Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 31244
Docket No. MW-30359
95-3-92-3-82

The Third Division consisted of the regular members and in addition Referee Robert T. Simmelkjaer when the Award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
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(Bangor and Aroostook Railroad Company

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

(1) The Agreement was violated when the Carrier required Bridge and Building Helper A. G. Lyford to submit a pre-signed resignation as a condition to his employment and after having accumulated over sixty (60) days seniority in his assigned position, it terminated his employment without benefit of the provisions of Article IV (Carrier's File 149.4.3).

(2) As a consequence of the violation referred to in Part (1) above, the Claimant shall be reinstated with all seniority and benefits unimpaired, he shall be compensated for all wage loss suffered, he shall be '*** paid the percentage of the signing bonus due him as per the recent agreement between the Bangor Aroostock Railroad and the Brotherhood of Maintenance of Way Employees. ***' and '*** interest on his percentage must also be paid from 03-30-91 until the date he is paid.'"

Findings:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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 the hearing thereon.

The Claimant, who was the last of three employees hired to perform Bridge and Building repair and maintenance work, signed a pre-employment resignation form dated April 10, 1990. The form indicated an employment period from April 11, 1990 through June 30, 1990, with a provision allowing for termination prior to April 30, 1990. On June 15, 1990, the Carrier advised Claimant that his services were required beyond June 30, 1990 and asked him to sign a second resignation form effective October 31, 1990. Claimant and the two senior helpers signed the resignation forms extending their employment.

When the 1991 seniority rosters were published, Claimant's name was omitted, resulting in the instant grievance. On April 1, 1991, the Carrier recalled a furloughed employee and assigned him to an established B&B helper position.

The Carrier has raised a procedural issue that this claim should be dismissed because the Organization failed to cite a specific rule violation during the handling of the grievance on the property. While the Carrier's position has technical validity since the Organization did not specifically refer to a violation of Article IV, the Board upon further review finds that the parties' correspondence provides evidence of substantial compliance with the requirements set forth in Circular No. 1 of the National Railroad Adjustment Board.

Without citing the applicable provision in the collective bargaining agreement, the Organization fulfilled its obligation of apprising the Carrier that its claim would encompass an Article IV violation. In its letter dated April 9, 1991 which, inter alia, states " that no employee shall be disciplined or dismissed without a fair and impartial hearing" the Organization provided the Carrier with adequate notice of the subsequent claim.

Having found that the claim is not procedurally barred, the Board addresses the substantive issue of whether Claimant is entitled to permanent status as an employee with commensurate seniority after signing two resignation forms, the second after his service had exceeded the sixty (60) day threshold period, affording him due process protection.

With respect to the merits of the claim, the Board cannot find evidence that Carrier subjected the Claimant to overt coercion in obtaining his resignations and thus constituted a dismissal without a fair hearing. However, the Board contends that despite the fact Claimant was not forced to resign under duress, his ostensible voluntary resignations were tantamount to implied coercion in that his failure to sign the initial pre-employment resignation form on April 10, 1990 would have precluded his employment and a subsequent refusal to sign the June 15, 1990 form would have discontinued that employment.

This case is distinguishable from Awards where a permanent employee, faced with criminal or other serious charges, is forced to tender his/her resignation without benefit of a hearing. The instant Claimant was undoubtedly presented with the quid pro quo of either signing the pre-employment and reemployment resignations or not working. The Carrier's reliance on the Third Division Award 28075, where a permanent employee voluntarily executed a general release terminating his claim to seniority, cannot be reconciled with the choice confronting the instant Claimant.

Assuming arguendo that Carrier's utilization of the initial pre-employment resignation form was a valid means to meet its temporary employment needs, the Board finds substantial evidence that the Carrier's second resignation request circumvented the collective bargaining agreement by entering into an individual employment contract with Claimant. As noted in Third Division Award 20581, contracts with individual employees are subordinate to collective bargaining agreements as follows:

> "A resignation obtained as a condition precedent to employment which deprives the employe of the protection of certain provisions of the collective bargaining agreement is clearly distinguishable."

The instant case is further distinguished from the line of Awards which hold that Carriers are free to hire summer employees and obtain pre-dated resignations as a condition of their employment (See Award 9 of PLB No. 400) At the same time, however, Award 9 of PLB No. 400, as cited in Third Division Award 20581 held:

> "... Without commenting on the efficacy of that award, we note that it states 'This handling applies to summer employment only and does not extend to men who hire out for other than summer time jobs.' The case at hand involves some five months commencing in mid Spring and ending in early Fall."

Similarly, Claimant here was not hired as a summer employee but one whose employment should have been managed in accordance with the provisions of the agreement. Unlike employees who are hired for vacation relief or temporary assignments, Claimant's employment, particularly the extension of his service beyond June 30, 1990 period, created a category of employee with the potential of undermining the parties' agreement. As the Organization has correctly argued, the unlimited use of pre-employment resignations could enable the Carrier to recycle a class of employees who would never, "regardless of their length of service achieve the seniority benefits of the collective bargaining agreement."

As a remedy, Claimant shall be reinstated with retroactive seniority to his date of hire, April 11, 1990. Moreover, he shall be compensated for all wages lost, as measured by the wages earned by the furloughed employee recalled on April 1, 1991 to date, less any compensation or monetary benefits received by Claimant during this period.

Absent evidence of a pertinent provision in the Agreement, Division Awards and PLBs denying the payment of interest shall prevail. Finally, there was insufficient evidence in the record to establish Claimant's eligibility for a signing bonus from March 30, 1991, or the calculation of his percentage, if any.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 1st day of November 1995.