Award No. 9851
Docket No. TD-9786

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Frank Elkouri, Referee

PARTIES TO DISPUTE:

AMERICAN TRAIN DISPATCHERS ASSOCIATION

SPOKANE, PORTLAND AND SEATTLE RAILWAY COMPANY
OREGON ELECTRIC RAILWAY COMPANY
OREGON TRUNK RAILWAY

STATEMENT OF CLAIM: Claim of the American Train Dispatchers Association that:

a. The Spokane, Portland and Seattle Railway Company, Oregon Electric Railway Company, Oregon Trunk Railway, hereinafter referred to as "the Carriers" violated the currently effective Agreement between the parties to this dispute, particularly Article 4 Section (e) when, on Sunday, December 2, 1956, the Carriers abolished all regularly assigned train dispatcher positions, effective 8:00 A. M., December 2, 1956, without first giving the Ninety-six (96) hours advance notice required by Article 4 Section (e) of the Agreement.

b. The Carriers shall now be required to compensate regularly assigned Train Dispatchers C. E. Smith, W. A. Isom, B. D. Allumbaugh, J. E. Schlaf, M. J. Gowin, E. Huguenin, A. S. Hidy, E. S. Weyand, D. Kersey, G. C. Morgan, R. G. Kenney, H. Jackson, W. J. Farris, M. L. Buntin and L. F. Vail, total fifteen (15), in the amounts hereinafter set forth which each of them would have earned if the requirements of said Article 4 Section (e) had been complied with.

EMPLOYES' STATEMENT OF FACTS: There exists an Agreement between the parties to this dispute effective October 1, 1952, on file with your Honorable Board and by this reference is made a part of this submission as though it were fully set out herein.

Article 1, Sections (a), (b), (c), (d), and (e), Article 3, Sections (a), (d) and (f), Article 4, Sections (a), (e), and (f), and Article 8, Sections (b), (c), (d), (e), (f) and (g), which are particularly pertinent to the instant claims are quoted here for ready reference.

"ARTICLE 1 — SCOPE

(a) This agreement shall govern the hours of service and working conditions of train dispatchers.

The term 'train dispatcher' as herein used shall include all train dispatchers except one chief train dispatcher in each dispatching office.

Respondent recognizes that there may very well be times when one group of employes may feel their interests will best be served by supporting the cause of another group of employes in opposition to their common employer. However, the employes in the supporting group must face the cold fact that they have a working agreement with the employer and if their support involves a refusal to cross a peaceful picket line and perform the services covered by their working agreement it must follow that they cannot, after having thus repudiated their obligation under the working agreement, retain any of the benefits thereunder.

In progressing the instant claim on the property, employes cited 3rd Division award 6118 in support thereof. The facts involved in that award are easily distinguishable from the facts in the instant case. There it appeared that the carrier abolished certain dispatcher positions (113 out of 138) as soon as a B.L.E. strike was called. There was no showing that Dispatchers had refused or intended to refuse to cross the picket line of the striking B.L.E. In our case, curtailed train service was operated during the B.L.E. strike necessitating the services of Dispatchers; and it was only after the carrier was reasonably satisfied that the dispatchers were refusing to cross the B.L.E. picket line that the telephonic request from the A.T.D.A. General Chairman that all dispatchers assignments be abolished immediately was complied with.

In conclusion respondent submits that the working agreement on which this claim is based was repudiated by the Dispatchers' refusal to cross the peaceful B.L.E. picket line and perform the services covered by the agreement; that, therefore the claim, based on a subsequent alleged violation of the same working agreement by respondent, must fail.

All data in support of the Carrier's position has been submitted to the Organization and made a part of the particular question here in dispute. The right to answer any data not previously submitted to the Carrier by the Organization is reserved by the Carrier.

OPINION OF BOARD: The Record herein is in utterly hopeless conflict and confusion as to matters which are of critical significance to the determination of the dispute on the merits. For instance, the Carrier has offered evidence to establish that Claimants informed the Carrier that they would refuse and that they did refuse to cross the picket line of the Brotherhood of Locomotive Engineers; the Claimants have denied that they informed the Carrier that they would refuse to cross the picket line and they have offered evidence to establish that they did not refuse to cross the picket line. The Carrier has offered evidence to establish that Claimants' positions were not abolished until about 2:00 P. M. (but retroactive to 8:00 A. M.) on December 2, 1956, and that the Carrier abolished the positions then only by virtue of a request from General Chairman Weber that all dispatcher positions be abolished to avoid embarrassment to the dispatchers as well as to the management; the Claimants have offered evidence to establish that they were orally notified before 8:00 A. M. on December 2 that their positions were abolished, and they have denied that the abolishment was effected upon the request or agreement of the General Chairman.

The conference which the Parties conducted on February 28, 1957 for the purpose of clarifying the facts leading to the filing of the claim actually left the picture even more confused and the facts even more in conflict than before. Adding to the confusion, neither of the Parties (particularly the Organization) has been by any means entirely consistent within its own evidence of Record in this case.

The Board has no means of resolving such extreme conflicts and inconsistencies as exist in the present Record, and the Board accordingly cannot reasonably be expected to rule upon the merits of the dispute. The claim must be dismissed.

