Award No. 11340

Docket No. CL-13178

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Arthur Stark, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL 5097) that:

1. Carrier violated the Clerks' Agreement when it dismissed Employe William Young, Janitor, Minneapolis, without a fair and impartial hearing.

2. Employe William Young shall now be restored to service with seniority and all rights unimpaired and his record cleared.

3. Employe William Young shall be compensated for a day's pay for July 29, 1960 and each date thereafter until restored to his position of Janitor.

OPINION OF BOARD: On July 29, 1960 Head Janitor William Young, employed since 1943, was found in the Minneapolis Depot locker room at 11:10 A. M. by Chief Carpenter H. H. Kruse. According to Kruse, Young had in his possession some fifty-five pages of alleged pornography-pictures and typewritten text. Kruse admonished Young (the employe claims that Kruse told him he was "fired," which Kruse denies), and together they started towards the Stationmaster's office. On the way they met Lieutenant Gallagan of Carrier's Police Department who confiscated the "literature."

Later that day Kruse handed Young a letter stating:

"This is to advise that you are being relieved of your Janitor duties as of this time, 12:45 P. M. CST July 29, 1960. The reason for this action is your being found in Janitors' locker room at 11:10 A. M. CST July 29 reading and sorting out phornographic literature.

This is strictly against the rules of the Railroad. You may request formal investigation at any time within the period prescribed by the rules."

At 5:00 P. M., according to Young, he phoned Local Chairman L. R.

Comstock and requested representation. Shortly thereafter, Comstock states, he phoned Kruse at home and was told that Young had been fired. Comstock advised the Chief Carpenter that, under the rules, an employe could not be fired without an investigation. (Kruse denies that this conversation occurred, but states that, on July 31, Comstock called to discuss the case and said that Young would have to get someone else to represent him since he (Comstock) had urgent family problems and did not know when he would be back at work.)

On August 1, 1960, Kruse informed Young, in a letter directed to the employe's home, that (1) charges were pending for "being found reading and looking at pornographic literature"; (2) standard investigation would be held on August 9 at 2:00 P. M. at which Young could have a representative of his choice.

On August 2 Kruse sent another letter to Young changing the hearing date to August 4. This communication was received by Young on August 3.

On August 4 at 1:45 P. M., according to Young, he asked the Information Clerk to contact Comstock, but was informed the Local Chairman was out of town. He then asked Kruse to "hold off" until Comstock returned. Kruse refused, Young says, and then went on to tell him that he had two choices: (1) sign a resignation and get on Railroad Retirement with a clear record, or (2) go to jail. Afraid that the Carrier might try to put him in jail, Young avows he signed a resignation in the hearing room.

Kruse, on the other hand, denies that he pressured or threatened Young in any way. He says that Young's decision was purely voluntary. Moreover, Kruse denies that Young requested a postponement of the hearing.

On August 11, 1960, Local Chairman Comstock called Superintendent F. J. Kuklinski about the matter and they met on August 18. Kuklinski agreed to look into the facts.

On August 29, Comstock wrote Kuklinski, stating in part:

> "I call to your attention, that Mr. H. H. Kruse, Chief Carpenter, . . . has caused to be violated Rule No. 22—Discipline and Grievances, Paragraph (a) (b) and (e) and therefore, it is now mandatory that this case be disposed of under Paragraph (g) of Rule 22, unless it should be your decision to satisfactorily dispose of this case prior to September 1, 1960.
>
> "Should the preceding paragraph of this letter not suffice to dispose of this case, then you can consider this to be, A written request, setting forth the employes complaint, of unfair and unjust treatment, in compliance with the provisions of Rule No. 22, Paragraph (g).
>
> "As a matter of information to you, and in order that any further confusion may be avoided and eliminated, I call your attention to the fact that the Rules provide no further investigation of the previous charges, as set forth in the letter of July 29, 1960. . . .
>
> "Should your decision be to investigate the complaint of unjust treatment to employe Wm. Young, will you please so notify all concerned . . ."

On September 20, 1960 Comstock wrote Kuklinski, in part, as follows:

". . . My letter to you was a written request, setting forth the employes complaint, of unfair and unjust treatment, in compliance with the provisions of Rule No. 22, Paragraph (g), and also a request for an investigation of this charge against Mr. H. H. Kruse, to be scheduled at your choice of Date, Time, and Place.

"Any further delay in scheduling the requested investigation can serve no beneficial purpose, therefore, I call upon you to make the necessary arrangements for this investigation to be held within the next seven days, or by September 27, 1960."

