Award No. 6112
Docket No. 5962
2-N&W-SM-'71

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

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

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 16, RAILWAY EMPLOYES' DEPARTMENT, AFL-CIO (Sheet Metal Workers)

NORFOLK AND WESTERN RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That under the provisions of the current Agreement, the Carrier improperly furloughed on October 11, 1968, Sheet Metal Workers C. T. Blair and Miles Ratliff, at the Lamberts Point Shop and Coal Piers, Norfolk, Virginia.

2. That the Carrier be ordered to compensate the above named claimants eight (8) hours each at the pro rata rate for all time lost from time furloughed October 12, 1968, until time recalled on October 17, 1968, or five days for each claimant.

EMPLOYES' STATEMENT OF FACTS: The Norfolk and Western Railway Company, hereinafter referred to as the carrier, maintains at Norfolk, Virginia a shop and terminal including coal piers and merchandise piers, where repairs, service and maintenance is performed in and on the same. On October 11, 1968, the carrier furloughed the above claimants, allegedly due to a coal miners' strike, with only 16 hours' advance notice. There existed from October 1, 1968 through October 14, 1968, a strike in the area serviced by the carrier's trains operating in the coal fields of Virginia and West Virginia. The major portion of the fields were shut down by October 3, 1968; however, coal continued to move from the fields into Lamberts Point throughout the strike period. Empty cars were dispatched to return to the coal fields. Also, time freight and perishable cargo continued to move into and away from this terminal.

Therefore, it is obvious that sufficient work that could be performed by the claimants did exist, in fact their jobs were filled by the realignment of the remaining forces and they were returned to their former jobs on the day of their recall.

The Agreement effective September 1, 1949, as subsequently amended, including memorandum of Agreement dated October 16, 1964, is controlling.

The fewer cars dumped and the shorter period of time requiring the piers to be in operation, less breakdowns occur and less maintenance is needed, thereby reducing the amount of pipefitter work to be performed.

Unquestionably, from the facts quoted above, an emergency condition prevailed and the carrier's operation at Norfolk was suspended in part and work which would have otherwise been performed by the furloughed employes no longer was available.

Regarding the request of the employes that the named claimants be paid eight (8) hours each at the pro rata rate for all time lost " * * * or five days for each claimant," carrier's records show that Claimant Blair only lost three (3) days from his regular assignment and Claimant Ratliff five (5) days.

In its submission carrier has shown:

1. At the time in question, there was a strike in progress, creating an emergency situation.

2. Agreements in effect on this property were written to provide for this type of situation.

3. Award 5895 concerns a similar incident and situation and the position of the carrier upheld.

4. Car dumping, inbound and outbound trains declined, and units stored increased from zero to 13 resulting in the disappearance of pipefitter work.

5. Forces were furloughed only in proportion to the work that disappeared.

6. Forces retained were more than adequate to perform the remaining work.

7. Claimant Blair only lost three (3) days from his regular assignment.

Carrier asserts there has been no violation of the agreement in this instance and respectfully requests that the claim be dismissed in its entirety.

All matters herein referred to in support of the carrier's position are available to or have been subject of correspondence or discussion in conference between the representatives of the parties hereto.

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.

This claim for pay of the two sheet metal workers, C. T. Blair and Miles Ratliff for lost time between October 12th and October 18th, 1968, is based on the contention that they were improperly furloughed.

The carrier denies any violation of the agreement and grounds its action in furloughing these two men on Article 6 of the August 21, 1954 agreement, the pertinent portion of which reads as follows:

> "Rules, agreements or practices, however established, that require more than 16 hours' advance notice before abolishing positions or making force reductions are hereby modified so as not to require more than 16 hours such advance notice under emergency conditions such as flood, snow storm, hurricane, earthquake, fire or strike, provided the carrier's operations are suspended in whole or in part, and provided further that because of such emergency the work which would be performed by the incumbents of the positions to be abolished, or the work which would be performed by the employes involved in the force reductions no longer exists, or cannot be performed."

From examination and careful study of the entire record, and from review of the relevant Awards interpreting and applying Article 6, the Board is sustaining the appeal for the following reasons:

1) Furloughing of employes on sixteen hours' notice is proper, and contractually sanctioned, provided that all three of the following conditions set forth in Article 6 exist:

   A) ". . . conditions such as floods, snow storm, hurricane, earthquake, fire or strike. . . ."

   B) ". . . carriers; operations are suspended in whole or in part . . ."

