

NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISIONAward No. 31032  
Docket No. MW-30324  
95-3-92-3-54

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees  
(  
(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 required the members of Gang 9181 to work beyond the date the gang was to be abolished and did not issue another five (5) day force reduction notice (Carrier's File 910219 MPR).
- (2) As a consequence of the violation referred to in Part (1) above, Foreman R. E. Taylor, Assistant Foreman G. A. Wehner, Trackman Driver W. J. Bathon and Trackmen J. A. Forth, E. F. Rodgers and T. L. Donze shall each be allowed five (5) days' pay at their respective rates of pay and each be credited with said additional days for vacation and holiday qualifying purposes."

FINDINGS:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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 is a dispute over the allegation that Claimants were not given five days' advance notice that their jobs were to be abolished. At the relevant time, Claimants were assigned to Gang 9181 working in the vicinity of Valmeyer, Illinois, working a four day/ten hour per day schedule.

According to the Organization, on November 20, 1990, Claimants received written five day notice dated November 19, that their positions would be abolished November 29. However, Claimants were held past November 29 and worked overtime on November 30. The Organization states that at the end of the day on November 30 Claimants were given written cut off notices dated November 29.

According to the Carrier, all Claimants were given another notification on November 21 that they would work until the end of the month, November 29 and that Claimants were also orally notified on November 26 that they would work until November 30.

The Organization argues that since the employees were held past the date of their original five day cut off notice (November 29), the Carrier was obligated to give a new five day notice and that, as a result, each Claimant is entitled to five days' pay plus benefits. The Carrier argues that it met its notice obligations and, in any event, if there was a violation, Claimants were not harmed.

Rule 3(b) states:

"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."

Although it is a good business practice for the Carrier to give the notice called for in Rule 3(b) in writing so that factual disputes (such as here) as to when notice was given can be avoided, the Carrier is correct that Rule 3(b) does not require that the notice be in writing. Third Division Award 27016 ("... [T]he absence of written notice does not, in the Board's view, entitle the Claimant to the claimed five days' pay.").

With respect to the factual dispute concerning when notice was given, we are satisfied that the evidence sufficiently shows that oral notification was given to Claimants on November 26 that their jobs would be cut off November 30. Statements from two supervisors assert that Claimants were told that information on November 26. While the Organization produced a statement contesting that assertion and while the Organization argues that the supervisors' statements are insufficient and do not "contain ... a clear statement explaining how its author supposedly had knowledge of the circumstances", although the statements are not artfully drafted, we find the supervisors' statements are sufficient to demonstrate that oral notification was given on November 26 as the Carrier contends. We note that one of the supervisors who gave a statement (Track Supervisor T. W Hergenroder) is identified in the employee's statement (R. Taylor's) as an individual who would give notice. Ultimately, the burden is on the Organization to refute the contents of the supervisors' statements. That has not been sufficiently done.

But, even with the November 26 oral notification, the evidence nevertheless shows that the Carrier failed to give "not less than five (5) working days' advance notice" for the actual cut off day of November 30. Even with the notice that was given on November 26 for the November 30 cut off, November 26 cannot be counted as part of the five days. "[N]ot less than five (5) working days" in Rule 3(b) requires that notice for November 30 had to be given by November 25. Third Division Award 27996.

The Carrier cannot rely upon an open ended notice to meet its five day obligation. The purpose of the Rule is to provide employees with a date certain for the abolishment of their jobs so that they have sufficient time to make plans to exercise their seniority rights on other jobs. In this case, Claimants were not given full benefit of that five day time period.

Therefore, Claimants are entitled to one day's pay as a result of the Carrier's giving at most four days' of the required five days' advance notice. Third Division Award 27016 ("... [N]otice given ... constituted only four working days' notice. The Claimant is thus entitled to one day's pay ...."). But, because this Board cannot impose a penalty, that pay entitlement must be offset by any amounts earned by Claimants in the Carrier's service during the period for which no notice was given. Third Division Awards 30111, 28545. This matter is therefore remanded to the parties to determine on an individual basis which Claimants, if any, suffered losses of wages during the workday immediately following November 30, 1990. Those Claimants suffering such losses, if any, shall be made whole.

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**AWARD**

Claim sustained in accordance with the Findings.

**ORDER**

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Dated at Chicago, Illinois, this 1st day of September 1995.