

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 30111
Docket No. MW-29798
94-3-91-3-158

The Third Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr., when award was rendered.

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

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

1. The Carrier violated the Agreement when it failed to furnish the employees on Texas District Tie Gangs 9165 and 9184 a proper five (5) day advance cut-off notice when it abolished their positions effective at the close of work on November 22, 1989 (Carrier's File 900241 MPR).
2. As a consequence of the aforesaid violation, the Claimants* (listed below) shall each be allowed five (5) days' pay at their respective straight time rate.

"*R.D. Speer
J.R. Hobbs
D.A. Perkins
D.W. Norwood
J.H. Moncivais Jr.
J.G. McCoy
C.V. Rodriguez
Roy Escobar
Don E. Hudson
K.W. Allen
G. Obregon
A.J. Arce
M. Alfred
J. Lopez
D.R. Jacobs
O. Martinez
Lee Ray Osban
Johnny Nickell
Abeline M. Cisneros
John Philpot
Jimmy D. Gowen
Vincent Williams
Pete P. Guevaro
J.M. Cisneros

C.R. James
Harry D. Easley
Ronald E. Bowman
Javier Moncivias
J.J. Boyd
R. Hinojosa
A. Hinojosa
H.B. Lancaster
Danny Hearn
C.D. Baxter
D.H. Slovak
J.E. McKinley
K.C. Fletcher
W.E. Dunn, Jr.
R.L. Oliver
C.A. Huffman II
G.W. Pope
B.A. Cockrell
Sam Harris
D.W. Taylor
Rick Landon
J.R. Alexander
E.M. Ramos
G. Hinojosa

J.D. Spencer
W.E. Robinson

A.W. Newton
R.D. Blanton"

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 employe 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.

This dispute concerns interpretation of Rule 3(b), which states in pertinent part as follows:

"Effective July 18, 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 one exception, there is no dispute concerning the Organization's summary of what occurred in this instance:

"Prior to the date this dispute arose, after roll call on November 13, 1989, the Claimants, all regularly assigned to Texas District Gang Nos. 9165 and 9184, were verbally notified that Gangs 9165 and 9184 would be abolished in five (5) days or if their work project was not completed, that abolishment would be when their work was completed. No other notice was received until the end of the date on November 22, 1989, when the Claimants received written cut-off notices effective that date."

The exception to this summary is that the Carrier contends the employees were given daily updates as to their prospective cut-off, while the Organization states that no such interim advice was provided.

Several issues discussed by the parties in their Submissions are clearly not relevant. No issue is raised here as to whether

the November 13 notice is improper solely because it was made orally rather than in writing. More significantly, the Organization does not argue that notice must be given exactly five days prior to cut-off; the Organization concedes that notice, if specific as to date, may properly be given more than five days in advance.

The principal point made by the Organization is that the applicable Rule requires that employees be notified of the actual cut-off date at least five days in advance. Without such specific advice, notice could be given on an indefinite basis, to be made effective whenever the Carrier wished, thus defeating the purpose of the Rule, which is intended to give employees at least five days' notice of the exact date of their cut-off. Of guidance here is Third Division Award 14598, which stated as follows:

"The alleged notice given by Carrier [in this instance, on November 13, 1989] was uncertain as to time or date and solely contingent upon the completion of a particular work assignment. Such notice does not meet the clear and unequivocal requirements of the controlling Agreement."

The Board finds this reasoning fully applicable here. Even if daily advice was provided, which the Organization denies, the fact remains the formal notice of the November 22, 1989 cut-off was received only on that date. Despite its attempt to deal with the uncertain completion of the work, the Carrier failed to comply with the Rule.

As a remedy, the Organization seeks five days' straight time pay for each Claimant. This presumably is to cover the five working days following receipt of the definitive cut-off notice on November 22, 1989. The Board finds this appropriate except where Claimants were under pay by the Carrier (through exercise of seniority or being on vacation) during this five-day period. The Organization seeks pay regardless of the Claimants' work status, but this would constitute a penalty payment, which the Board is not empowered to grant. On this aspect, reference is made to Third Division Award 28545, which in turn cites other Awards to similar effect.

The Carrier also seeks deduction of outside compensation or unemployment benefits received during this period, but the Board finds no basis for such offset.

A W A R D

Claim sustained in accordance with the Findings.

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NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Catherine Loughrin / lw
Catherine Loughrin - Interim Secretary to the Board

Dated at Chicago, Illinois, this 4th day of April 1994.