Award No. 4099

Docket No. CL-3922

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Jay S. Parker, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES

CHICAGO GREAT WESTERN RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated its Agreement with the Brotherhood governing Hours of Service and Working Conditions of Employes covered thereby when it refused to permit the employes employed in the General Offices to continue to perform their assigned work and duties of their positions, effective May 27, 1946.

(2) That the Carrier shall be required by appropriate award and order to compensate the employes affected for loss of time from one to four days as suffered by those employed in the different offices.

EMPLOYES' STATEMENT OF FACTS: Under date of May 24, 1946, the Officers in charge of the various general offices, i. e., Comptroller, Auditor of Freight and Passenger Accounts, Freight Claim Agent, Superintendent of Car Service, Traffic Department and Purchasing Agent and Stationary Storekeeper, issued and posted bulletins in their respective offices abolishing all existing positions effective May 27, 1946 covered by the Clerks' Agreement—totaling 202. All bulletins carried the following statement: "This action necessary account strike". The strike referred to was that of the Trainmen and Engineers, which was called off on May 25, 1946.

On Monday, May 27, 1946 the 18 clerks employed in the Freight Claim Agent's office reported and worked their assigned positions and before the end of the work day were advised verbally that an error had occurred in notifying them to return to work and that they should not return until Friday, May 31st, on which day they resumed their former positions losing two full days pay in that work week.

The 34 clerical employes in the Car Service Department were notified Monday May 27, to report for work at usual time on their positions Tuesday morning May 28. These employes lost one days work in that work week. The 29 clerical employes in the Comptroller's Office, 97 in the Auditor of Freight and Passenger Accounts and three in the Purchasing and Stationary Department were advised to return to work on Friday May 31, all losing three days work in that work week. The 21 clerical employes in the Traffic Department were not allowed to return to work until Saturday, June 1, 1946, all losing four days work in that work week.

(5) that new positions were established to conform to exigencies of the service after settlement of the strike;

(6) that the new positions were properly bulletined in accordance with the rules;

(7) that employes returning from furlough were temporarily assigned to new positions with due regard to preference of senior employes, pending the bulletin process;

(8) that successful applicants were permanently assigned to newly established positions after expiration of five working days, strictly in accordance with the rules;

(9) that claimants had no assigned positions, either of a temporary or permanent basis, during the period for which loss of compensation is claimed;

(10) that the Carrier could not and did not, therefore, "refuse to permit employes employed in the General Offices to continue to perform their assigned work and duties of their positions, effective May 27, 1946," as alleged by Petitioner in Statement of Claim, because such positions were non-existent;

(11) that there is no basis for the Petitioner's request "That the Carrier shall be required by appropriate award and order to compensate the employes affected for loss of time from one to four days as suffered by those employed in the different offices;"

(12) that claim should be denied for lack of merit; and respectfully requests the Third Division to hold accordingly.

Exhibits not reproduced.

OPINION OF BOARD: The instant dispute springs from a nationwide strike.

At 4 P. M. on May 23, 1946, Engineers and Brakemen on almost every railroad in the country went on a strike with the result practically all railroad operations were suspended. This strike was settled about 4 P. M. May 25, 1946.

Between the hours of 11:50 A. M. and 2 P. M. on May 24, through the medium of divers bulletins, posted in its various Chicago Offices, the Carrier gave notice that effective forty-eight hours from their date 195 positions in different departments of its General Offices at Chicago would be abolished. The date head of such bulletins varied slightly in hours but it can be safely stated that all positions were declared abolished as of some time during the early afternoon of May 26, and that no abolition order became effective, even under its own terms, until at least twenty hours after the strike had been settled and notice of its termination had been publicized.

As a result of the Carrier's action with respect to the strike the employes involved lost from one to four days' work from May 27 through May 31, depending on the date they were assigned to positions newly bulletined. May 30th being a holiday is not involved.

The claim is for pay for time lost by all employes not permitted to work by the Carrier from the designated effective date of the abolition orders until the dates such employes were permitted to go back to work.

Preliminary to consideration of the vital issues involved it will be well to clarify certain factual matters not heretofore related which, although they cannot be regarded as the source of the Claim, are nevertheless of importance to its decision.

The positions here were not the only ones bulletined for abolishment. The Brotherhood asserts and the record reveals positions over the Carrier's

entire system were bulletined in like manner but that immediately following the settlement of the strike such bulletins were cancelled and all other employes over the system, except those in the General Offices at Chicago, were returned to work before the reduction in force became effective and continued in their assignments without loss of time or employment. It likewise appears that immediately after termination of the strike became known and prior to the effective abolition date of the positions the Brotherhood's General Chairman and its General Office Division Chairman each, through Local and Long Distance telephone calls, requested the Carrier to permit the General Office Clerical Employes to return to work on Monday, May 27, 1946, as line employes were doing, which requests were refused.

Aside from the question whether the involved positions continued to exist and were not actually abolished by the Carrier's action the Brotherhood makes no contention and in fact concedes that so far as requirements as to form are concerned the attempted force reduction and replacement of employes was carried out in strict conformity with the provisions of Rule 18 of the Agreement.

At this point contentions of the respective parties can be and should be briefly stated.

