Award No. 11214
Docket No. MW-10038

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

David Dolnick, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

DULUTH, MISSABE AND IRON RANGE RAILWAY COMPANY

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

(1) The Carrier violated the Agreement when it laid off certain of its Maintenance of Way employes effective as of July 2, 1956 without giving such employes "notice three (3) working days in advance of reduction in force."

(2) Each employe who was laid off as set forth in Part (1) of this claim be reimbursed for the earnings each would have received had he been allowed to continue working in his respective position for three (3) working days after being notified of the impending force reduction.

(3) Each employe who was laid off in the above-mentioned force reduction and who ultimately displaced junior employe, be reimbursed for any earnings lost during the first three (3) working days after being notified of the impending force reduction.

(4) Each employe who was displaced by a senior employe within the three-day period immediately following receipt of notice of force reduction be reimbursed for the earnings lost during and within that three (3) working day period.

(5) A joint check be made of the Carrier's records to determine the proper claimants and the amount due each of them.

EMPLOYES' STATEMENT OF FACTS: Because a strike by employes of the United States Steel Company was scheduled to take place on June 30, 1956, the Carrier decided to drastically reduce its Maintenance of Way forces. Accordingly, it notified a considerable number of its Maintenance of Way employes that "In the event of a steel strike taking place on June 30, 1956, you are hereby notified . . . that the following employes will be laid off effective July 2, 1956. Last shift to be worked July 1, 1956. . . ." Another notice read:

Proctor, Minnesota
June 28, 1956

"Dalbert Johnson
Helper-Proctor

Dear Sir:

In the event of a steel strike taking place on June 30, 1956 you

However, the effect of the strike was immediate, and created a major emergency situation, which, when coupled with the steamship strike, which began when the steel strike ended, halted the Carrier's operations almost completely for a period of more than sixty days (July 1st to September 7th), and caused a substantial part of the work that is normally performed by employes of the Carrier during the ore shipping season to cease to exist for that period of time.

It is evident from the nature of this claim, and the handling of it on the property, that the claim here is grounded entirely on the extravagant contention that all the work normally performed by the Carrier's maintenance of way forces during the ore shipping season continued to exist in spite of the fact that the steel strike immediately halted the Carrier's operations almost completely.

Such an assertion is obviously false. There is only one reason why the maintenance of way force is twice as large during the ore shipping season as it is in the winter season, and that is because there is heavy traffic over the Carrier's tracks during the ore shipping season and the larger force is needed to maintain them under such conditions. It is an obvious fact, therefore, that where, as here, work for double the maintenance of way force that is employed during the winter months is created and exists solely because there is a period of heavy traffic at that time, that a substantial part of that work, at least one-half, ceased to exist when there was no such traffic during the ore shipping season and operations were reduced to an even lower level than they were in the winter season.

III. **Conclusion.**

In summary the Carrier submits that it has shown (1) that the claim of the Employes in this docket is improper and (2) that it has complied fully with the letter and spirit of the applicable rules and agreements, and that not more than sixteen hours advance notice of the force reduction was required under the circumstances here involved.

For these reasons the Carrier respectfully requests that the claim of the Employes in this docket be denied in its entirety.

It is hereby affirmed that all data submitted by the Carrier in support of its position in this case has been discussed with the Employes or their representatives, or is known or available to them.

(Exhibits not reproduced.)

OPINION OF BOARD: On June 28 and 29, 1956, the Carrier notified Claimants that in the event a steel strike took place on June 30, 1956, that they would be laid off effective July 2, 1956. The last shift to be worked by some employes was on June 29 and by others on July 1, 1956. June 30 was a Saturday, July 1 was a Sunday and July 4 was a holiday. They were not work days for the Claimants.

Carrier contends that the claim should not be considered because it is "indefinite and vague and otherwise improper under Article V of the August 21, 1954 National Agreement which was effective January 1, 1955." Employes reply that this issue was not raised on the property and it cannot, therefore, be raised here. The record is clear that the Carrier denied the claim on the merits. At no time did the Carrier raise an alleged procedural defect on the property.

