

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Frank Elkouri, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

BOSTON AND MAINE RAILROAD

STATEMENT OF CLAIM: *Claim of the General Committee of The Order of Railroad Telegraphers on the Boston & Maine Railroad,*

(1) That the Carrier violated Articles IX and IV of the Telegraphers Agreement, and Notice and Order No. 1 and Notice of Instructions of Federal Manager C. H. Buford of Government Controlled Railroads of May 17, 1946, when, effective May 24, 1946, the Carrier declared abolished the positions of the claimants named in the following Employees' Statement of Facts and on the days specified therein, because of the strike of the engineers and trainmen commencing on May 24, 1946, and has refused to pay these claimant employes their wages for the day or days on which they were improperly suspended from work during their regular hours; and

(2) That each of the claimants named in the Employees' Statement of Facts who were thus improperly deprived of their usual employment by the Carrier on the day or days specified by being improperly suspended during their regular hours and who were ready for service and not used, shall be reimbursed for the wage loss on the day or days specified as a result of this improper act of the Carrier.

EMPLOYEES' STATEMENT OF FACTS: An agreement bearing date August 9, 1944, as to the rates of pay and rules of working conditions is in effect between the parties to this dispute.

Due to a threatened strike of the engineers and trainmen on the Boston & Maine Railroad the United States Government took possession, control and operation of the Boston & Maine Railroad effective 4:00 P.M., May 17, 1946, by means of the following quoted Notice and Order No. 1:—

"NOTICE AND ORDER NO. 1

To each carrier by railroad named in the Executive Order of the President of the United States, dated May 17, 1946, concerning possession, control, and operation of certain railroads:

1. By order of the director of the Office of Defense Transportation, dated May 17, 1946, the authority vested in said director by Executive Order of the President of the United States, dated May 17, 1946, whereby possession and control of your transportation system, plants, and facilities are taken and assumed by the United States as of 4:00 o'clock P.M., May 17, 1946, has been duly delegated by said director to the undersigned as Federal Manager of Government Controlled Railroads.

7—An affirmative Award is not warranted by rule, precedent, justice or equity.

8—The claims should be denied.

(Exhibit not reproduced.)

OPINION OF BOARD: The contract provisions which cover this claim are:

ARTICLE IX Suspension of Work

"Employees will not be required to suspend work during regular hours or to absorb overtime."

ARTICLE IV Guarantee Rule

"Regularly assigned employees will receive one day's pay within each twenty-four (24) hours for six (6) days each calendar week, according to location occupied or to which entitled if ready for service and not used or if required on duty less than the required minimum hours constituting a day's work as provided for in Article III.

"This rule shall not apply in cases of reduction of force, nor where traffic is interrupted or suspended by conditions not within the control of the Railroad, or on the following Holidays, viz., * * * "

ARTICLE XII Vacancies

"(a) Employees will be advised within five (5) days of all permanent vacancies or new positions covered by this agreement by notice sent to each office, stating hours of service, days per week and salary. * * * "

Claimants say that the Carrier instructed them that their positions were abolished at the end of their tours of duty on May 24, 1946, and that when the strike was terminated at the end of the following day they were instructed to resume their identical positions after having been suspended during their regular hours on the day or days shown in the list of Claimants.

Several recent Awards have been concerned with questions similar to the one involved here. These Awards have held that if the positions were abolished in fact the claim should be denied, but that if they were not abolished in fact the claim should be sustained (see Awards 3680, 3701, 3702, 3715, and 4170 of the Third Division). In Award 3680 this Board said:

"* * * The Carrier used language in the two telegrams the effect of which was to cancel and abolish the positions. However, the question remains, did the Carrier actually or in fact cancel or abolish the positions? If, as evidenced by its subsequent conduct, it is apparent that the Carrier did not actually consider the positions abolished, then the positions were, in fact, in existence and the employees regularly assigned thereto would be entitled to pay under Rule 29 paragraph nine of the effective agreement."

"We therefore come to the conclusion that the Carrier, by its actions and conduct, never actually considered it had abolished these positions and we find in fact it had never done so. The incumbent employees were simply suspended and held in readiness, subject to call, to return to their positions. During this period they were regularly assigned employees to the positions and, under Rule 29, paragraph nine of the effective agreement, entitled to be paid."

The Board in the present case finds that the positions in question were not abolished. The bonded agents at stations were not transferred out by audit, but remained in charge of the stations and maintained full custody of the records of the stations during the period in question; they were not relieved of their responsibility on the positions they had covered. Also, if the positions had been abolished they could only have been brought back into existence as new positions; Article XII of the Agreement provides for the

bulletining of such, and this is essential to the establishment of new positions. None of these positions were bulletined. The fact that the Carrier did not give Claimants a chance to exercise their seniority also supports the conclusion that the positions were not abolished.

If the positions were not abolished they must have been suspended. Article IX of the Agreement provides that "Employees will not be required to suspend work during regular hours or to absorb overtime".

But the Carrier contends that the exception to the Guarantee Rule (second paragraph of Article IV, quoted above) exonerates it here. In Award 3701 an exception to the Guarantee Rule involved in that case provided that "*if commercial or other conditions change materially the company reserves the right to abolish an office or reduce the force without notice, to conform to such modified conditions*". There this Board, in regard to that provision, said: "However, the abolition of jobs must be bona fide under any circumstances to meet the requirements of the Agreement". Concerning the part of the exception, in the present case, which states, "nor where traffic is interrupted or suspended by conditions not within the control of the Railroad," the Board believes that the condition in question here was not sufficiently beyond the control of the Carrier to entitle it to come within the scope of the words "*conditions not within the control of the Railroad*". Without being more specific, such conditions are normally thought of as being Acts of God, Acts of Providence or Acts of Nature.

The Carrier has indicated that the Employees' Statement of Facts included in the list of Claimants some employes who were not supposed to work on the days involved; of course such employes do not have a claim and nothing is due them from the Carrier.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That both parties to this dispute waived oral hearing thereon;

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 as indicated in the Opinion.

AWARD

Claims sustained, to the event of requiring the Carrier to reimburse those Claimants who would have worked on the days when they were improperly suspended, for the wages lost.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 17th day of February, 1949.