

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 24449
Docket Number CL-24214

Martin F. Scheinman, Referee

PARTIES TO DISPUTE: { **Brotherhood of Railway, Airline and Steamship Clerks,
Freight Handlers, Express and Station Employees
Chicago, Milwaukee, St. Paul and Pacific Railroad Company**

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (CL-9466) that:

- 1) Carrier violated the Clerks' Rules Agreement in Seniority District No. 3 when it arbitrarily reduced forces by abolishing fifty-nine (59) positions effective 11:59 p.m., October 31, 1979 without giving the employees affected thereby "not less than five (5) working days advance notice" nor did it issue a standard abolishment notice as required.
- 2) Carrier shall now be required to compensate all employees affected an additional eight (8) hours pay at the rate of their assigned positions which were abolished, or at their protective rates, whichever is greater, for November 1, 1979 and for each workday until they were returned to service:

Note : Claimants and positions held are as follows:

Jefferson	D. D. Shy	Pos. 31500, Agent
Manilla	W. M. Baker	" 28600, Agent
		" 33500, Yard Clerk
Mapleton	L. LaBrune	" 33050, Agent
Marion	J. E. Beeson	" 26300, Clerk
	D. Stinson	" 27020, Yard Clerk
	J. N. Sieck	" 27030, Yard Clerk
	K. Machacek	" 27070, Yard Clerk
	w. Soper	" 2 Relief Clerk
Perry	A. M. Harrison	" 26020, Genl. Clerk
	R. M. Tolle	" 27950, Agent
	M. J. Garrett	" 34000, Roadmaster Clerk
	B. R. Wyett	" 33300, Yard Clerk
	D. L. Booth	" 33310, Yard Clerk
	J. Murphy	" 33320, Yard Clerk
	L. D. Anderson	Relief Clerk
	L. L. Fister	" 72140 Relay Opr.
	R. Jackovich	" Protected Employee
	3. Shafer	" "

Portsmouth	C. Klein	" 28750, Agent
Redfield	A. D. Woodford	" 32700, Agent
Rockwell City	R. DeWald	" 31650, Agent
Tama	H. Reinier	" 27600, Agent
Mendota		" 42059, Agt. -Opr.
Albert City	R. L. Bentley	" 31750, Agent
Amana	A. Lockridge	" 30800, Agent
Cedar Rapids	R. Jeurhing	88360, Rev.Clk-Gr.A
	M. Symond	88410, Bill k Exp. Clk
	G. Teachout	88460, Keypunch Opr-Clk
	J. Dougherty	88470, " "
	J. Harlon	88510, Cashier
	R. Hotz	88520, Asst. Cashier
	J. Kelsey	88840, Rev.Clk-Gr. A
	D. M. Huff	88900, Keypunch Opr-Clk
	L. Dougherty	88910, Rev.Clk-Gr.B
	J. Claypool	88920, Rev.Clk-Gr.B
	D. Peyton	88930, Rev.Clk-Gr.B
	J. V. Green	88940, Sill & Exp Clk
	C. M. Huff	88950, Rev.Clk-Gr.A
	A. J. Wood	88960, Rev.Clk-Gr.A
		16926, Agent
		03350, Rt. Serv. Insp.
	E. L. McMickle	33800, Chief Yd Clk
	J. Kennedy	33810, Yard Clerk
	E. Papesh	33820, Yard Clerk
	K. Slater	33830, Yard Clerk
	A. Atkinson	33860, Yard Clerk
		33870, Yard Clerk
	D. Kula	1, Relief Clerk
	J. Schloeman	2, Relief Clerk
	F. Canady	27040, Yard Clerk
Clive	E. Schleisman	32600, Agent
Coon Rapids		28500, Agent
Des Moines	JoAnn Bucher	10810, Chief Clerk

Council Bluffs	C. Ziegenhorn	22870, Warehouse Foreman
	M. E. Jensen	33600, Yard Clerk (Ch)
	N. R i c e	33610, Ch Yard Clerk
	D. Larsen	33620, Ch Yard Clerk
	R. Hardman	33630, Yard Clerk
	R. Rodenburg	33640, Yard Clerk
	R. Bonar	1 , Relief Clk
		2 , Relief Clk

Where occupants of positions are not listed, same to be determined by joint check of Carrier's records.