The Carrier contends the positions were properly abolished as authorized and permitted by Rule 18(a) of the Agreement. On the other hand the Brotherhood questions its right to reduce forces under the existing circumstances under Rule 18(a) or any other rule of that Agreement, asserts such positions were not in fact abolished and insists the Carrier's action resulted in a violation of Rules 46 and 64 of the Agreement.

Rule 46, supra, so far as pertinent, commonly referred to as the basis of pay rule, reads:

> "Nothing herein shall be construed to permit the reduction of days for the employes covered by these rules below six (6) per week, excepting that this number may be reduced in a week in which one of the seven holidays specified in Rule 45 occurs by the number of such holidays."

Rule 64 provides:

> "Established positions shall not be discontinued and new ones created under the same or different titles covering relatively the same class of work for the purpose of reducing the rate of pay or evading the application of these rules."

That the Carrier had the right under Rule 18 of the Agreement to reduce forces by abolishing positions during the time the strike was in progress and railroad operations were practically suspended is no longer an open question in this Division of the Board. See Awards 4001, 3838, 3682, and 3680. Under the foregoing awards this is true notwithstanding the Agreement contains a guarantee Rule such as Rule 46 heretofore quoted. For other decisions of like effect see Decision No. 197 and Decision No. 198, rendered by the United States Railroad Labor Board.

Thus if this were a case where positions had been abolished under orders effective prior to the termination date of the strike we would have little difficulty in reaching a conclusion the claim should be denied. To hold otherwise would have the effect of overruling our Awards 3838 and 3682 and what was recently said and held in Award 4001 with respect to the St. Paul and St. Cloud phases of the claim there involved.

But this is not a case that can be so easily disposed of. Under its facts the positions were not abolished at the time the strike was settled. They were still in existence and the Carrier knew there was no longer cause for their abolition. It knew also that the reason assigned by it for their abolishment, sound as it might have been if the strike had continued, had ceased to be a reason. Under such conditions and circumstances can the Carrier

now be heard to say its action was not in violation of the Agreement? We fail to find any Awards of this Division supporting a conclusion that it can. When analyzed Awards 3682, 3838 and Award 4001, limited to the two phases to which we have referred, on which the Carrier places much reliance, do not do so. In each of those cases positions were effectively abolished before the strike was settled. Thus an entirely different issue was involved.

It must be remembered the general rule is that before positions can be abolished, either singly or en masse, a substantial part of their duties must have disappeared and there must be an actual bona fide intent to permanently abolish them (Award 3884). That this is the rule even in cases where strikes are relied on as grounds for abolishing positions is clearly evidenced by the awards to which we have heretofore referred and by Awards 3680, 3701, 3702, 3713 and 3723, sustaining claims, similar in nature to the instant one, on the basis there was no actual or bona fide abolishment of the positions there involved.

Upon examination it will be found that some of the awards last cited deal with a situation where by Carrier fiat positions were declared abolished and orders to that effect became effective prior to settlement of the strike. The writer of this opinion is not disposed to reach out and distort the facts or invent fictitious or imaginary reasons for holding that positions are not abolished in good faith where it appears action has been taken because of strikes. It is his personal view there is a presumption such action is bona fide where it appears abolition of positions has been effected prior to settlement of a strike and he would be less than frank if he did not say that in his opinion some of the awards to which reference has just been made go too far in sustaining claims and are entitled to little weight as precedents on the particular point in question. Even so it is his view an entirely different conclusion must prevail when—as here—the Carrier insists on making abolition of positions effective after the date on which the strike is over.

No useful purpose would be served by restating the facts already related. It cannot be successfully urged a substantial part of the duties of the involved positions had disappeared in the few hours intervening between the date on which the strike was called and the date on which it terminated. In that situation, under all the conditions and circumstances disclosed by the record and conceding Carrier's initial action was bona fide, we think its action lost that status when, with the strike over and the positions yet unabolished, the Carrier refused the Brotherhood's request to permit the employes occupying the involved positions to return to work on May 27 as it was permitting its line employes to do and when it failed and neglected to cancel the abolition bulletins before they became effective. Cancellation could have been accomplished by the simple process of posting notice on the bulletin board and there was ample time in which to do it. With the cause for abolition removed action in treating the positions as abolished resulted in a temporary lay off which the Carrier know would be of short duration. It also resulted in the discontinuance of established positions for the purpose of evading payment of compensation incumbents of such positions were entitled to under the Agreement. We are impelled, therefore, to conclude Rules 46 and 64 of the Agreement were violated and that the claim must be allowed.

While the foregoing conclusion is based upon what we believe to be the merits of the cause, we think it is required if the precedent established by a prior award of this Division is to be followed. See Award 4001, where it is held:

> "The record shows that Sioux City the notice abolishing the positions effective May 27, 1946, was posted on Saturday, May 25, 1946. The strike terminated during the afternoon of May 25, 1946, thus removing the cause which justified the abolishment of the positions. The Carrier had ample time to cancel the notice

before it became effective and we think it was obligated to do so. . . ."

In our opinion there is no room for differentiation between the issue in the Sioux City phase of the award just quoted and the one involved in the instant case. A careful analysis of both cases will reveal that the basic facts upon which each depend for decision are substantially the same.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Carrier violated the Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 10th day of September, 1948.