Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 10871
SECOND DIVISION Docket No. 10617
2-MKT-CM-'86

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

Parties to Dispute: (Brotherhood Railway Carmen of the United States and Canada
(Missouri-Kansas-Texas Railroad Company

Dispute: Claim of Employes:

1. That the Missouri-Kansas-Texas Railroad Company violated the agreement between the Missouri-Kansas-Texas Railroad Company and the Brotherhood Railway Carmen of the United States and Canada, effective January 1, 1957, as amended, and the Railway Labor Act, as amended, when the Missouri-Kansas-Texas Railroad Company failed to restore the jobs of Carmen J. H. Smith, W. R. Williams, R. R. Lawson, K. R. Bruce, R. Sharp, L. D. Skjeveland, K. W. Keiningham, T. G. Faries, and D. M. Davis at the end of the emergency created by the labor dispute with the Brotherhood Locomotive Engineers. This emergency was effectively ended September 21, 1982.

2. That the Missouri-Kansas-Texas Railroad be required to pay Carmen J. H. Smith, W. R. Williams, R. R. Lawson, K. R. Bruce, R. Sharp, L. D. Skjeveland, K. W. Keiningham, T. G. Faries and D. M. Davis forty (40) hours pay at the proper pro rata rate account they did not receive the proper five (5) day notice that they were furloughed indefinitely without a proper five (5) day notice.

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 employes 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.

As a result of a strike on September 19, 1982, by the Brotherhood of Locomotive Engineers, the Carrier abolished all craft positions throughout its system effective September 20, 1982. The issue before this Board for determination is whether the Claimants were entitled to receive a five day notice pursuant to Article III of the June 5, 1962 Agreement, and if so, when was it required that the five day notice be given.

Article III provides the following advance notice requirements:

"Effective July 16, 1962, existing rules providing that advance notice of less than five (5) working days be given before the abolishment of a position or reduction in force are hereby revised so as to require not less than five (5) working days' advance notice. With respect to employees working on regularly established positions where existing rules do not require advance notice before such position is abolished, not less than five (5) working days' advance notice shall be given before such positions are abolished. The provisions of Article VI of the August 21, 1954 Agreement shall constitute an exception to the foregoing requirements of this Article."
(Emphasis supplied).

Article II of the April 24, 1970 Agreement provides:

"(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 requirement 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 required 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."
(Emphasis supplied).

The Organization does not dispute the propriety of the Carrier's initial job abolishment notice on September 20, 1982. It takes the position, however, that when the strike emergency was over on September 22, 1982, the force level which existed immediately prior to the temporary reduction in force on September 20, 1982, had to be restored.

The Awards cited by the Organization do not support the aforementioned conclusion. Second Div. Award No. 6112 is inapplicable as it did not involve the same Force Reduction Rule which govern this dispute. Second Div. Award No. 8907 which involved adverse weather conditions, rather than a labor dispute, is relevant only to the extent that it placed the burden of proof on the Carrier to show the length of the layoff is directly attributable to a suspension of operations caused by one of the emergency conditions listed in the Force Reduction Rule. In Second Div. Award No. 7326, the parties contested whether a one day temporary reduction was justified by the work stoppage.

The Carrier contends that Claimants were temporarily furloughed in accordance with Article II of the April 24, 1970 Agreement. It maintains there was no contractual obligation for it to recall the Claimants from furlough, and then give the five day notice under Article III of the 1962 Agreement. Carrier strenuously argues that even prior to the strike it had a diminished work load, a condition which was only aggravated by the strike. Carrier further suggests that neither party has shown the layoff status of Claimants to be permanent, or that what should have happened "two to three months" after the strike (suggesting a five day notice may have been appropriate at a later date) is of any relevance to this dispute.

The Board finds Carrier's failure, upon the evidence of record, to give Claimants any notice whatsoever beyond the initial, temporary job abolishment due to the labor dispute is determinative of this dispute; not whether the Claimants had to be recalled before receiving a five day notice or whether a reduction in force was necessary.

The Board further finds Carrier's reliance upon Article II is misplaced to the extent its actions went beyond the express exception carved by Article II from the application of existing "rules, agreements or practices," including Article III of the 1962 Agreement. Careful examination of Awards interpreting the reasonableness of recall from a temporary job abolishment due to a labor strike give this Board guidance as to when a "permanent," or "non-emergency" layoff notice must be given.

Review of several Awards supports the general principle that under certain conditions, a reasonable extension of the layoffs caused by a strike, if temporary in nature, are permissible. Second Div. Award No. 10732; Second Div. Award No. 6560; Second Div. Award No. 6513; and Second Div. Award No. 6411. In Second Div. Award No. 6431 cited by the Carrier, the Board applied a reasonableness standard in finding that a one day delay in recall from the end of a strike did not call for Carrier to post a five day layoff notice. In Second Div. Award No. 6560, nine out of ten employees were recalled within four weeks from the termination of strike activity, and the Board held no advance notice was required.

This Board has approved a Carrier's recall of employees within two days of the end of a strike as action taken in "good faith." Second Div. Award No. 6513. In Second Div. Award No. 6412, restoration of forces within three days of a strike's end did not call for advance notice, and was held to be reasonable. See also, Third Div. Award No. 25876; layoff under strike conditions permitted to continue for two work days after termination of strike due to its impact.

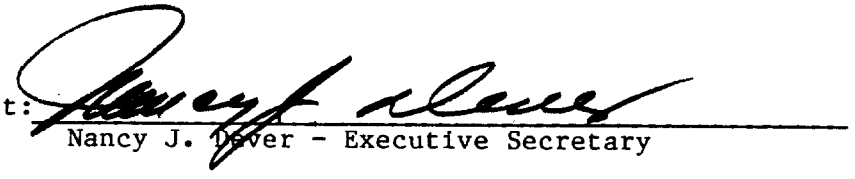
This Board does not take lightly Carrier's position that the strike had an impact, albeit of an unspecified degree, on its operation so as to require a degree of reduction in force after the strike was over on September 22, 1982. We also recognize that there is no language, express or implied, in the Emergency Force Reduction Rule, or in the applicable contract, which requires all employees furloughed during a strike to be immediately recalled when the strike ends. Second Div. Awards Nos. 10732, 6412. We further find there is no evidence in the record of either bad faith or vindictiveness on the part of Carrier.

Nevertheless, Carrier's actions remain subject to a requirement long recognized by this Board that the continued layoff of employees after an emergency condition involving a labor dispute has terminated, is limited to a reasonable period of time. Based upon this Board's prior Awards and the record in this case, the Board finds a two week period after the termination of the strike on September 22, 1982, or no later than October 7, 1982, to be a reasonable period of time within which the Carrier should have been in a position to determine its force requirements. We find, therefore, that for each work day, up to a maximum of five (5) working days, any of the Claimants remained furloughed beyond October 7, 1982, each such Claimant is entitled to receive compensation at the then applicable hourly rate based upon an eight hour day.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: 
Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 4th day of June 1986.