According to Comstock, an agreement was reached on September 23, to conduct an investigation on September 30. This is denied by the Carrier.

On October 3, however, Superintendent Kuklinski wrote Comstock:

". . . Confirming telephone conversation at 11:45 A. M., September 28th, 1960, this is to advise that we feel there is no basis for an investigation to be held in view of Mr. Young's resignation."

Local Chairman Comstock replied on October 8:

". . . This is to advise that your letter of October 3, 1960, setting forth your decision in this case, will be incorporated in the file, and, as such, I must now notify you that your decision is hereby respectfully declined, and shall be appealed to the next higher officer . . ."

On October 11 Comstock wrote Superintendent Kuklinski as follows:

"With further reference to your letter dated Oct. 3, 1960, File: Janitors-DR I9, pertaining to the case of Mr. Wm. Young.

Your repeated verbal denial of my request for an investigation of the action taken by Mr. H. H. Kruse, prior to my letter to you dated Sept. 20, 1960, your mutual, verbal agreement with me Friday, Sept. 23, 1960, that you would hold the requested investigation Friday, Sept. 30, 1960, extending the time past Sept. 27, 1960 due to your prior commitments, and your letter dated October 3, 1960, in which you state in part, "we see no basis for an investigation," my letter to you dated October 8, 1960, in which I respectfully declined your decision, make it necessary for me to file a claim with you for your approval, or declination.

Claim

It is hereby claimed, at 12:45 P. M. on July 29, 1960, Mr. H. H. Kruse, Chief Carpenter, and Supervisor of Janitors and Janitresses, violated Rule No. 22, when he discharged, or as he stated it to me 'FIRED' Mr. Wm. Young, without benefit of investigation. Your continued support of Mr. Kruse's position in this matter, and your denial of the request for the investigation, continuing the violation to this date, have caused Mr. Wm. Young to suffer an earnings, or wage loss, for each and every day that he has been held from service, including his vacation time not granted, or paid for, for which we now claim payment of, and continuing for what ever succeeding time loss shall be suffered by Mr. Young."

On November 15 Kuklinski responded, stating (1) The Organization's

October 11 claim was barred since it had not been properly handled in accordance with Article V, Section 1(a) of the August 21, 1954 Agreement; (2) Kruse never "fired" Young; (3) Young resigned on August 4.

On January 5, 1961 the Organization appealed to S. W. Amour, Assistant to Vice President. This and subsequent appeals were denied.

On December 6, 1961, the Organization submitted to this Board the claim that "Carrier violated the Clerks' Agreement when it dismissed Employe William Young . . . without a fair and impartial hearing." Accordingly, it requests back pay to July 29, 1960.

Carrier argues that this claim should be dismissed because it was not presented in a timely manner under Article V of the 1954 Agreement and, moreover, after August 4, 1960 there was no dispute cognizable by this Board since Claimant Young had resigned. Petitioner, on the other hand, contends that no basis for a claim existed until Superintendent Kuklinski denied the Local Chairman's request for a Rule 22(g) investigation—which he did on October 4, 1960. The claim, filed on October 11, was therefore timely.

It is virtually impossible to arrive at a sensible conclusion in this case by a piece-meal analysis of events. Too many errors of commission and omission were committed by both sides to justify a decision reached by isolating one or two incidents, communications or conversations. For example, (1) Management's very first letter of July 29 erroneously placed the burden on Head Janitor Young to request an investigation, whereas Rule 22(a) provides that an employe "shall not be disciplined or dismissed without investigation . . ." and that "investigations will be held prior to the time employes are held from service when it is possible to do so;" (2) Although this error was corrected by Management's August 1 letter providing for a hearing, another error occurred when the Carrier failed to set the investigation "within seven days" in accordance with Rule 22(b); (3) This was corrected, presumably, by the August 2 notice which, however, was not delivered to Young until August 3, thus allowing him but one day's notice despite Rule 22(b)'s admonition that "employes shall have reasonable opportunity to secure the presence of representatives and/or necessary witnesses . . ."