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 for reasons stated in Opinion the claim must be dismissed.

AWARD

Claim dismissed in accordance with Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois this 27th day of February 1961.

LABOR MEMBERS DISSENT TO AWARD 9851 — DOCKET TD 9786

The majority, consisting of the Carrier members and the Referee, apparently lost sight of the basic issue in dispute, which dispute turns squarely on the following Rule.

Article 4 Section (e)

ABOLISHMENT OF REGULAR POSITIONS

> "Ninety-six (96) hours notice shall be given the General Chairman and the Office Chairman of intended abolishment of a regularly assigned position."

The above Rule requires ninety-six (96) hours notice and there are no exceptions thereto. In Second Division Award 1738, Referee Wenke properly ruled under similar circumstances that * * *

> "There are no qualifications of, nor exceptions to, the four days' notice requirement contained in Rule 27(b), nor do we think any exceptions or qualifications thereto are inherent in the rule without their being either contained therein or in some other provision of the parties' agreement which relates thereto. See Awards 372 and 1701 of this Division and 6188 of the Third Division. In this respect we have exam-

ined the numerous decisions and awards cited by the parties and with the possible exception of one early decision, we find they all hold that strikes, or results thereof, do not relieve carrier from fulfilling such requirement."

Also see Second Division Award 1739, and Third Division Awards 4001, 6188, 6354 which have sustained the Employes' claims under similar circumstances. Third Division Awards 4854, 5016, 5070 are also in point.

In Fourth Division Award 1276, Referee Sembower summed up the controlling principles that should have been followed here. Referee Sembower stated:

"The Carrier on the afternoon of December 2, 1956, abolished the positions of Yardmasters at Portland, Vancouver, and Wishram. Rule 8 of the applicable Agreement provides in its entirety: 'When a regular assignment is to be abolished, the yardmaster filling the assignment will be given not less than 24 hours' notice.'

Claimants demand payment for their assignments on December 2 and 3, 1956, on the ground that the requisite 24 hours' notice of the abolishment of the jobs had not been given.

The Carrier maintains that since a picket line of another organization had been established around the property and the Carrier's officials had been 'given to understand informally * * * it would be honored by the yardmasters', and since the line had in fact not been crossed by the yardmasters, including their general chairman, at the start of the shifts immediately before midnight on December 1st and the morning shifts of December 2, the yardmasters cannot be deemed to have been 'filling the assignment', within the parlance of the said Rule 8; and, therefore, the requirement of 24 hours' notice was not applicable.

The provision for 24 hours' notice is clear and explicit. There are no equivocations. It seems unwarranted to assume that an employe who is absent for whatever reason but without having quit is not 'filling the assignment' within the terminology of this clause, which relates by its context to the holder of the job and not a jobholder who reports to work. Whether an employe is absent justifiably or not is another matter entirely.

When strike talk is in the air, rumors often are rife. Certainly it is never safe for either employes or the Carrier to content themselves with 'informal understandings.' Whether an employe is going to report for work or not may be in the realm of pure conjecture or speculation. For that matter, strikes by their very nature often end suddenly. For parties at such time to try to divine what the other will do or to rely upon second guessing only adds to trouble and confusion."

* * * * *

"When it became apparent to the respondent that the yardmasters as a group were refusing to cross the peaceful BLE picket lines and fulfill their assignments, all yardmasters assignments at Portland and Vancouver were abolished during the afternoon of December 2nd."

* * * * *

"However, with respect to the Claimants who on Sunday morning received the improper notice that their jobs were abolished that day, they had a right to rely upon the information that no work would be available to them and their rights were crystallized as of then if the notice was improper, as in this case it was because it did not provide the requisite 24 hours. It is purely subjective and conjectural whether they intended to go to work at all, and therefore, this cannot be material.

If, as in the case of Claimant Strohmeier, the day of the improper abolishment of his job occurs on his rest day, he also would not have been deprived of any work by the wrongful abolishment per se, and since it would have cost him nothing he naturally has no claim.

The time when the abortive notice was given to the Claimants is important because it establishes whether such notice had the effect of relieving the Claimant of having to report for work and be deprived of an opportunity to work on account of the improper abolishment in order to fix his claim for being deprived thereby of an opportunity to work.

Thus, at Portland Claimant D. R. Foran was scheduled to start at 8 A. M. on December 2nd, and apparently had already failed to go to work when the improper notice of abolishment reached him, which abolishment was not to take effect until 2 P. M. that day anyway and would not have affected him. Therefore, he has no claim.

The other Claimants at Portland asking compensation for December 2nd, however, appear to have received improper notices giving them less than 24 hours, and, therefore, were relieved of the necessity of reporting, so that their claims for a lost day's work on December 2 must be allowed."

Conflicting statements of the parties referred to by the Referee does not change the clear and unambiguous language of a Rule as the majority here erroneously held.

From the above well established principles it is clear that Award 9851 is erroneous. For that reason I dissent.

H. C. KOHLER,
Labor Member - Third Division
National Railroad Adjustment Board