Award No. 5675
Docket No. 5540
2-ART-CM-'69

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Gene T. Ritter when award was rendered.

PARTIES TO DISPUTE:

BROTHERHOOD RAILWAY CARMEN OF AMERICA AFL-CIO (Carmen)

AMERICAN REFRIGERATOR TRANSIT COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That the American Refrigerator Transit Company violated the controlling agreement, particularly Rule 20(b), Pueblo, Colorado, when they furloughed O. J. Wotte, Carman, and T. J. Garber, Mechanical Refrigerator Repairman, on June 30, 1966, without giving proper notice in compliance with the provisions of Rule 20 (b).

2. That accordingly, the American Refrigerator Transit Company be ordered to compensate O. J. Wotte, Carman, and T. J. Garber, Mechanical Refrigerator Repairman, eight (8) hours each at the straight time rate for actual time lost June 30, 1966.

EMPLOYES' STATEMENT OF FACTS: The American Refrigerator Transit Company, hereinafter referred to as the Carrier, operates a car repair shop at Pueblo, Colorado, where a force of carmen are employed, including Carman O. J. Wotte and Mechanical Refrigerator Repairman T. J. Garber, hereinafter referred to as the Claimants.

On May 18, 1966, the following bulletin was posted:

"Pueblo, Colorado
May 18, 1966

NOTICE

The Pueblo Shop will not work during the period of June 27 through June 30, 1966 for the purpose of taking annual inventory of material and supplies.

Only employes necessary for the taking of the inventory, the operation of the meat car wash track and mechanical refrigerator

was completed on the 29th, Shop Superintendent Smith advised the two claimants on the afternoon of June 29 that their services would not be needed on the next day, June 30. This is in accordance with the practice at Pueblo and in accordance with the provisions of Rule 20 (f) of the agreement. The last portion of the rule anticipates the problems that will arise by the use of two or three employes out of the force of 27 men for the purpose of taking inventory. Rule 20 (f) waives the requirement in Rule 19 (c) that men who are furloughed be paid off by voucher. The requirement in paragraph (a) of Rule 20 that seniority govern when men are laid off is also waived, so that the company may select the men needed for inventory purposes. Lastly, Rule 20 (f) waives the requirement that furloughed employes be given 15 days' notice before being required to return to work as provided in paragraph (d). By waiving these requirements, the company may use as many employes as necessary for as long as necessary for inventory purposes. Otherwise, the Shop is closed during the inventory period. The Employes have no rule support for this demand that the claimants be used on the date of claim, the fourth day of the inventory period.

To summarize, notice was posted on May 18, 1966 using the same language and in the same manner as in previous years that the Shop at Pueblo would be closed from June 27 through June 30, 1966 for inventory purposes. The Shop was closed during this period. Three employes were used for a part of the period for inventory purposes. None of the employes had a right to be called for work during the period the shop was closed. The claim for a day's pay for June 30 for each of the two claimants is entirely lacking in merit. Rule 20 (f) specifically recognizes the right of the Carrier to close the Shop. It follows that the claim should be denied.

(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.

Carrier operates a car repair shop at Pueblo, Colorado, where a force of Carmen are employed, including the two named Claimants. This dispute requires interpretation of Rule 20(b) and 20(f), and the notice given by Carrier under Rule 20. The pertinent part of Rule 20 is as follows:

> "(b) Five (5) working days' notice will be given employes affected before reductions are made, and a list of all men affected in force reduction will be furnished the Local Committee."
>
> "(f) During periods when annual inventory of material and supplies is being made by the Accounting Department, the shops may be closed for a period not to exceed four (4) days, during which

period, insofar as using employes for inventory purposes and in order not to disurb outside train yard inspection forces, the provisions of Paragraph (c) Rule 19, and Paragraph (a) and (d) of Rule 20 are waived."

On May 18, 1966, Carrier in pursuance to the above quoted Rule 20 (f), posted the following bulletin or notice:

"Pueblo, Colorado
May 18, 1966

NOTICE

The Pueblo Shop will not work during the period of June 27 through June 30, 1966 for the purpose of taking the annual inventory of material and supplies.

Only employes necessary for the taking of the inventory, the operation of the meat car wash track and the mechanical refrigerator repair men will work June 27, 28, 29 and 30, 1966, as per Rule 20, Paragraph (f) of the present working agreement.

Shop operation will be resumed Friday, July 1, 1966.

/s/ B. M. Smith"

The record discloses that the two named Claimants were included as part of the skeleton force referred to as "only employes necessary" for the taking of inventory. These Claimants worked in accordance with the above quoted notice, on June 27, 28 and 29, 1966, but were not allowed to work on June 30th, 1966. The Organization contends that the Claimants were wrongfully deprived of one day's work for the reason that Carrier failed to comply with Rule 20(b), which requires a 5 working days' notice prior to the furloughing of an employe. The Organization further contends that the above quoted notice or bulletin placed a mandatory duty on Carrier to work these Claimants the full four days set out in said notice. Carrier contends that the inventory did not require 4 days, and that in the years (1965, 1966 and 1967), the Carrier gave an identical notice although it did not require employes to work the full four days, thereby proving that the practice on this property did not require Carrier to work the skeleton force the full four days.

This Board finds that the wording of the notice furnishes the key to resolving this dispute. This notice contains the words "will work June 27, 28, 29 and 30, 1966." The fact that no claim was filed during the years 1965 and 1967 is not evidence that the Agreement was not violated during those years. This Board has repeatedly held that violations of an Agreement can not be condoned by proof of past violations. In this dispute, the notice must be interpreted in connection with the above quoted portions of Rule 20. There is no doubt that the Carrier could have charged the Employes with insubordination if they had refused to work the full four days. These Employes could not make plans for any period during the four days contained in the notice, and, although they did not work the full four days, these Employes were subjected to the discretion of Carrier during the entire four day period. For the reasons above stated, this claim will be sustained. This Board

might have ruled differently if the notice had been worded to the effect that the skeleton crew would work during this four day period or as much time as was required in making the inventory. By wording a notice to the effect that the Employes "will work June 27, 28, 29 and 30, 1966", Carrier bound itself to guaranteeing four days' work for "employes necessary for the taking of the inventory * * *."

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this twenty-third day of April, 1969.

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