On the other hand, while Petitioner's Local Chairman may have had no doubts concerning the nature of his post—August 4 conversations with Management, he did not succeed in making his position completely clear in subsequent correspondence. For example, in his August 29 letter, while Rule 22(g) is invoked in at least two paragraphs, in one the Local Chairman also refers to violations of Rule 22(a), (b) and (e), whereas in the other he notes that the Rules "provide no further investigation of the previous charges." Additionally, the Local Chairman never made explicit his charge that Young's resignation had been obtained by improper means, although this resignation was obviously a subject of discussion between the Local Chairman and Superintendent Kuklinski. (On August 31, according to Comstock's September 20 letter, he was told by Kuklinski that "Young was lying like a rug." And, in an October 3 letter to the Superintendent, Comstock insisted that "This . . . matter of Rule violations . . . cannot be settled by verbal discussion on the absence of written testimony, in which all the truths, and facts, can be brought out, and substantiated with evidence . . .")

Nevertheless, in light of all the events and communications and conver-

sations it seems evident that a Rule 22(g) investigation of Young's alleged unjust treatment by Kruse (i.e. coerced resignation) was discussed and requested by the Organization as early as August 29. Since this was within 30 days of the "cause of complaint" (the resignation occurred on August 4), it was a timely request under Rule 22(g) which provides:

> "(g) An employe, irrespective of period employed, who considers himself unjustly treated, other than covered by these rules, shall have the same right of investigation, hearing and appeal, in accordance with preceding sections of this rule, provided written request, which sets forth employe's complaint, is made to the immediate superior officer within thirty (30) days from cause of complaint."

True, the August 29 request was directed to Superintendent Kuklinski rather than Kruse, and 22(g) calls for a written request to "the immediate Superior Officer." But, aside from the fact that no protest was raised on the property, regarding this lapse, we note that the charge is directed against Kruse himself, so that an appeal to him would have amounted to little more than a meaningless formality.

What, then, of Article V, Section 1(a) which provides, in relevant part, that all claims or grievances must be presented in writing within 60 days "from the date of the occurrence on which the claim or grievance is based"? If it is held that the request for a 22(g) investigation is part of the Organization's October 11 claim, then there is no question of timeliness since that claim is based on the Carrier's October 3 refusal to conduct such an investigation. On the other hand, if the Organization's claim is limited to a July 29 occurrence, it would have to be deemed untimely.

At first blush it does appear that the Local Chairman's October 11 claim is concerned only with July 29 events since he states "on July 29, 1960 Mr. H. H. Kruse . . . violated Rule No. 22 when he discharged . . . Mr. Wm. Young, without benefit of investigation." It can be argued, not without justification, that (1) This represents the claim, (2) The Board does not have authority to amend or change the claim, (3) This claim must be denied since the original July 29 discharge action, in effect, was rescinded by Management's August 1 letter.

Such ruling would be tantamount to holding that the Organization had abandoned its 22(g) unjust treatment claim. We doubt, however, whether such was its intent (nor has the Carrier advanced that contention in its submissions). While the wording of the Organization's claim leaves much to be desired (a similar weakness appears in the December 6, 1961 claim to this Board), it cannot be properly understood outside the content of the entire case. On October 11 the Organization was aware that (1) Young had been removed from service at the end of July; (2) An investigation had been ordered, after some schedule changes, for August 4; (3) Young had resigned on August 4; (4) If the resignation were bona fide, there would be no need to proceed further; (5) Young believed the resignation had been improperly obtained and the Organization had requested a 22(g) investigation of his alleged unjust treatment; (6) Management had refused to grant any investigation whatsoever. In his preliminary paragraph of October 11 Local Chairman Comstock refers directly, or indirectly, to some of these matters. He then proceeds to detail his claims which, incidentally, mentions the Carrier's "continued support of Mr. Kruse's position . . . and your denial of the request for the investigation, continuing the violation to this date . . ."

Under the circumstances it is fair to conclude that the Organization was

using this claim to cover the entire Young case—not just a piece of it—and that the primary significance of the July 29 date was that it represented Young's last day of employment. It is therefore not necessary to go beyond or amend the claim in order to consider the entire case, including its 22(g) component.

What of the "merits"? Since Young was never tried on the original charge against him ("reading and sorting out pornographic literature") this Board cannot rule on that subject. However, it is clear that (1) Young resigned, and (2) his subsequent request for a 22(g) "unjust treatment" investigation was denied. There is nothing in the record to indicate why Management refused to grant this investigation. In its Reply to Organization's Submission the Carrier merely asserts that 22(g) is not applicable in the instant case. But there can be do doubt, in our judgment, that 22(g) does apply to a charge that an employe's resignation has been coerced or obtained under duress. Therefore, Management was obligated to grant the requested investigation and its failure to do so constituted a violation of the Agreement.

