Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 8907
SECOND DIVISION Docket No. 8941
2-L&N-CM-'82

The Second Division consisted of the regular members and in addition Referee Gilbert H. Vernon when award was rendered.

Parties to Dispute: Brotherhood Railway Carmen of the United States and Canada

Louisville and Nashville Railroad Company

Dispute: Claim of Employes:

1. That the Carrier violated the terms of the Current Agreement when notice dated January 15, 1979, was posted notifying Evansville, Indiana, Carmen E. C. Hooker, G. L. Snodgrass, T. R. McGaha, K. W. Benton, D. L. Paulson, H. A. Hale, P. C. Couch and K. A. Brown that they were to be furloughed effective 3:00 PM, January 16, 1979, the notice did not provide for a five working days advance notice as required by Rule 26 (b) of the Current Agreement.

2. That the Carrier be ordered to compensate the following listed Carmen the amount shown opposite each name.

Mr. E. C. Hooker	4 days pay at straight time
Mr. G. L. Snodgrass	5 days pay at straight time
Mr. T. R. McGaha	4 days pay at straight time
Mr. K. W. Benton	5 days pay at straight time
Mr. D. L. Paulson	5 days pay at straight time
Mr. H. A. Hale	4 days pay at straight time
Mr. P. C. Couch	5 days pay at straight time and 13½ hours at overtime
Mr. K. A. Brown	5 days pay at straight time

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 15, 1979, the Carrier affected a partial force reduction at its Evansville, Indiana, facility. The partial force reduction was instituted by the following notice:

"The following position(s) will be abolished at quitting time of shifts starting 3:00 p.m., January 16, 1979, due to

severe weather conditions interrupting train schedules from the north. This abolishment is in effect until further notice.

E. C. Hooker	G. L. Snodgrass
T. R. McGaha	K. W. Benton
D. L. Paulson	H. A. Hale
P. C. Couch	K. A. Brown"

As can be seen, Carrier gave affected employees twenty-four hours advance notice.

The Organization contends that the employees were entitled to a five-day notice by virtue of Rule 26 (b):

> "If force is reduced, 5 working days advance notice will be given the men affected by bulletin before the reduction is made. Notices will indicate seniority dates, names and classification of employes affected with copy to the local chairman."

The Carrier contends that due to a major snowstorm in the Chicago area on January 12, a curtailment of business resulted totally in Chicago and partially at Evansville. As such, the notice provisions of Rule 26 (b), Carrier argues, are excepted by Article II of the April 24, 1970 National Agreement, which states:

> "ARTICLE II - FORCE REDUCTION RULE
>
> Insofar as applicable to the employees covered by this agreement, Article VI of the Agreement of August 21, 1954, is hereby amended to read as follows:
>
> (a) Rules, agreements or practices, however established, that require advance notice to employees before temporarily abolishing positions or making temporary force reductions are hereby modified to eliminate any requirements for such notices under emergency conditions, such as flood, snow storm, hurricane, tornado, earthquake, fire or labor dispute other than as covered by paragraph (b) below, provided that such conditions result in suspension of a Carrier's operations in whole or in part. It is understood and agreed that such temporary force reductions will be confined solely to those work locations directly affected by any suspension of operations. It is further understood and agreed that notwithstanding the foregoing, any employee who is affected by an emergency force reduction and reports for work for his position without having been previously notified not to report, shall receive four hours' pay at the applicable rate for his position.
>
> (b) Rules, agreements or practices, however established, that require advance notice before positions are temporarily abolished or forces are temporarily reduced are hereby modified so as not to require advance notice where a suspension of a carrier's operations

> in whole or in part is due to a labor dispute between said carrier and any of its employees."

Carrier asserts that under the April 24, 1970 Agreement, no advance notice was necessary before effecting the force reduction.

