Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 8675
Docket No. 8391
2-N&W-CM-'81

The Second Division consisted of the regular members and in addition Referee Abraham Weiss when award was rendered.

Parties to Dispute: (Brotherhood Railway Carmen of the United States and Canada
(Norfolk and Western Railway Company

Dispute: Claim of Employes:

1. That the Norfolk and Western Railway Company violated Article III - Advance Notice Requirements - National Agreement dated June 5, 1962, when Carman R. A. McGowan was furloughed on January 5, 1978, without proper five (5) working days' advance notice.

2. That the Norfolk and Western Railway Company be ordered to compensate Carman R. A. McGowan forty (40) hours at the straight time rate of pay.

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 January 5, 1978, Claimant was furloughed at Carrier's Toledo, Ohio location without 5 working days' advance notice, occasioned, according to the Carrier, by a coal miners' strike which began December 6, 1977.

Petitioner contends that Article III of the June 5, 1962 Agreement dictates 5 day advance notice before abolishment of a position or reduction in force and that the notice requirement may be waived only under "emergency conditions" as defined in Article II(a) of the April 24, 1970 National Agreement, "provided such conditions result in suspension of a Carrier's operations in whole or in part." Article II(a) lists as illustrative of "emergency conditions" such events as "flood, snow storm, hurricane, tornado, earthquake, fire or labor dispute". Article II (a) also provides that "such temporary force reductions (without advance notice to employees) will be confined solely to those work locations directly affected by any suspension of operations".

Petitioner denies that "emergency conditions" existed on January 5, 1978, when Claimant was furloughed without notice. Petitioner asserts that Carrier has not established that reduced operations, if any, were directly attributable to the strike that began December 6, 1977, one month prior to Claimant's furlough; that a decline in Carrier's business was gradual and foreseeable, and, hence, that

an "emergency condition" did not exist to justify Claimant's furlough without proper notice; and that Carrier's data of cars handled at Toledo before and after the date the strike started are misleading inasmuch as the figures do not directly show the impact of the strike compared to other factors and do not distinguish between coal cars and other types of freight cars.

Petitioner relies heavily on sustaining Second Division Awards 7326 and 6611, as well as 7327, 5834, 5817, 4413, 4412, and Third Division Award 21262. Award 6611 reads, in pertinent part:

> "It should be noted, however, that the burden is upon Carrier to established that reduced operations, which may be interpreted to be a suspension of operations in part, are directly attributable to the work stoppage ('labor dispute') and not other causes."

During the handling on the property, Carrier cited figures of total cars handled at Toledo for the months of September 1977 through April 1978, contending that because of the strike its Toledo operations were drastically suspended "as a direct result of a decline in loaded and empty coal hoppers handled at Toledo ***".

As for the Awards cited by Petitioner, Carrier denies their applicability on the ground that in some of these cases (Second Division Awards 7327, 7326, 6611 and Third Division Award 21262) the claims were sustained because the Carrier offered no proof of emergency conditions, whereas in the instant case, Carrier has proffered such proof, and in the remaining cases (Second Division Awards 5834, 5817, 4413 and 4412), the awards were based on violation of Article VI of the August 21, 1954 Agreement which was in effect at the time those claims arose, but Article VI was subsequently and specifically superseded by Article II of the April 24, 1970 Agreement.

Carrier cites other Awards in support of its actions (Second Division Awards 6411, 6412, 6431, 6473, 6475, 6482, 6483, 6513, 6514, 6560, 7000, and Third Division Award 20059).

In its submission, Carrier cited system-wide figures on gross ton miles for the months September 1977 through April 1978, as well as the number of employees furloughed for the weeks ending December 9, 1977 through January 20, 1978 (excluding the week ending January 6, 1978). Such data was not presented during the handling on the property and, following established Board rulings, cannot be considered when the matter is reviewed by the Board.

We do not find most of the Awards cited by the parties applicable to the instant case because of different fact situations. Here, the furlough was made a month after the coal strike started, whereas in Second Division Awards 6412, 6473, 6475, 6482, 6483, and 6514, claimants were furloughed without notice on the day the labor dispute began or the next day. Award 6560 provides no information as to when the furloughs were made. Awards 6411, 6412, 6473, 6475, 6482, 6483, 6514, and 6560 involve a work stoppage by another railroad labor organization and not, as in the instant case, a work stoppage by a non-railroad labor organization.

