Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 29434
THIRD DIVISION Docket No. MW-29571
92-3-90-3-520

The Third Division consisted of the regular members and in addition Referee Dana E. Eischen when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Union Pacific Railroad Company

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

(1) The Agreement was violated when, beginning September 1989, the Carrier began issuing bulletins (Louisiana Division Bulletins LOU 00133, LOU 00138, Arkansas Division ARK 00340 - 00353, ARK 00359 - 00390, ARK 00337 - 00339 and ARK 00357 - 00358) wherein positions and gangs were advertised as 'seasonal' (Carrier's File 900167 MPR).

(2) The Carrier shall be prohibited from advertising positions or gangs as 'seasonal' on job bulletins."

FINDINGS:

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

On August 4, 1988, the Worker Adjustment and Retraining Notification Act (WARN or "Plant Closing Act") became law. Section 8(a) of WARN directed the Department of Labor (DOL) to issue interpretive regulations for WARN. At the outset, the DOL emphasized the remedial purpose of WARN which was to provide full-time employees, their families and communities sixty (60) calendar days advance notice of an employer's reduction in employment levels. Section 4 (1) of WARN provides:

> "Sec. 4. EXEMPTIONS
> This Act shall not apply to a plant closing or mass layoff if -

> (1) the closing is of a temporary facility or the closing or layoff is the result of the completion of a particular project or undertaking and the affected employees were hired with the understanding that their employment was limited to the duration of the facility or the project or undertaking;"
> (emphasis added)

Although Section 4 exempts temporary/seasonal projects from the 60 day advance notice requirement, Congress incorporated the thrust of WARN in the exemption--to provide advance information to employees about their future employment status. This background information is pertinent to this dispute.

On August 15, 1989, the Carrier advised the Organization as follows:

> "Gentlemen:
>
> As information, in future vacancies advertised through the telephone bidding system, all gangs established on a seasonal calendar will have the notification of 'This is a seasonal gang.' This will basically include: Rail Gangs, Tie Gangs, Surfacing Gangs, AFE Gangs, etc., or any gang that the Carrier deems appropriate when established for a set duration.
>
> I will be glad to discuss this with each of you at our mutual convenience."

One of the General Chairmen took exception to the Carrier's position and stated:

> "It seems the real reason the Carrier wishes to make this change, is to circumvent the law concerning the Plant Closing Act."

On September 18, 1989, the Carrier denied the General Chairman's allegation that the Carrier's notice circumvented the Plant Closing Act, and agreed to discuss the matter in conference. Carrier declined to remove the seasonal notice announcement from gang bulletins and the Organization filed a claim of contract violation.

For its part, the Organization cites Rule 11 of the Agreement which reads as follows:

"Rule 11 (a) New positions and vacancies will be advertised promptly and in any case no later than ten (10) days following the establishment of the position or date the vacancy occurs. Temporary vacancies created by reason of a regularly assigned employe's absence due to sickness or injury, or authorized leave of absence when known to be of twenty (20) days or more duration will, if the vacancy is to be filled, be advertised and assigned as 'temporary vacancies' in the same manner as other positions are advertised and assigned under the provision of this Rule 11. A vacancy created by assignment of an employe to a temporary vacancy will not be advertised as a temporary vacancy, but the advertisement will show the reason for the vacancy. When the employe creating a temporary vacancy returns, he will resume his regular assignment, and the employe or employes who have moved up by reason of his absence will be required to displace on the position to which previously assigned, if the same is still in existence. Employes assigned to temporary vacancies will be subject to displacement by senior employes who have displacement rights."

According to the Organization, this dispute pivots on the Carrier's refusal to remove the wording "seasonal employment" from bulletins for temporary and permanent positions in its Maintenance of Way Department. The Organization submits that Rule 11 does not provide for the inclusion of such wording in the bulletins, and should the Carrier want to include such verbiage, it must be accomplished through negotiations. Further, the Organization asserts that there is no such thing as seasonal employment on the Missouri Pacific Railroad, as Carrier is predominately a southern railroad which is "relatively unaffected by adverse weather conditions" such as cold weather.