What should be the remedy for this violation? The Organization says: Grant the claim and restore Young to work with back pay. The Carrier suggests that the claim should be denied. A further possibility is to remand the matter to the property for a 22(g) investigation.

There is no hard and fast rule for application of an appropriate remedy or relief in cases of this nature. The question of how best to redress a wrong depends on many factors which differ from case to case. Since few cases are alike, the influence of precedent is limited. This Board has taken cognizance of these facts and has tried to tailor its Awards to the particular needs of a given situation. Some claims have been sustained without remand. For example, in Award 10069 the claim (for back pay and a particular assignment) was granted when Management denied the Claimant an unjust treatment hearing which, the Board held, was not an "inconsequential" violation. In Award 10410 a claim for back pay (the Grievant had already been reinstated) was granted when Management refused to consider an appeal under 22(d) of the same Agreement which is before us in the case at hand. A similar claim was upheld (this one included reinstatement) in Award 9832 under this Agreement. In Award 6399 reinstatement with pay was ordered after the Claimant was dismissed without an investigation and the evidence showed his resignation was obtained under duress.

On the other hand, this Board has remanded cases for further proceedings when that appeared to be the wisest policy. For instance, in Award 5228 the matter was sent back when the Board found nothing in the unjust treatment clause (no hearing had been granted) concerning time limits. In Award 3346 the case was remanded for a hearing when the Claimant had been tried in absentia and there was a conflict as to whether the parties had agreed on an adjournment. In Award 2637, where an employe had been dismissed on charges of molesting a female passenger, the case was remanded after the Claimant had been denied access to the complaining passenger's name and address. The Board commented that "the ends of justice would not be served by unconditionally sustaining or denying the claim."

Interestingly, in Award 10439 (where a dismissed employe signed a resignation, prior to hearing, which he later claimed was under duress) the Board remanded the case to determine the validity of the resignation although no request for an unjust treatment investigation had been submitted.

In other decisions the Board has reiterated its right to reinstate with pay—despite the absence of a hearing, or after an unfair or inconclusive hearing—even though it chose not to do so in a given case. In Award 4207, for example, an employe was tried for violating the privacy of a female passenger, but the evidence did not substantiate the charge and there was "bias implicit in the charge." The case was remanded, nevertheless, for additional explorations of fact with this comment: "We recognize this is an unusual treatment of a discipline case and if some other type of offense were involved we would not have hesitated to direct full reinstatement." Again, in Award 2728 an employe was denied a fair hearing when he was tried for neglect of duty but convicted of insubordination (and dismissed). The Board remanded the case for hearing on the alleged neglect of duty although recognizing that it "could . . . unconditionally sustain the claim" and reinstate the employe with full pay.

These citations illustrate the Board's responsibility for devising an appropriate remedy in disciplinary cases which are complicated by errors in procedure or due process. In each situation consideration must be given to such factors as nature of the employe's infraction, nature of the Management's procedural or due process error, effect of time lapse, effect of reinstatement, and the like. The determination in any single case need not necessarily be applicable in any other case—although it might well provide helpful guide lines.

In the case before us we do not believe that the ends of justice would be served by remanding the case for a 22(g) investigation. As already noted, no explanation or justification has been offered for Management's denial of Young's request. A 22(g) investigation (including hearing and appeal) constitutes one of the employes' basic rights under this Agreement. It cannot be lightly disregarded. The time limits, too, are important. They are more than mere procedural steps. They serve to assure an aggrieved worker that his allegation of unjust treatment will be heard promptly, while memories are fresh and witnesses available, before the facts are "cold," and that he will have a reasonable opportunity to present testimony or evidence on his own behalf. Appeals, as well, are to be considered expeditiously under Rule 22—and for the same reasons.

If an unjust treatment hearing can be denied without cause, and the only available remedy (applied almost three years later) is to order a hearing to be held, then in our opinion, the protection of that basic contractual safeguard would be immeasurably reduced. While a remand might be called for in certain circumstances, that should not be the universal rule nor in our judgment, the one applied in this case.

Young may or may not have been guilty of some infraction on July 29, 1960. He may or may not have submitted a valid, uncoerced resignation on August 4, 1960. It is clear, however, that he asked for an opportunity—granted by contract—to explain his resignation at a hearing where the accused Supervisor could have defined his position. But the time for airing these matters was August 1960—not now. True, reinstatement of Young will foreclose the parties from finding what really happened. But of equal significance is the fact that by ordering a hearing now, we would allow a signficant denial of contractual due process, in effect, to go unremedied. (Moreover, since Young's alleged misconduct was not of the same order as that in the cases cited where molestation of female passengers was involved, there is no persuasive reason to treat this case as "unusual.")