   C) ". . . the work which would be performed by the (incumbent) employes involved in a force reduction no longer exists, or cannot be performed."

2) The record and evidence submitted contains conclusive proof that conditions A and B above prevailed.

3) The record and evidence submitted do **not** provide convincing factual proof that the work of claimants no longer existed, or that it could not be performed.

Carrier, in the record, submitted schedules showing sharp decline of trains in and out of Norfolk, units stored and cars dumped, on October 12, 13, 14, 15, 16 of 1968, when compared with dispatching, storing and dumping on September 14, 15, 16, 17 and 18 of 1968.

Carrier did not show, however, that the above reductions in operational activities, **in fact**, caused the work, that incumbents Blair and Ratliff customarily performed, to cease to exist, or that such work could no longer be performed.

Rather, carrier in its Brief, when connecting up its schedules showing reduction in operations with the amount of pipefitter work that was to be performed, stated:

"Logically, again, the fewer units in operation the fewer breakdowns occur, and less maintenance has to be performed, thereby reducing the amount of pipefitter work to be performed."

Logical deduction or induction is not a substitute for hard fact. The Board finds an absence of positive evidence that the actual work to be performed by the incumbents no longer existed. Similarly, the Board finds an absence of positive evidence, that the work of the incumbents (which could have been performed) was not possible of performance on the days in question.

The absence of proof that the third condition described in Article 6 is sufficient grounds for awarding in favor of claim for pay.

Carrier cites Award 2060 but it is found that such citation is not pertinent, because the longshore strike referred to, caused all three factors provided for in Article 6 to be present, thus properly justifying invocation of Article 6. That Award states, that because of the strike, ". . . claimants' work did not exist during the strike. . . . Operations, including the use of machinery, were suspended during the strike." Thus it is not controlling in the instant case.

Carrier also cites Award 5895, emphasizing the following quotation:

"Certainly, during the pendency of a major strike such as occurred here, fewer cars will be shipped, and the volume of indispensable carmen will be substantially decreased."

Award 5895 disposes of the issue of whether or not the work of furloughed incumbent ceased to exist, or whether or not it was possible of performance, **not on a factual or evidentiary basis, but rather by adoption of the deductive processes.** Thus the Award states that during a major strike, "few cars will be shopped"; not that fewer cars were actually shopped. Similarly the Award states that "carmen craft tasks **will be** substantially decreased"; not that they in fact actually decreased, or, to use the language of the agreement, "no longer existed or cannot be performed."

This Board is not content, in the instant case, to allow induction or deduction to be its guide in adjudicating the claims before it. It prefers instead to be guided by facts. The facts in the record before it do not disclose that curtailment of carrier's operations in fact caused incumbents' work to become non-existent or incapable of performance.

Thus, the Board finds for the claimant, because the carrier has failed to show by positive evidence that incumbents' work was non-existent, not possible of performance, or had actually and in fact decreased, and thus awards that each claimant is to be paid for the five days claimed, minus whatever time either claimant worked during the furlough period.

AWARD

Claim sustained to extent provided for in findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 21st day of April, 1971.

DISSENT OF CARRIER MEMBERS TO AWARD NO. 6112

The reasoning advanced in this Award is in serious error and departs from the basic established principle of labor-management relations and procedures established by this Board. All Divisions of the Board have often held that prior Awards involving the same or substantially comparable facts and the same contractual provisions will generally be followed, except when glaringly erroneous, or plainly unfair. (See 2–3991, 4337 and many others.) The instant case is identical to that in Award No. 5895, which involved the same Carrier, same agreement, identical strike under the same circumstances in which a denial Award was rendered. It was neither glaringly erroneous nor plainly unfair and the majority erred in not following the precedent established in Award No. 5895.

Also, it is Carrier's contention and recognized by the Board, that the burden of proof is on the petitioning party or the one who asserts the claim. In the instant case, the petitioning party has presented no evidence to show that the work of abolished positions existed and was performed during the period involved. In fact, they readily admit (also established by Carrier's record) that there was a strike in the area serviced by the Carrier resulting in drastic decline in Carrier's business. In other words, causing work which would have been performed no longer to exist. They did not meet the burden of proof which was required.

It is not within the majority's power to amend the agreement or record. They must take the record and agreement as they find them. A more careful study of the record would have shown quite pointedly what these parties had accepted as the meaning and intent of the August 21, 1954 agreement. The majority should have given the record that type of study.

For these and other reasons, this Award is patently erroneous and we dissent.

H. F. M. Braidwood

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