

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 35628
Docket No. MW-32709
01-3-96-3-2**

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
(Southern Pacific Rail Corporation (former Chicago,
(Missouri and Western Railway Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when it improperly abolished the position of SPCSL employe C. Davis, effective November 14, 1994, without providing the five (5) working days' advance written notice as stipulated within Rule 22 (a) (Carrier's File BMW95-30 CMW).**
- (2) The Carrier violated the Agreement when it improperly abolished the positions of all SPCSL employes listed on the January 27, 1994 Seniority Roster, effective October 14, 1994, without providing the five (5) working days' advance written notice as stipulated within Rule 22(a) (Carrier's File BMW95-28).**
- (3) The Carrier violated the Agreement when it improperly abolished the positions of SPCSL employes R. H. Santacrose and S. Heffren, effective October 14, 1994, without providing the five (5) working days' advance written notice as stipulated within Rule 22(a) (Carrier's File BMW95-29).**
- (4) As a consequence of the violation referred to in Part (1) above, Claimant C. Davis shall be compensated for ‘*** eight (8) hours pay at his respective rate of pay for each and every work day beginning November 14, 1994 and continue to receive same until such time**

that he receives the proper written notice as provided for in Rule 22 (a). ***'

- (5) As a consequence of the violations referred to in Part (2) above, ' . . . all of the employees listed on the January 27, 1994, SPCSL Seniority Roster who received verbal instructions that their jobs were being abolished effective October 14, 1994, should receive eight (8) hours pay at their respective rates of pay for each and every workday beginning October 17, 1994, and continue to receive same until such time that each receives the proper written notice as provided for in Rule 22 (a).'
- (6) As a consequence of the violations referred to in Part (3) above, ' . . . claimants Santacrose and Heffren, should each receive eight (8) hours pay at their respective rates of pay for each and every workday beginning October 17, 1994 and continue to receive same until such time that they receive the proper written notice as provided for in Rule 22 (a).''

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.

Three separately filed claims arising out of the same transaction were consolidated for common handling in the appeal to this Board. Each of the claims alleges a violation of the Claimants rights to "at least five (5) working days' advance written notice, including the date of notice," under the following provision of Rule 22 (a):

"RULE 22
REDUCING FORCES

(a) In reducing forces, seniority rights shall govern. Except as provided in paragraph (e) and (f) of this Rule, at least five (5) working days, advance written notice, including the date of notice, shall be given employees affected in reduction of forces or in abolishing positions. A copy of such notice shall also be posted on bulletin boards. Employees whose positions are abolished may exercise their seniority rights over junior employees; other employees affected may exercise their seniority rights in the same manner. Employees whose positions are abolished or who are displaced, and whose seniority rights entitle them to a position, shall assert such rights within ten (10) working days from the date actually affected. An employee who fails to exercise seniority within the ten (10) day period, must then either displace the junior employee on the seniority roster or bid the bulletined vacancy where such employees hold seniority. During this ten (10) day period, such employee will perform work as assigned. Employees having insufficient seniority to displace other employees will be considered furloughed. . . ."

The undisputed record shows that named Claimants Santacrose and Heffren each were verbally informed by Roadmaster Thrash on Friday, October 7, 1994, that his position would be abolished effective Friday, October 14, 1994. The record establishes that each was also verbally informed on October 7, 1994 that he would be paid for the week of October 10 - 14, 1994 but not required to work that week. In that connection, the following written statement from Roadmaster Thrash, provided to the Organization in handling on the property, is unrefuted:

"Told them on Friday October 7, 1994, that their jobs were being cut off effective October 14, 1994. Some asked for and got letter on October 7 and some did not. They did not have to work the week of October 10-14, but letters were available at Bloomington, Springfield and Woodriver for them. Those that could work returned on October 17 and those that could not work just never returned to pick up a cut off letter. I figured those who did not return to get their letters did not want them."

As for Claimant Davis, it is undisputed that he was verbally informed on November 9, 1994 that his position was abolished effective November 10, 1994, that he was paid for but not required to work for four days, and that written notice of the abolishment subsequently was faxed to Ridgely Yard on November 11, 1994 but never given to Claimant Davis.

The undisputed facts establish a prima facie violation of the clear and unambiguous language of Rule 22 as to named Claimants Davis, Santacrose and Heffren referenced in Parts 1, 3, 4, and 6 of the claim(s). (As to the general claim for unidentified Claimants referenced in Parts 2 and 5 of the claim(s), the Organization failed to meet its burden of proof.) In each such case, the Carrier failed to give these employees affected in reduction of forces or in abolishing positions at least five working days, advance written notice, including the date of notice or post a copy of such notice on bulletin boards. Advance verbal notice and leaving written notice someplace for the employees to find after the fact does not suffice to satisfy the Carrier's obligation or the employee's rights under Rule 22. In the facts of this record, the Carrier effectively abolished the named Claimants' positions on the same day that it provided them with verbal notice, thereby circumventing Rule 22 (a) entirely. The Carrier argues a theory of "no harm no foul" because it paid the Claimants for the workweek following the de facto abolishment of their positions, but we conclude that the proven blatant and unmitigated disregard for the requirements of the Agreement require an appropriate remedy. The continuing damages claimed by the Organization are excessive and disproportionate to the proven contract violations, but to remedy those violations we direct the Carrier to compensate Claimants Davis, Heffren and Santacrose each for 40 hours at the applicable straight time rate. Parts 1, 3, 4 and 6 of the claim(s) are sustained to the extent indicated in the Findings. Parts 2 and 5 of the claim(s) are dismissed for failure of proof.

AWARD

Claim sustained in accordance with the Findings.

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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 28th day of August, 2001.