Under all the circumstances this claim will be sustained. Young shall be restored to service with seniority and all other rights and, in accordance with

provisions of Rule 22(f), shall be paid for all time lost less any amount earned in other employment.

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.

AWARD

Claim sustained. William Young shall be restored to service with seniority and all other rights and shall be paid for all time lost since July 29, 1960 less any amount earned in other employment.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 26th day of April, 1963.

DISSENT TO AWARD NUMBER 11340, DOCKET NUMBER CL-13178

A fundamental issue in this case was the validity of Claimant's resignation. The record contains his signed and unqualified resignation. The voluntary nature of the resignation is supported by affidavits and statements of four witnesses to its execution, and at no time did Claimant request its withdrawal.

Claimant's challenge of the resignation by belated denial merely placed the question at issue before the Board. As the moving party on the appeal, the Petitioner had the burden of proof to show that the resignation was involuntary. The Opinion on this significant issue is necessarily premised on speculation off the record that the resignation was coerced.

The Local Chairman's handling does not support the majority's view of the issue concerning Rule 22 (g). The Local Chairman did not request a Rule 22 (g) hearing on the resignation question on August 29, 1960, October 11, 1960 or even in the December 6, 1961 letter of intent to this Board. The majority finds "it is fair to conclude that" the "22(g) component" is in the case. Regardless, it is not reasonable to find it related to the resignation question. It is the application of the conclusion which lacks justification. The conclusion of the majority on the point is not supported by the language employed, but is the product of inference. In every letter quoted and even the Statement of Claim, which should control, the unujst treatment objected to runs to the dismissal of Claimant on July 29, 1960 and not to the resignation of August 4, 1960.

It may be true that this docket has "many errors of commission and omission by both sides." However, the extended Opinion does eventually find all the sins on one side, and seems to forget the sound admonition in **Award 9266** (Hornbeck): "But, the Claimant can not succeed on the weakness of a specific defense of the Carrier. He must maintain his claim on the strength of his own proof."

For the above reasons, among others, we dissent.

/s/ **T. F. Strunck**

/s/ **P. C. Carter**

/s/ **D. S. Dugan**

/s/ **W. H. Castle**

/s/ **G. C. White**

LABOR MEMBER'S REPLY TO CARRIER MEMBERS' DISSENT TO AWARD 11340, DOCKET CL-13178

It is clearly evident why the Dissenters are attempting here to confuse the basic issue in this dispute and thereby evade the fact that Carrier refused the Claimant's request for an unjust treatment investigation under Rule 22(g), requested for the purpose of proving that his resignation was obtained under duress and coercion. This was a substantive right guaranteed by the Agreement, of which the Carrier is not privileged to ignore. In Award 8710, Referee Weston ruled:

> "A hearing is fundamental to our system of fair play and no valid reason is perceived for denying one in this case to determine whether or not the 'resignation' document was actually voluntary and truly expressed the intent and desire of Claimant. The Carrier cannot avoid the effect of Article 18(b) [22(g) here] by compelling an employe who considers himself unjustly treated to accept, without a hearing, its conclusion on conflicting evidence that the employe terminated his employment by resignation. Atricle 18(b) is sufficiently broad to authorize a hearing for an employe who allegedly has been coerced into resigning his position." [Parenthesis ours].

The facts of record clearly show that Carrier violated Rule 22(g) when it refused to grant claimant an unjust treatment investigation upon request. No other proof was necessary to prove that the Agreement was violated, regardless of the "weakness of a specific defense of the Carrier." It is crystal clear that Carrier had no defense of its arbitrary action.

In view of this, it is obvious why the Dissenters rely on misleading statements and super-technalities in an attempt to cover up Carrier's flagrant violation of Claimant's fundamental rights of due process. In Award 3256, Referee Carter held:

> "* * *, it was not intended by the Railway Labor Act that its administration should become super-technical and that the disposition of claims should become involved in intricate procedures having the effect of delaying rather than expediting the settlement of disputes. * * *."

It should be remembered that this is not the first time that the confronting

Carrier has refused to grant employes hearings under similar circumstances. See Awards 8233, 9415 and 9854. Also, see my Reply to Carrier Members' Dissent to Award 10069.

The Board's conclusions in the confronting award is fully supported by the facts of record, Rule 22(g) and awards of this Division.

/s/ J. B. Haines

J. B. Haines
Labor Member