

Award No. 4389

Docket No. TE-4389

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Edward F. Carter, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

ATLANTIC COAST LINE RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Atlantic Coast Line Railroad Company:

(1) That the Carrier violated Articles 3-(a), 3-(c), 3-(f) and 9 of the telegraphers' agreement and Notice and Order No. 1 and Notice of Instructions of Federal Manager C. H. Buford of Government Controlled Railroads of May 17, 1946, when, on May 24 and 25, 1946, the Carrier unilaterally declared "abolished" or "temporarily discontinued" the positions of the claimants named in the following Employees' Statement of Facts on the days specified therein, and all other employees under the telegraphers' agreement whose positions were likewise declared "abolished" or "temporarily discontinued" because of the engineers' and trainmen's strike commencing May 24, 1946, and has refused to pay these claimant employees their wages for the day or days on which they were thus improperly suspended from work during their regular hours; and

(2) That each of the claimants named in the Employees' statement of Facts and all other employees under the telegraphers' agreement who were thus improperly deprived of their usual employment by the Carrier on the day or days involved by being improperly suspended during the regular hours and who were ready for service and not used, shall be reimbursed for the wage loss on the day or days involved as a result of this improper act of the Carrier.

EMPLOYEES' STATEMENT OF FACTS: An agreement bearing date November 1, 1939, as to rate of pay and rules of working conditions is in effect between the parties to this dispute.

Due to a threatened strike of the engineers and trainmen the United States took possession of the Atlantic Coast Line Railroad Company effective 4:00 P.M., on May 17, 1946, by means of the following quoted Notice and Order No. 1:

"NOTICE AND ORDER NO. 1

To each carrier by railroad named in the Executive Order of the President of the United State, Dated May 17, 1946, concerning possession, control, and operation of certain railroads:

would not have been subject to displacement under seniority rules had the position remained open. If declined by them, the position will then be bulletined."

The Carrier respectfully submits that it has carefully complied with the provisions of Articles 9 and 12(j), for each and every employe involved in this dispute was restored to his or her assigned position immediately after train service operations were resumed, indicating clearly that the Carrier acted in good faith.

(Exhibits not reproduced.)

OPINION OF BOARD: On May 22, 1946, locomotive engineers and trainmen went on a nation-wide strike which suspended practically all railroad operations. On May 24, 1946, the Carrier notified a large number of its employes working under the Telegraphers' Agreement substantially as follows: "Your position is abolished (blanked or cut-off) until the strike is settled and don't get out of pocket for we might call you on short notice." In one district where the notice was by letter, employes were advised substantially as follows: "Confirming conversation with Messrs. * * * effective immediately * * * temporarily discontinued, account strike of engineers and trainmen. Operators so displaced may exercise seniority or take vacation and should telegraph this office where can be reached on short notice." The claimants contend that they were thus improperly suspended from work during their regular hours on the days specified in this claim.

It is urged that the Carrier was without authority to abolish the positions here involved because of "Notice and Order No. 1," dated May 17, 1946, issued by Charles H. Buford, Federal Manager of Government Controlled Railroads, issued pursuant to an executive order of the President bearing the same date. We have previously determined that the rights of the parties under the Agreement were in no manner changed by the issuance of this Order and we adhere to that decision. Award 3680.

It is urged also that it was generally known that the strike would be of short duration and that the Carrier, for that reason, could not properly abolish the positions here involved. Any attempt to predetermine the length of a strike is to say the least very speculative. The Carrier is entitled to act in the manner that the situation at the time seems to require. If there was no work to be performed, the Carrier had the right to abolish the positions and reduce forces. Award 4001. As we said in the last cited award, "The fact that the strike ended sooner than anticipated, does not have the effect of making violative of the contract that which would not otherwise have been."

The important question here raised is whether the Carrier actually abolished the positions in question. The use of the words "abolished," "blanked" or "cut-off" indicate an attempt to wholly eliminate the positions. But when the Carrier instructs them not to "get out of pocket for we might call you on short notice," there is a definite indication that the Carrier expected to call them back into service on their same positions without rebulletining them as the contract requires. The fact is that none of the positions held by claimants were rebulletined. The Carrier asserts that this latter action was justified on its part by Rule 12 (j) of the Current Agreement, which provides:

"When regular positions which have been closed not exceeding six months are reopened they will be offered employes who held them when closed provided such employes are still in the service and would not have been subject to displacement under seniority rules had the position remained open. If declined by them, the position will then be bulletined."

While it is true that the rule cited protects the former occupant of an abolished position if it be reestablished within six months, it has no applica-

tion at all if the position was not finally abolished in the first instance. It is an optional rule of which an employe may take advantage. The Carrier cannot compel the employe to accept his former position. To abolish a position, the Carrier must use such language and so conduct itself that the non-existence of the position is evidenced. It cannot use words indicating that a job has been abolished and then qualify them by instructions or directions tending to exercise employe control over the occupant of the abolished position. When the Carrier instructs the occupant of a position alleged to have been abolished to not "get out of pocket" and "we might call you on short notice," at a time when he is occupying no position under the Agreement, it is quite persuasive that the Carrier was trying to benefit itself by "abolishing" the positions and at the same time protect itself by exercising its powers as employer against loss and delay in resuming operations when and if the strike ended. That the Carrier may abolish the positions when the work stops must be conceded, but the abolishing of the positions must be actual and have the effect of removing the occupant from the service of the Carrier until such time as he may voluntarily exercise his seniority to another position if such right exists. The abolishing of a position can be accomplished with plain and simple language and when, as here, qualifying directions and instructions are included, it is evidence that the Carrier intended, in fact, something other than to eliminate the position absolutely.

We are of the opinion, under the facts and circumstances here shown, that Carrier never actually abolished these positions. It is urged by the Carrier, however, that even if this be so, it is not obliged to compensate these claimants under the Guarantee Rule in force on this property. This rule provides:

"Regularly assigned employes will receive one day's pay within each twenty-four (24) hours, according to location occupied or to which entitled, if ready for service and not used, or if required on duty less than the required minimum number of hours as per location, except on Sundays and holidays.

This rule shall not apply in cases of reduction of forces nor where traffic is interrupted or suspended by conditions not within the control of the carrier." Article 9, current Agreement.

It is contended by the Carrier that where traffic is interrupted or suspended by a strike that it is a condition not within the control of the Carrier within the meaning of the rule. The Organization contends that the applicable portion of the rule excepts only floods, washouts, fires, and the like. We do not think the position of the Organization is tenable. If the rule makers had intended to exclude traffic interruptions and suspensions caused by happenings usually denominated as acts of God, it could easily have been done by appropriate language. A strike is not a condition within the control of the Carrier within the meaning of the rule. The fixing of the responsibility for strikes usually involves intricate fact finding proceedings that may or may not terminate the strike. To say that a strike was within the control of the Carrier within the meaning of Article 9 would require a strained interpretation of plain words of common meaning. It is clear, we think, that Article 9 excepts from its provisions traffic interruptions or suspensions caused by a strike. The claims here involved grow out of a traffic suspension caused by a strike. Consequently, the Guarantee Rule does not apply and no basis for an affirmative award exists.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 28th day of April, 1949.