- 3) The Carrier shall be required to compensate all those employees who were displaced by employees whose positions were abolished an additional eight (8) hours pay at the rate of their assigned position, or their protected rate, whichever is the greater, for November 1, 1979 and for each workday until they were returned to service.

Note: The employees and monetary wage due those employees displaced by employees whose positions were abolished to be determined by joint check of payroll and other necessary records.

OPINION OF BOARD: This claim protests Carrier's abolishment on October 30, 1979, of fifty-nine bulletined positions without providing five working days' notice to the affected employees. The Organization maintains that failure to give such notice violates Rule 12 of the Agreement. It seeks appropriate compensation for the incumbents of those positions as well as compensation for other employees displaced by the incumbents as a result of Carrier's abolition of the positions in question. Carrier defends on the grounds that the abolition occurred as a result of an emergency, thereby obviating the need for any notice to the affected employees, pursuant to Rule 12(a). Carrier also raises certain procedural objections to the filing of the claim which are discussed below.

On December 19, 1977, Carrier filed a petition for reorganization under the Federal Bankruptcy Act, 11 U.S.C. §205. Pursuant to that petition, Judge Thomas R. McMillen of the United States District Court-Eastern Division appointed Stanley E. G. Hillman, and later Richard B. Ogilvie as trustee. On April 23, 1979 Trustee Hillman petitioned the Court to institute an embargo over approximately eighty per cent of Carrier's lines. On June 1, 1979, the Court denied the Trustee's embargo request.

On August 10, 1979, the Trustee filed a second petition with the Court seeking an embargo of certain of Carrier's lines as of October 1, 1979. On September 27, 1979 the Court ordered the embargo, effective November 1, 1979. In addition, the Court's denial of the Trustee's first petition was reversed by the U. S. Court of Appeals for the Seventh Circuit on October 2, 1979.

Accordingly, on October 26, 1979, Judge McMillen issued Order No. 220C. That order directed Richard B. Ogilvie as Trustee of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company (Carrier) to embargo Carrier's freight operations on certain of its lines effective 12:01 a.m. (c.D.T.), November 1, 1979. The Order reads, in relevant part:

"In accordance with Order No. 220A dated September 27, 1979, Wis Court's decision dated the same date, and the decision of the Court of Appeals for the Seventh Circuit in In Re Chicago, Milwaukee, St. Paul and Pacific Railroad Co., Nos. 79-1494, 79-1675, 79-1683, 79-1698 (7th Cir. Oct. 2, 1979), IT IS **HEREBY ORDERED that:**

1. Richard B. Ogilvie, as Trustee of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company is directed to embargo at 12:01 a.m. C.D.T., on November 1, 1979 all of the Debtor's freight operations on lines which are not shown on Appendix A, either as solid or dotted lines, nor listed on Appendix B, or Appendix C.

* * * *

5. As of November 1, 1979, or as soon thereafter as is practical, the Trustee shall furlough all employees not required for the services and operations continued under paragraph 1 or for the administration of the estate, the protection of the Debtor's property or the finalization, approval and implementation of a plan of reorganization." (**Emphasis supplied.**)

On October 30, 1979, Mr. L. W. Harrington, Carrier's Vice President - Management Services issued a memorandum addressed to "Employees Affected by Force Reduction" in which he advised the recipients that as a result of the Court ordered embargo of certain Milwaukee Road lines their positions "may be affected by force reduction effective November 1, 1979."

Also on October 30, 1979, Mr. J. W. Stuckey, Division Manager issued a notice to the occupants of fifty-nine positions at a number of Carrier's facilities. The notice provided, in relevant part, that:

"In view of the U. S. District Court-directed embargo of certain Milwaukee Road Lines, your position is abolished effective 11:59 p.m. (C.S.T.), October 31, 1979 under the emergency force reduction provision of your union contract. This will confirm verbal advice given you in this regard."

As a result of Carrier's action, the Organization filed the instant claim on December 12, 1979 with Mr. D. W. Schultz, Assistant Division Manager - Administration. It was denied by him on January 28, 1980. The claim was subsequently handled in the usual manner on the property, whereupon it was appealed to this Board for Adjudication.