While there are conflicting Awards on this issue, we believe that where a procedural question alone is involved, that it is considered waived unless raised on the property. Furthermore, we believe that the identity of the Claimants is readily ascertainable. The records are in the possession of the Carrier. It is not too much to ask that they be checked. It is not the purpose of the Railway Labor Act or the August 21, 1954 Agreement to dismiss disputes on mere technicalities. It is rather, the intent to resolve them on the merits unless it is clear that the essential procedural provisions have been completely ignored or that the Carrier is unable to ascertain the identity of the Claimants. The dispute is properly before the Board and it should be resolved on the merits.

The sole question is whether the employes were given sufficient notice in advance of the lay off. Employes contend they were not given three (3) working days advance notice as required in Rule 5 of the Agreement, and the Carrier contends that they were given adequate notice under Article VI of the August 21, 1954 National Agreement.

Rule 5 (b) reads:

> "Employes will be given three (3) working days in advance of reduction in force."

Article VI of the August 21, 1954 National Agreement reads:

> "Rules, agreements or practices, however established, that require more than sixteen hours advance notice before abolishing positions or making force reductions are hereby modified so as not to require more than sixteen hours such advance notice under emergency conditions such as flood, snow storm, hurricane, earthquake, fire or strike, provided the Carrier's operations are suspended in whole or in part and provided further that because of such emergency the work which would be performed by the incumbents of the positions to be abolished or the work which would be performed by the employes involved in the force reductions no longer exists or cannot be performed."

Second Division Award 2195 (Wenke) interprets Article VI. The Referee was a member of the Emergency Board that recommended that Article. The Award held that two requirements must exist before an emergency may be properly exercised. These are:

> "First, the emergency conditions must cause the carrier's operations to become suspended in whole or in part . . .
>
> Second, that because of such emergency conditions the work which would ordinarily be performed by the incumbents of the positions to be abolished, or by the employes involved in the force reductions no longer exists or cannot be performed. If the work that would normally be performed by the employes being laid off continues to exist and is such that it can be performed by them, regardless of the strike, then the mere fact that service revenue would be cut off by the strike would not authorize the carrier to abolish the positions and reduce its forces in accordance with the provisions of Article VI."

Did the steel strike create an emergency which caused "the carrier's operations to become suspended in whole or in part?" The record shows that the steel strike began on July 1, 1956 (R 14). Carrier says that:

"From the normal number of about 180 train and engine crews employed per day during the ore shipping season the number employed after the strike fell to 59 on July 1; 53 on July 2; 30 on July 3; 7 on July 4; 27 on July 5; 31 on July 6; and 23 on July 7." (R 14)

It is not enough to say that the Carrier normally employs about 180 train and engine crews during the ore shipping season. What number of trains were operated immediately preceding July 1st? The records does not show.

A mere reduction of the work force did not alone establish an emergency which required the Carrier to suspend its operations in whole or in part. There must be a showing that the operations—the movement of trains—was suspended in whole or in part. There is no such showing in the record and no such evidence was submitted on the property.

It is not sufficient to say that the volume of business was "only a small fraction of what it was before the strike." Maintenance of way employes may very often be furloughed even while all train and engine employes are working. It may be implied that there probably was iron ore ready for shipment which was mined prior to the strike date. This is supported by Carrier's showing of train crews used on July 1, 2, 3, 5 and 6. While there was a steady reduction in that period, there was no drastic reduction which established an emergency in that period of time. It should be noted, in that regard, that the number of train crews actually increased on July 6 over July 5 and this was six days after the strike began.

Furthermore, maintenance of way work continued to exist. There is no evidence in the record that such work no longer existed or could not be performed at least up to and including July 6. The mere fact that the amount of such work declined in that period is not sufficient to justify an emergency under Article VI.

Carrier had every right to furlough Claimants because of the strike or for any other reason. But that right is governed by the provisions of Rule 5 and not by Article VI of the August 21, 1954 National Agreement. Carrier did not comply with the provisions of Rule 5.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole 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 is sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 15th day of March, 1963.