Second Division Awards 6378 and 7192 involve the issue of premium pay in relation to whether an emergency existed, but not in relation to Article II(a) of the April 24, 1970 Agreement. Second Division Award 6611 involves a strike by another railroad labor organization but the carrier involved was not struck. In Award 6611, the Board sustained the claim on the ground that the Force Reduction Rule was not applicable since "Carrier presented absolutely no evidence that the work at the point Claimants were employed was affected in any way by the work stoppage on feeder lines or strikes at any other Carrier".

The situation present in Second Division Award 7326 most closely approximates that in the case before us. In the earlier case, a coal strike began on November 12, 1974 and continued until December 5, 1974. Carrier attempted to effect a temporary force reduction at its Reading, Pa. Locomotive Shops to be effective for one day only - November 29, 1974 - claiming this right under Article II(a) of the April 24, 1970 National Agreement.

The Board sustained the claim, with findings:

> "From the record before us, thereis no evidence of probative value advanced by Carrier relative to their assertions that the work at the point where claimants were employed was somewhat affected by the work stoppages in the coal industry. Therefore, it is concluded that the Carrier has not met its burden to prove that the conditions which justify the temporary abolishment of positions with less than five days' advance notice as permitted in Article II of the April 24, 1970 Agreement did in fact exist, and the claim must, therefore, be sustained. See Second Division Award No. 6611 (Lieberman), where it was ruled:
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> > '*** It should be noted, however, that the burden is upon Carrier to establish that reduced operations, which may be interpreted to be a suspension of operations in part, are directly attributable to the work stoppage ('labor dispute') and not other causes.'"

The furlough rule provides that notice will be given except when "emergency conditions" arise. An emergency is a situation arising out of an unforeseen, unplanned and abnormal work condition which the parties, under normal conditions, could not have contemplated. The test of "emergency conditions" is not only whether immediate action is required, but also the nature and extent of departure from normal methods.

The determination of the issue here presented depends primarily on whether the facts and circumstances herein set forth constitute "emergency conditions". If so, there is no violation of the Agreement. The usual and ordinary definition of "emergency" must, therefore, be applied to the facts presented to determine if "emergency conditions" exist.

In order for the 5-day advance notice of furlough to be required, the reduction in force must be caused by circumstances which management could reasonably

anticipate. The determination of whether the circumstances of a particular furlough require the giving of a 5-day notice must be made solely on the basis of the circumstances existing at least 5 days prior to the furlough.

The 5-day notice is not required in case of furloughs caused by circumstances beyond management's control which cannot be reasonably anticipated, such as work stoppages which cause an immediate cessation of work.

The controlling consideration is: was the necessity for the furlough (force reduction) reasonably apparent for a sufficient period in advance, 5 days in this instance, to permit giving the required notice. Given the time lapse of 30 days between the date the coal strike started and Claimant's furlough, we are of the opinion that the necessity for the furlough was reasonably apparent to Carrier at least 5 days in advance.

The coal strike started a month prior to the date of the furlough notice. The possible consequences of the strike on Carrier's operations were not unforeseeable, once the strike started and continued. Carrier had this period of time to anticipate and take the necessary steps in anticipation of the effects of a continued coal strike on its traffic, and, hence, its employment needs.

The conditions existing on the date Claimant was furloughed without 5 days' prior notice -- 30 days after the coal strike started -- could not be characterized as a critical, sudden, or emergency situation invoking a pressing necessity for immediate action or relief. This is the usual and ordinary definition of emergency.

Carrier has not met the burden of proof, by competent evidence, of establishing the fact that "emergency conditions" existed at its Toledo location so as to enable it to furlough Claimant without the required 5-day advance notice. Nor has Carrier shown that reduced operations at Toledo were directly attributable to the "labor dispute" and not other causes so as to enable it to dispense with the 5-day advance notice requirement. We conclude, therefore, that under the circumstances herein set forth Carrier did not have the right to furlough Claimant without 5 days' advance notice as required by the Agreement.

In view of the foregoing, we shall sustain the claim.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 15th day of April, 1981.