The Organization contends that the Carrier's abolition of the above referenced positions violates the Agreement between the parties, particularly Rule 12.

Rule 12 reads, in relevant part:

"Rule 12 - Reducing Forces

(a) In reducing forces, employees whose positions are to be abolished will be given not less than five (5) working days advance notice except:

1. Rules, agreements or practices, however established, that require advance notice to employees before abolishing positions or making force reductions are hereby modified to eliminate any requirement for such notices under emergency conditions such as flood, snow storm, hurricane, tornado, earthquake, fire or labor dispute other than as covered by subparagraph 2 below, provided that such conditions result in suspension of a carrier's operation in whole or in part. It is understood and agreed that such force reductions will be confined solely to those work locations directly affected by any suspension of operations. It is further understood and agreed that notwithstanding the foregoing, any employee who is affected by an emergency force reduction and reports for work for his position without having been previously notified not to report, shall receive four hours' pay at the applicable rate for his Position. If an employee works any portion of the day he will be paid in accordance with existing rules.

(c) When bulletined positions are abolished, notice will be placed on all bulletin boards in the seniority district affected and a copy of same will be furnished to the local and general chairman. Such bulletin notice shall include the names of employees filling the positions abolished at the time abolished." (Emphasis supplied.)

In the Organization's View, Rule 12(a) is clear and unambiguous in that employees whose positions are abolished must be given five (5) working days' notice of such abolishment except for the emergency circumstances listed in the rule. Obviously, the Court ordered embargo is not a "flood, snow storm, hurricane, tornado, earthquake, fire or labor dispute." Thus, the Organization asserts that it is not an emergency under Rule 12(a).

Furthermore, according to the Organization, the embargo cannot be considered an emergency even if other events not listed in Rule 12(a) are deemed to constitute emergencies. This is so because Carrier was well aware as of September 27, 1979 that its lines would be embargoed on November 1, 1979, unless the Court of Appeals reversed the District Court. Also, the Organization contends that on October 26, 1979, the date of Judge McMillen's final order, it advised Carrier's representatives that they would be in violation of the Agreement if Carrier did not give proper notice of the abolishments resulting from the embargo order.

Additionally, the Organization argues that Carrier's actions in this dispute violate Rule 12(c), second paragraph. That clause requires that when all bulletined positions are abolished, "notice will be placed on all bulletin boards in the seniority district affected and a copy of same will be furnished to the local and general chairman." Rule 12(c) is explicit and allows for no exceptions. Thus, the Organization contends that Carrier violated the rule when it failed to send copies of the abolishment notices to either its local or general chairman.

Accordingly, the Organization seeks additional eight hours compensation for the incumbents of the abolished positions for November 1, 1979 and each work day thereafter until they were returned to service (Item 2 of claim). Additionally, the Organization asks that all employees displaced by those holding the bulletined positions listed above be similarly compensated (Item 3 of claim).

Carrier, on the other hand, both denies that any violation of the Agreement exists and raises two procedural objections to the form of the claim. First, Carrier insists that even if a violation of the Agreement is proven, any award by this Board granting monetary damages would be in the nature of a penalty and, absent clear language authorizing penalty payment, violative of the Railway Labor Act. In Carrier's view, the Organization is seeking sums of money for certain employees for work they did not perform. Thus, these employees would be receiving a windfall and Carrier would be burdened with a penalty were the claim to be sustained as to monetary damages. Carrier notes that the Agreement does not provide for penalty payment. Therefore, for this Board to award monetary damages where none had been incurred by the employees involved would mean, in Carrier's view, that this Board would be modifying the provisions of the existing Agreement. Clearly, the Board does not have the authority to add to, subtract or in any way, modify those provisions. Accordingly, Carrier concludes that this Board is without jurisdiction to order any monetary damages in this case.

Second, Carrier asserts that to the extent the claim asks for compensation for unnamed individuals or to the extent that it seeks to ascertain the names of certain individuals by a check of payroll records, it is invalid. Carrier points out that Item 3 of the claim seeks compensation for "those employees who were displaced by employees whose positions were abolished" (Emphasis supplied.) The Organization adds, under Item 3 that "the employees...displaced by employees whose positions were abolished (are) to be determined by joint check of payroll and other necessary records."