Finally, the Organization restated that the inclusion of such wording was the Carrier's attempt to "circumvent the requirements" for a 60 day notice prior to layoffs as provided for by the Plant Closing Act.

Carrier cites DOL regulation Section 639.5(c) which reads as follows:

"(c) Temporary employment. (1) No notice is required if the closing is of a temporary facility, or if the closing or layoff is the result of the completion of a particular project or undertaking, and the affected employees were hired with the understanding that their employment was limited to the duration of the facility or the project or undertaking.

(2) Employes must clearly understand at the time of hire that their employment is temporary. When such understandings exist will be determined by reference to employment contracts, collective bargaining agreements, or employment practices of an industry or a locality, but the burden of proof will lie with the employer to show that the temporary nature of the project or facility was clearly communicated should questions arise regarding the temporary employment understandings.

(3) Employers in agriculture and construction frequently hire workers for harvesting, processing, or for work on a particular building or project. Such work may be seasonal but recurring. Such work falls under this exemption if the workers understood at the time they were hired that their work was temporary. In uncertain situations, it may be prudent for employers to clarify temporary work understandings in writing when workers are hired. The same employers may also have permanent employees who work on a variety of jobs and tasks continuously through most of the calendar year. Such employees are not included under this exemption. Giving written notice that a project is temporary will not convert permanent employment into temporary work, making jobs exempt from WARN."

According to the Carrier, there is no language in the Agreement generally, or in Rule 11 specifically, which prohibits the Carrier from including the term "seasonal" on gang bulletins. The Carrier reiterated that it is cognizant of the unique meaning of the term "temporary" in the industry, and was merely attempting to avoid confusion while striving to comply with WARN. The Carrier further maintains that the Organization has failed to establish any rule that would prohibit the inclusion of language in Carrier's "reasonable, good faith" attempt to comply with WARN.

Pursuant to the DOL's issuance of final regulations, Carrier sought to determine their impact on Carrier's operations and interactions with its various collective bargaining agreements including the Organization's. Germane to the Carrier, were DOL comments addressing what employment falls in the "temporary" exception. DOL stated that certain industry practices are sufficient to put employees on notice of the work's temporary nature, which would preclude the necessity of advance written notice about the temporary nature of the jobs. A critical element of WARN, according to the DOL, is that the employer communicate an understanding to the employees at the outset, that when the work is done, their jobs will cease. The Carrier concluded that the traditional, project specific nature of maintenance gang work fell within the confines of the Section 4(1) exception, and although Carrier determined that it technically did not need to provide this advance communication to its employees, Carrier opted to provide written notice, by way of gang bulletins, to avoid any misconception as to the permanent nature of such jobs.

While attempting to develop bulletin language which would provide gang employees notice that their work was temporary, for purposes of WARN, the Carrier concluded that the use of the word "temporary" would be inappropriate as that word is a term of art with a particular meaning in the administration of the parties' Agreement. Therefore, in an attempt to avoid confusion, the Carrier opted to use the term "seasonal" to denote that the gangs are not permanent.

There is no dispute concerning the facts presented. However, it is incumbent upon the Organization that it substantiate its claim of Agreement violation by a preponderance of the evidence. The Organization has failed to carry its burden in this dispute.

This Board finds nothing in the language of the Agreement, past practice, or law which prohibits the Carrier from including the word "seasonal" in the posting of Maintenance of Way position bulletins. It is not for this Board to say whether Carrier made a correct legal assessment of its exposure to possible liability under the statute; it is sufficient that the record supports Carrier's assertion of a good faith reasonable business judgment in an area where its discretion is not circumscribed by Agreement, practice or law. There is no Agreement support for this claim and therefore it must be denied.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 21st day of October 1992.