

Award No. 4787
Docket No. TE-4522

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Francis J. Robertson, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS
THE KANSAS CITY SOUTHERN RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on The Kansas City Southern Railway Company,

(1) That the Carrier violated Section 7-1, 7-4 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, on May 25, 1946, the Carrier declared abolished the positions of the claimants named in the following Employees' Statement of Facts on the days specified therein, because of the engineers' and trainmen's strike commencing May 24, 1946, and has refused to pay these claimant employees their wages for the 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 days involved by being improperly suspended during their regular hours and who were ready for service and not used, shall be reimbursed for the wage loss suffered on the days involved as a result of this improper act of the Carrier.

EMPLOYEES' STATEMENT OF FACTS: An Agreement bearing date May 1, 1942, as to 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 trainment the United States Government took possession of The Kansas City Southern Railway Company effective 4:00 o'clock P.M. on May 17, 1946, by means of the following 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.

COMMENT:

Our records show strike commenced 4:00 P.M., May 23, 1946. Federal controls was terminated 4:00 P.M., May 26, 1946.

These positions were abolished effective May 25th on notices issued May 23rd and 24th, after the strike became effective. The positions were reinstated by similar notices as soon after 4:00 P.M., May 26th, as it was definitely ascertained that the strike was terminated.

The complainant organization will, no doubt, urge that it was generally known that the strike would be of short duration and that, for that reason, we could not properly abolish these positions. This is merely speculation. "Hindsight" is much clearer than "foresight", but the fact remains that the duration of the strike could not be predetermined. If that had been possible it would not have been necessary for the Government of the United States to take such extensive measures as it did to operate the roads, and to issue instructions from Washington, over signature of Federal Manager Buford, May 24th, that if the striking employees did not return to work by 4:00 P.M., May 25th, intensive recruiting campaign for needed employees should immediately be instituted, as follows:

"If the striking employees have not returned to work by 4:00 P.M., May 25th you will immediately institute an intensive recruiting campaign for needed employees using your own hiring facilities or by advertising or radio and should call on the U. S. Employment Service and Railroad Retirement Board for assistance in meeting your needs and have your designated representative call on the commanding general of the appropriate service command for any assistance needed in removing pickets from railroad property and furnishing necessary protection to workers getting to the job."

Nor, would it have been necessary for the Railroad Retirement Board, through its Regional Director, to send the following telegram:

"URGENT. Please notify all unemployment insurance Claims Agents and Countersigning Agents immediately as follows regarding claims registration problems arising from strike situation. Quote—No registration should be made prior to the second week from the date the strike begins by anyone affected by strike. Delayed registrations will be accepted during the second week without prejudice to whatever benefits claimants may be entitled under the law. Such delayed registrations may also be made by individuals now registering with railroad claims agents at registration facilities affected by the strike. There will be no break in registration period as a result of transfers caused by changes in registration facilities resulting from the strike—Unquote."

If it had been generally known that the strike would be of only short duration, we feel sure it would not have been necessary for the President of the United States to request Congress to grant him the authority to take whatever action might be required to bring the strike to an end.

This strike was not the fault of this Carrier but our service was brought to a standstill; no traffic was moving, it was not necessary to have telegraph service at these any many other points. These seven men were thrown out of work for a day or two, but so were many thousands of others, for which this Carrier's was not responsible.

We cite Awards 3838, 3841, 3889 and 4001 of this Division in support of our position. We have checked awards cited by complainant General Chairman, but do not consider that any of them are applicable to this claim.

(Exhibits not reproduced).

OPINION OF BOARD: On May 23, 1946, Carrier caused a telegram to be sent to the claimants, advising that effective 8:00 A.M., May 25, 1946, their

positions would be abolished. This action of the Carrier was taken because of the stoppage of service by reason of the Engineers' and Trainmen's strike commencing May 24, 1946. The positions were reinstated on May 27, 1946, with the cessation of the strike. On May 27, 1946, Carrier Superintendent wired General Chairman asking whether it should allow men who were assigned to the jobs being restored to return, or if he wanted them all re-advertised. To this wire the General Chairman replied on June 3, 1946, that he had been off the property for the past two weeks and just got the wire of the 27th, and if not already done, return all men to their regular positions and without any advertisements.

The Board has had occasion to consider many claims for employees being held out of service by reason of the strike of the Engineers and Trainmen, commencing May 24, 1946. In some instances in those prior Awards, claims were sustained and in others denied. General speaking, the issue upon which those cases turned was whether or not there was a bona fide abolishment of the position. On the record in this docket, it is clear, in the first instance, that there was no equivocation in the Carrier's telegram advising of the abolition of the positions. Clearly, that is a positive indication of its intent at that time to completely terminate the same. Did the subsequent conduct of the Carrier indicate any temporizing with respect to the initial action? We think not. It recognized its responsibility under the Agreement to bulletin the positions and stood ready to do so. The General Chairman, however, very discreetly indicated that he did not wish the Carrier to take such action. In effect, the Carrier did not comply with the bulletining provision in deference to its own and the General Chairman's view that so many employees should not be discommoded because of its prior action. The right of the General Chairman to waive compliance with the Agreement cannot be doubted. Under the circumstances, it would be defiant of logic and justice to hold that because the positions were not bulletined after the notice of abolishment that there was not a bona fide abolishment of the positions in the first instance. The fact that no displacements were made after these positions were abolished is of no moment because the onus in exercising displacement rights is on the employee. There is no evidence that any employee gave notice to displace and was denied an opportunity to do so.

It follows that a denial Award is in order.

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

That the parties waived oral hearing thereon;

That the Carrier and the Employees involved in this dispute are respectively carrier and employees 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 Carrier did not violate the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 28th day of March, 1950.