Carrier further notes that in Item 2 of the claim seven of the fifty-nine individuals whose positions were abolished are not named. Rather, they are identified only as follows:

" Manilla	Position 33500, Yard Clerk
Mendotta	Position 42059, Agt.-Opr.
Cedar Rapids -	Position 16926, Agent
Cedar Rapids -	Position 03350, Frt. Serv. Insp.
Cedar Rapids -	Position 33870, Yard Clerk
Coon Rapids -	Position 28500, Agent
Council Bluffs -	Position 2, Relief Clerk

"Where occupants of positions are not listed, same to be determined by joint check of Carrier's records."

Carrier maintains that Item 3 of the claim is **invalid** in that it seeks compensation for individuals who **are** both unnamed and **unknown**. Rule 36 of the Agreement requires that "all claims or grievances **must** be presented in writing by or on behalf of the **employees** involved." Thus, according to Carrier, where the claim is presented, as here, on behalf of unknown and unnamed individuals, it must be dismissed.

In addition, Carrier argues that absolutely no schedule rule and/or agreement between **the parties** provides for a joint check of Carrier's records to determine the names of individuals allegedly aggrieved. Thus, it is **Carrier's** position that to the extent that Items 2 and **3** require such a check to ascertain the names of aggrieved individuals, they are similarly invalid.

As to the merits of the dispute, **Carrier** contends that the embargo ordered by Judge **McMillen** on October 26, 1979 clearly constitutes an emergency of the type contemplated by Rule **12(a)1**. Carrier notes that the list of emergencies in that rule is not all inclusive. The phrase "such **as**" clearly indicates that "flood, snow storm, hurricane, tornado, earthquake, fire and labor dispute" are only examples of the type of emergencies which **may** occur.

In **Carrier's** view, a court ordered embargo, to begin **at** a specific time on a specific date constitutes an emergency of the utmost magnitude. In fact, accord&g to Carrier, on a least seven prior occasions the parties to this dispute have recognized that an embargo constitutes an emergency, thereby allowing for temporary position **abolishments** under the provisions of Rule **12(a)1**. **Furthermore**, Carrier notes that the Interstate Commerce Commission has specifically recognized that embargoes and even threatened embargoes constitute emergencies.

Thus **accoring** to Carrier, the embargo order of the Federal Court clearly was **an** emergency within the meaning of Rule **12(a)1**. As such, Carrier was not obligated. to give five working days' notice when it abolished fifty-nine **positions** as a result of the embargo order. Therefore, **Carrier** asks that the claim be denied on its merits as well as on procedural grounds.

Both parties have cited numerous awards of this Board in support of their respective positions.

The relevant facts of this case are virtually identical with those in Award **No. 24446**, decided herewith. The rationale for our decision is set forth in great detail in that case. There we decided **thatas** to Carrier's procedural objections, a monetary award is not a penalty **payment**. Furthermore, we concluded that **to** the extent Items (2) and (3) of the claim referred to unnamed or **unidentified** individuals, they were invalid. Here seven individuals in Item (2) are **unnamed**. However they are referred to with sufficient specificity so as to be readily **indentifiable**. Thus, all fifty-nine **employees** referred to in Item 2 of the claim are proper Claimants, while Item (3) is deemed invalid.

As to the merits, we concluded in **Award No. 24446** that under the facts of that case, as here, the Court ordered embargo on October 26, 1979 did not constitute an **emergency** as defined by Rule **12** of the Agreement. Furthermore, we found that each of the Claimants had received one day's advance notice of the abolishment of his or her position.

Accordingly, for the reasons set forth above and in **Award No. 24446**, we will award each of the incumbents of the positions listed in Item (2) of the claim eight hours' pay at the rate of his or her assigned position or protected rate, whichever is greater for November 1, 1979 and for **each** day until he or she returned to service, up to a maximum of four days' pay. Thus Items (1) and (2) of the claim are sustained to the extent indicated in **the** Opinion. Item (3) of the claim is denied.

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 **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 the Agreement was violated.

A W A R D

Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By **Order** of Third Division

ATTEST: Acting Executive **Secretary**
National Railroad Adjustment Board

BY *Rosemarie Brasch*
Rosemarie Brasch - Administrative Assistant



Dated at Chicago, Illinois, this 29th day Of **June 1983**.