

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 35327
Docket No. MW-33131
01-3-96-3-548**

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 Employees
(Soo Line Railroad Company (former Chicago, Milwaukee,
(St. Paul and Pacific Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when, following the August 29, 1994 Presidential Executive Order which ordered all employees back to work (ending the strike by U.T.U.), the Carrier failed and refused to allow Ms. J.L. Gaul to report for work until September 6, 1994 (System File C-60-94-S320-47 CMP).
- (2) As a consequence of the aforesaid violation, Ms. J. L. Gaul shall be allowed thirty (30) hours' pay at the crane operator's straight time rate and eight (8) hours' pay for the September 5, 1994 Labor Day holiday.”

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 were given due notice of hearing thereon.

The Parties deemed two portions of Rule 9 **EXERCISE SENIORITY - FORCE REDUCTION** pertinent to this dispute. Paragraphs (e) and (f) read as follows:

- “(e) Advanced notice before positions are temporarily abolished or forces are temporarily reduced are not required where a suspension

of the Carrier's operations in whole or in part is due to a labor dispute between the Carrier and any of its employees.

- (f) Except as provided in paragraph (e) hereof, no advance notice to employees before temporarily abolishing positions or making temporary force reductions under emergency conditions, such as flood, snow storm, hurricane, tornado, earthquake, fire, or a labor dispute other than as defined in paragraph (e) hereof, provided that such conditions result in suspension of the Carrier's operations in whole or in part. It is understood and agreed that such temporary 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 such 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 position of the day he will be paid in accordance with the rules."

On July 13, 1994, the SOO Line Railroad was struck by the United Transportation Union (hereinafter referred to as "UTU"). Said strike continued until August 29, 1994, when President Clinton assigned a Presidential Emergency Board (PEB) to review the SOO/UTU dispute. That assignment effectively ordered all employees back to work. Throughout that period of time, members of the Brotherhood of Maintenance of Way Employees (BMWE) voluntarily honored the UTU picket lines.

The Claimant established and holds seniority as a Crane Operator with seniority as such dating from September 24, 1991, in the Maintenance of Way and Structures Department. At the time this dispute arose, the Claimant was regularly assigned as such on Extra Gang R-1 on the River Subdivision. Commencing July 14 through August 29, 1994, the Claimant honored the UTU picket lines. Subsequent to the Presidential Executive Order, the Claimant was required to be available to return to work but, on August 29, the Carrier notified her not to report for her assignments until September 6, 1994.

On October 24, 1994, the Organization submitted a claim on behalf of the Claimant and 68 additional Maintenance of Way employees maintaining that the Carrier had violated Schedule Rules 1, 2, 3, 4, 5, 19, 20 and 23, as well as the Presidential Executive Order of August 29, 1994, when it "arbitrarily" decided to withhold the Claimant(s) from service until September 6, 1994. Of note, in subsequent correspondence the Parties opted to consolidate the 69 identical claims into one.

The Carrier denied the claim premised upon the following:

“Claimants were advised on Monday, August 29 that they should not report until Tuesday, September 6, as a result of the emergency conditions created by the strike. Anyone with an assignment and work function that could begin immediately were advised to report to work on August 30, 1994. After the PEB was declared, we had work for all foremen and assistant foremen; however, we only had work for some machine operators and laborers. When the strike ended all equipment had to be inspected and due to the importance of resuming train operations on the River Sub, a track window was not available until Tuesday, September 6, when actual rail installation could resume. Under these circumstance, people just standing around with nothing to do would serve no useful purpose but would create potential for unnecessary operation and/or safety issues.

Forces were temporarily reduced as a result of this emergency situation in accordance with Rule 9 and there was no violation of the collective bargaining agreement.”

In that same correspondence, the Carrier stated that it would pay eight hours holiday pay for Monday, September 5 to any individuals who were “penalized and lost holiday pay” to which they would have been otherwise entitled.

In response to the Carrier’s denial, the Organization asserted that the Presidential Emergency and Executive Order required both the Carrier and the Organization to resume the pre-strike status quo and that the Carrier was not free to “arbitrarily pick and choose” who was to report to work and upon what date. Further, the Organization maintained that it was incumbent upon the Carrier to produce evidence to support the “affirmative defense” that equipment and material stored off Company property had to be relocated and inspected, prior to recalling the Claimants. Finally, the Organization contended that on August 25, four days prior to the August 29 Executive Order, the Carrier managers told General Chairman Birnbaum, in words or substance: “If BMW members were willing to cross UTU picket lines they could mark up and return to work.”

The crux of this dispute centers upon the Organization’s allegation that, subsequent to the cessation of the 47-day UTU strike, certain BMW members were not recalled to work in a timely manner. Specifically, the Organization maintains that Rule 9(f), supra, prohibits the Carrier from “refusing to allow” the Claimants to return to work following the restoration of operations on August 29, 1994. For its part, the Carrier maintains that anyone who had assignments and work functions that could begin immediately were instructed to report for work on August 30, while others, including the Claimant were returned as soon as possible on September 6, 1994, subsequent to the Labor Day holiday.

We find no evidence on this record that causes us to conclude that the Carrier violated the Agreement. The very circumstances which constitute the genesis of this dispute are clearly set forth in paragraphs (e) and (f) of Rule 9, and under such circumstances, the Carrier is entitled to some latitude with respect to recalling employees. In view of all of the circumstances, the short delay experienced by some BMW members cannot per se establish bad faith by the Carrier, unreasonable, arbitrary or capricious exercise of managerial discretion or a willful violation of any of the cited Agreement provisions. Therefore, this claim must be denied.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

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

Dated at Chicago, Illinois, this 16th day of February, 2001.