Disputes involving the application of Article II are not new to this Board. In cases where the Carrier seeks to apply the exceptions found in Article II to Rules such as 26 (b) it is well established that the burden is on the Carrier to show that Article II is applicable. In Award 6611 which involved a work stoppage rather than a snow storm as in the instant case, the following observation was made: "It should be noted, however, that the burden is on the 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 Board finds Article II is not applicable in the instant case for a combination of two reasons. First, the Carrier has failed to establish a reasonable connection between the snowstorm and the length of the layoff. The Organization contends that the employees laid off by the January 15 Notice were not called back for 77 days. The Carrier indicates that two were called back in 24 days and the remainder were called back 48 days later. Regardless of whose version is believed regarding the length of the layoff, it was rather long and as suggested in Award 6411, the Carrier must show the length of the layoff is reasonably related to the emergency condition. On this regard the Carrier cited us to Award 6412 which, among other things, holds that there is no limitation upon the duration of a temporary force reduction under Article II. As the Board observed in that Award:

> "As an anology, we do not believe that shut down caused by an emergency due to a blizzard or flood, for example, ends automatically when the last snowflake has fallen or when the high water mark has passed. *** The parties have put no limitations upon the duration of a temporary reduction in the rule negotiated in 1970."

We have no quarrel with the above quoted statement from Award 6412. We agree that the effects of an emergency condition, such as those cited in the rule, can have lingering affects on a Carrier's operation. However, this does not change the Carrier's burden to show that the length of the layoff is directly attributable to a suspension of operations caused by one of the emergency conditions listed in the rule. The Carrier has the burden to show that the emergency conditions necessitated a lay off of this length or that other new and unforeseen conditions caused the lengthiness of the layoff. In this case, the Carrier's justification for a layoff of this length is unclear. There is no description in the record as to how the snowstorm affected Carrier's operations except for the first few days after the storm. There is no specific statements as to how long the train service was suspended after January 12. There is no evidence as to the effects on traffic volume, revenue or any other evidence that would show a connection between the snowstorm and the significant length of the layoff.

Secondly, we do not find that Article II is applicable because we are not convinced that the operations in Evansville were effectively suspended in whole or in part. The Organization, in each level of handling of the property, contended that the operations at Evansville were, in fact, not suspended in part because the positions of the furloughed carmen continued to be worked during the period in question. They contend that the furloughed carmen positions were filled from the overtime board. For instance, the following statement was made by the local chairman in a letter to the master mechanic: "As you will remember, it was necessary to fill all these men's vacancies while they were off." The letter was dated March 17, 1979, notably a date after Carrier contends all employees were recalled. Other similar statements were made at other levels during the handling of the case. In reviewing the record on this point, the Board cannot find any denial, refutation or response to the Organization's assertion as quoted above. It is well established that an undenied assertion stands as fact. The Board finds that the fact that the positions were filled during the layoff particularly significant. In light that the furloughed carmen positions continued to be filled from the overtime board during their furlough, we cannot conclude that the snowstorm in Chicago resulted in an effective or meaningful suspension of the Carrier's operations at Evansville. If, in fact, there had been a partial suspension there would have been no need to have filled these positions during the period of the employees' layoff. The Carrier has been faced with this assertion at every step of the handling and chose not to respond. The burden is on the Carrier, not only to respond to the Organization's assertions, but to show that the suspension of the operations existed and were attributable to causes outlined in Article II. This burden was not fulfilled.

The Board must decide cases based on the evidence before it. Based on the evidence in this record, it cannot be concluded that the layoffs were reasonably related to the emergency conditions as asserted by the Carrier nor can it be concluded that there was any effective suspension of the Carrier's operations in part at Evansville. In view thereof, we find that Article II is not applicable and thus under Rule 26 (b), the employees were entitled to a five-day notice. However, regarding part two of the claim we find it excessive. It is clear in the record that the employees were given a 24-hour or one-day notice. They are entitled to a five-day notice, therefore, claimants are entitled to no more than four days pay at the straight time rate as anything beyond is not supported by agreement. Each claimant shall be entitled to four days pay at straight time.

A W A R D

Claim sustained to the extent indicated in the Findings.

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 10th day of February, 1982.

DISSENT OF CARRIER MEMBERS
TO AWARD 8907, DOCKET 8941
(Referee Vernon)

The Majority in this Award seriously erred in its interpretation of Article II (Force Reduction Rule) of the April 24, 1970, National Agreement.

