as follows:

> "L. R. Parsons, Supt.
> Denver, Colorado
>
> I, M. M. Santos, Man No. 78402, do hereby resign my seniority and rights as a Clerk, Pueblo, Colo, effect-ive this date due to personal reaaona.
>
> (Signed) Mary Madeline Santos
> M. M Santos

In a subsequent letter dated June 23, 1979, Claimant clearly stated the situation and her decision to resign as follows:

> "At 4:15 P.M., I knew that my only alternative was to resign. I went upstairs, the office door was closed. I went to Dutch and he said Bill was up there - he called Sill and I met him on the steps and asked him for a form to fill out for resignation...he said there was no form and as he was unlocking the door he asked me if I was sure that's what I wanted. I almost began crying and answered 'It's what I have to do.' He asked me not to cry. He asked me to type a little resignation statement and I was shaking after three tries - he said he would do it."

Clearly, it was the Claimant's singular and voluntary decision to resign and that decision, once made and fox whatever reasons, regardless of what someone more "learned" may consider proper, is not subject to Monday morning quarterbacking.

An employee has the unfettered right to resign his or her employment for any reason. The only basis upon which this Board may review such action is if there is a factual basis on which to conclude that the resignation was coerced by the Carrier.

Second Division Award 6714 (Shapiro):

> "Although Petitioner raises a number of alleged conditions which it contends are necessary for a resignation to be valid and binding on an employee, essentially it recognizes that an employee who voluntarily terminates his relationship with his employer, ceases to have any right to invoke any contractual entitlements or procedures. The basis for this claim is that Claimant was coerced by a representative of Management Into signing the above quoted letter. It is well established in Awards of the Divisions of this Board that resignations induced by use of duress, fraud, or threats of dire consequences, will be considered involuntary acts of employees so treated and will be set aside and considered void. Awards of this Division 5743, 5744 and 6374 and Third Division Awards 6399, 8710, 10439, 11340 and 13225".

In early Fourth Division Award 514 (Elkouri) (1948), it was stated:

> "This resignation was given in claimant's handwriting. In it the claimant stated he thereby relinquished all rights and privileges with the Carrier. There is no adequate evidence In the record to indicate any act of the Carrier upon which a claim that claimant wrote and delivered his resignation under duress could be sustained. Claimant resigned from the service of the Carrier, therefore his claim must be denied."

Even the citation of early Third Division Award 3100, quoted by the Majority at page 2 of the Award, points out that:

> "If the resignation was procured by coercion....." (Emphasis added)

Such a statement clearly requires that there be evidence of impropriety by the Carrier.

Yet what has the Majority produced In the way of evidence that Claimant "....resigned under questionable circumstances....". Not one bit of evidence.

Instead, the Majority concludes that Claimant was denied contractual "due process". However, to get to this point, the Majority has purposefully ignored the first step of the argument - that coercion was exercised by the Carrier. When that is not substantiated, it must be found that the resignation was proper and, as such, voluntarily terminated all contractual rights. (Third Division Awards 22440 - Franden; 21836 - Marx; 4583 - Carter: 19556 - Lieberman; 18476 - Rimer; 19455 - Cola; 21264 - Dorsey; 22392 - Roukia; Second Division Award 6628 - O'Brien.)

However, here the Majority has put the cart before the horse. To conclude that Claimant was entitled to a hearing under Rule 25, it must first be determined that Claimant was an employee, and to do so, requires a conclusion that the resignation was improper. Tbua, the only means for reaching the conclusion made here was to assume that any resignation is invalid unless tested in a hearing. Such is neither proper, nor is it the consistent decision of this Board. As was concluded in Third Division Award 10439 (Rose):

> ". . ..we may not determine the validity of the resignation on the basis of suspicion."

This Board has neither the right nor the competence to determine whether an individual's exercise of choice was good or bad. Our sole function is to render contractual rulings based on the evidence of record. The Majority here, as it did in Awards 23427 and 23588, has ignored the facts in order to legitimize its own preference.

We dissent.

P. V. Varga

W. F. Euker

D. M. Lefkow

J. E. Mason

J. R. O'Connell