Award Number 17372
Docket Number MW-18059

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Louis Yagoda, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

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

(1) The Carrier violated the Agreement when it abolished positions of extra gang laborers in Extra Gang #6047 with insufficient advance notice. (System file D-8-16/MW-2-68).

(2) Extra Gang Laborers J. A. Cesneros, H. W. Garcia, Frank Cordova, R. Roybal, Tito E. Trujillo, Julian B. Lopez, S. Roybal, Efrein D. Castenulla and all other extra gang laborers that were laid off at this time each be allowed thirty-two (32) hours' pay at their straight time rate because of the violation referred to within Part (1) of this claim."

EMPLOYES' STATEMENT OF FACTS: On November 9, 1967, the claimants, all of whom were regularly assigned to Extra Gang 6047, received notice that, effective at the close of the work period on November 15, 1967, said gang would be abolished. Their foreman, Mr. Ochoa, was subsequently advised that the gang would not be abolished but would be used to perform track work at Sommerset.

On December 5, 1967, Roadmaster Mike Davis advised Foreman Ochoa that the gang would be abolished at the close of the work period that same day. Upon being reminded that the claimants were entitled to five (5) working days' advance notice, Roadmaster Davis then advised the claimants that their five days' notice would begin on the following day. However, he subsequently changed his mind and the gang was abolished at the close of the work period on December 6, 1967.

It is our position that the Carrier's action was in violation of Article III of the June 5, 1962 National Agreement which reads:

> "Effective July 16, 1962, existing rules providing that advance notice of less than five (5) working days be given before the abolishment of a position or reduction in force are hereby revised so as to require not less than five (5) working days' advance notice. With respect to employees working on regularly established positions where existing rules do not require advance notice before such position is abolished, **not less than five (5) working days' advance notice shall be given before such positions are abolished.** The provisions of

'1. That the carrier violated our agreement of June 5, 1962 when it failed to give the extra gang laborers on extra gang #6047 the proper five days notice before abolishing their gang and laying off all the men.

'2. That the following below named employees and any and all other extra gang laborers that were working and laid off at this time be allowed eight hours a day for four days, a total of 32 hours for each man at pro-rata rate of pay.

J. A. Cesneros	Tito E. Trujillo
H. W. Garcia	Julian B. Lopez
Frank Cordova	S. Roybal
R. Roybal	Efrein D. Castenulla

'3. That this claim is account the company notified this gang on November 9, 1967 that they would be laid off on November 15, 1967, then on November 15, 1967 the foreman was told not to lay off the gang and further that they did not know when the gang was to be laid off, then on December 5, 1967 the foreman was told to lay the engire gang off the next day December 6, 1967, which was done.'

"Article III of the National Agreement signed June 5, 1962, only requires 'not less than five (5) working days advance notice' of the abolishment of a position under the contract. Your position that a specific date be given is not supported by Article III. The notice given by the Carrier on November 9, 1967, to Extra Gang No. 6047 was in keeping with the provisions of Article III.

"It is also Carrier's position that your claim does not conform to the provisions of Article V of the August 21, 1954, Agreement.

"Your claim and position are denied.

Yours truly,

/s/ J. W. LOVETT

J. W. Lovett
Director of Personnel"

(Exhibits not reproduced)

OPINION OF BOARD: The claim alleges violation of Article III of the June 5, 1962 National Agreement which reads:

"Effective July 16, 1962, existing rules providing that advance notice of less than five (5) working days be given before the abolishment of a position or reduction in force are hereby revised so as to require not less than five (5) working days' advance notice. With respect to employees working on regularly established positions where existing rules do not require advance notice before such position is abolished, not less than five (5) working days' advance notice shall be given before such positions are abolished. The provisions of Article VI of the August 21, 1954 Agreement shall constitute an exception to the foregoing requirements of this Article."

The parties are in agreement concerning the basic circumstances which gave rise to this claim.

It is undisputed that during the time involved, Claimants were employed on Extra Gang No. 6047, in replacement of rail on Carrier's North Fork Branch.

Carrier notified the members of this gang on November 9, 1967 that they would be laid off on November 15, 1967 and that this constituted required notice under Article III. After said notice was given, but prior to November 15th, the date on which it was to be effective, Carrier informed gang members that they would not be laid off on November 15th, but would be used to perform track work at Somerset, Colorado, also located on North Fork Branch.

On December 5, 1967, 26 days after the first notice had been given and approximately 22 days after it had been withdrawn, the employes were informed that they would be laid off that evening.

Claimants contend that Carrier failed to provide the five days notice called for in Article III, in abolishing this gang and must now reimburse those who were laid off to the extent of notice allegedly denied.

In correspondence with Claimants and their Organization on property, Carrier stated:

> "It is also Carrier's position that your claim does not conform to the provision of Article V of the August 21, 1954 Agreement".

No specific grounds were stated for this contention.

However, in its submission to this Board, Carrier raised two questions of procedural interpretation. One of these is that the claim should be dismissed on the grounds that subject Claimants are not employes working on regularly established positions within the meaning of Article III. It is also contended that the claim does not expressly and specifically identify those for whom claim is made and remedy sought.

In regard to the merits of the substantive claim, Carrier contends that the notice originally issued on November 9, 1967, satisfied the requirements of Article III, in respect to the layoff which eventually took place on December 6, 1967. That is, the employes involved were given more than the 5 day minimum advance notice required by the rule.

We dismiss the procedural considerations raised by Carrier on the grounds that they were not specifically expressed to Claimants or their Organization in the exchanges between the parties on the property. The blanket sentence used by the Carrier in grievance correspondence that "Your claim does not conform to the provisions of Article V of the August 21, 1954 Agreement", cannot be accepted to justify either a later search for implementation or as a convenient catch-all to justify either a later search for implementation or revealed to this Board. The disputes resolution procedures in the Act and in the Agreement between the parties is meant to be an opportunity for the parties to confront together all the facts and arguments which the respective sides can bring to bear. As part of that procedure, each side should have the benefit of all that its adversary intends to show and to say on the subject so that there may be full and informed response and indeed, full and informed search for settlement.

This Board can deal only with that dispute which the parties confronted together on the property, not with a modified one to which there have been added some new aspects for the special ocasion of our perusal.

Turning now to the merits of the claim, we believe that this situation conforms generally to the type of circumstances dealt with in Award 14598. In Award 14598, there was somewhat more guidance given to the employes as to the probabilities of layoff ("as soon as the gang reaches Mile Post G-90") than was present here. In the situation before us, Carrier contends that gang was told "that they would be retained in service until this new trackage was constructed" and argues therefrom that the visible nearing of the completion of said trackage should have served as notice in itself.

We believe that in this case as in that dealt with in Award 14598, a notice which is "uncertain as to time or date and solely contingent upon the unequivocal requirements of the controlling Agreement".

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;

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 Agreement was violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 1st day of August 1969.

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