The stated purpose of Article II was to grant the signatory Carriers, the right to reduce their work force without respect to advance notice requirements under two stipulated conditions. Namely, such force reductions could be effectuated without advance notice if an emergency condition existed and if as a result of such emergency condition, the Carrier's operation at the location was suspended in whole or in part.

Relative to the first condition, it cannot be gainsaid that on January 12, 1979, a blizzard of major proportion hit most of the northwestern part of the United States. The Chicago area was paralyzed by this snow storm and the Carrier's three northern divisions, including Evansville, were severely affected. The magnitude of this blizzard made national headlines and its effect on railroad operations is well known. Thus, it is obvious that an emergency condition, i.e. a snow storm, was the controlling factor in the force reduction at Evansville.

In respect to the second condition set forth in Article II, the Carrier clearly demonstrated that as a result of this blizzard all rail operations were initially suspended between Evansville and Chicago and when rail operations resumed they were greatly curtailed. This fact was never refuted by the Employees. During the handling of this case on the property, the Carrier never asserted that its

operations at Evansville were completely suspended, however, it made a clear showing that such operations were suspended in part. This is all that is required in the Agreement.

Inasmuch as the two conditions set forth in Article II were met, it would then be logically concluded that the Majority would issue a denial Award. However, the Majority chose to add provisions to Article II which are not included therein in order to arrive at the convoluted conclusion that the Claimants should have been afforded a five-day advance notice of the force reduction.

The first stumbling block the Majority places in front of the Carrier is the addition of a provision not found in the Agreement which requires the Carrier to show a causal relationship between the length of the force reduction and the initial emergency situation. In arriving at this conclusion, the Majority mistakenly cited Second Division Awards Nos. 6411 and 6412 as support for this erroneous contention. Contrariwise, both Awards support the Carrier's position in this dispute. While in both Awards, the Employees argued that the force must be recalled following the alleged end of the emergency, Referee Lieberman was not persuaded by such argument. For example, in Award 6411, the Referee explicitly ruled as follows:

> "* * *We do not concur in this argument, since the jobs had not been reestablished and no basis in the Rules exists for a second force reduction procedure.
>
> * * * *
>
> "The parties have put no limitation upon the duration of a temporary force reduction in the Rule negotiated in 1970."

While the Majority in the present dispute quoted a portion of Referee Lieberman's "Findings" in Award No. 6412, they conveniently failed to include the next sentence following the quotation, which is germane to the instant case and reads as follows:

> "It is evident that an advance notice of furlough to men already on furlough is not provided for in any Rule.

Nor did the Majority cite the following statement:

> "1. The parties have put no limitation upon the duration of a temporary force reduction in the Rule negotiated in 1970. Such limitations are not unknown in this industry; for example in the Protective Agreement of February 1965 a provision exists requiring recall of employees temporarily laid-off upon the termination of the emergency."

Fortunately, Referee Lieberman realized that he had no jurisdiction to change the negotiated Agreement, however, the Majority, by citing Awards 6411 and 6412, completely failed to realize this point.

A second glaring error was committed by the Majority when they held that the fact that some of the work normally performed by Claimants was being performed by existing forces and that at times this involved the working of overtime, this in someway indicated that there was no suspension of the Carrier's operations at Evansville. This conclusion was reached despite the Carrier's unrefuted showing that the operation between Evansville and Chicago was at first suspended completely and thereafter severely curtailed for an extended period of time. It should be noted that when the Employees made this argument on the property and in their Submission, they cited Awards which predated the April 24, 1970, National Agreement, and which were based on Article VI of the August 21, 1954, National Agreement. While the

August 21, 1954 Agreement had a stipulation that the work of the positions no longer existed, such provision was expressly eliminated and was not included in Article II of the April 24, 1970, National Agreement. It is evident that the Majority ignored this fact and based its decision on the earlier Agreement which had been superceded.

In light of the foregoing, the decision in this Award cannot be given any force or effect for the application of future cases, and accordingly, we dissent.

J. M. FAGNANI

D. M. LEFKOW

J. E. MASON

J. R. O'CONNELL

P. V. VARGA