Award No. 5074

Docket No. MW-4984

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

A. Langley Coffey, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

MISSOURI PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood:

(1) That the Carrier violated the provisions of the effective agreement, and specifically Rule 12 (i), Rule 14, Section 2, paragraph (a) and (b), Rule 16, Rule 17, and Rule 23, when on September 9, 1949, and on subsequent assigned days thereto it failed to employ all of its Maintenance of Way forces, with the exceptions of those few it retained in service;

(2) That each employe thus improperly deprived of his or her usual employment by the Carrier during the period referred to in Part (1) of this claim shall be paid the equivalent wage he or she would have earned had they been employed 8 hours per day, 5 days per week during the period they were held out of service.

EMPLOYES' STATEMENT OF FACTS: Effective as of the close of day, September 9, 1949, the Carrier barred from service a majority of its Maintenance of Way employes on account of the strike of other classes of railroad employes.

All Maintenance of Way Employes who were barred from service because of the strike suffered a loss of time and earnings of approximately thirty (30) working days, with the exception of a few who were permanently or temporarily returned to service during the period of the lockout. The employes who were adversely affected because of the Carrier's action in barring them from service were not paid for time lost.

The Carrier's actions, wherein it deprived the employes of the right to fill their assigned positions was protested by the General Chairman of the Brotherhood prior and subsequent to the date they were barred from service. The General Chairman's request that the employes be retained in service or returned to service and compensated for time lost was declined by the Carrier.

The agreement in effect between the two parties to this dispute, dated July 1, 1938, and subsequent amendments and interpretations are by reference made a part of this Statement of Facts.

contentions on the property in support of their claim. The applicable rules of the agreements are those which cover the events which took place. These events were a reduction in force and a subsequent increase in force. Rule 3 covers the first of these events and Rules 3 (f) and 11 cover the other. The Carrier complied with these rules in all the phases of its handling of these events.

It is our position that this claim is without merit or agreement support and should be denied.

The Carrier requests the privilege of making additional submission in the event the Employes present facts not touched upon in this submission because of the failure of the Employes to properly progress the claim.

(Exhibits not reproduced.)

OPINION OF BOARD: This case puts in issue the right of the Carrier, over the protest of the Organization, to reduce forces and abolish positions by reason of strike conditions on the property, brought about by employes other than those whose jobs are here in question. Also present are objections raised on jurisdictional grounds, which the Board, after careful deliberation, has overruled for reasons next hereinafter stated.

The Board subscribes to the principle that the orderly procedures of the contract for filing time claims are not to be ignored in appropriate cases; but, where the issue is one going to the very essence of the Agreement and involving fundamental differences between signatory parties, the fact that incidental claims for compensation are involved, which may be defective, does not mean the Board should disclaim jurisdiction. See Awards 2724, 2809.

Also, the contention that individual employes, in whose behalf the claim is made, are not named is not new and is entirely devoid of merit. See Awards 3251, 3256, 3687.

Another and final reason why the Board is not impressed, with exceptions taken to the handling of the claim on the property, is the showing made in the record that this grievance is predicated on action of the Chief Personnel Officer and no good reason appears why the claim should have originated at a lower level. Under such circumstances the Board cannot allow hypertechnical contentions or strained construction of contract terms to obstruct the processes for expeditious settlement of disputes.

On the merits of the dispute, the Organization charges, among other alleged violations of the Agreement, that its members were "locked out" while a dispute was pending between the parties to this proceeding in violation of Rule 12 (i). The question to be resolved is whether the Carrier, under all the facts and circumstances of the case, acted counter to this rule by taking the action about which the Organization complains.

The rule is what is commonly known and referred to as a "no strike", "no lockout" pledge. In consideration of the Organization's pledge that it will not strike to enforce its demands where the contract provides a method for orderly settlement of disputes, the Carrier agrees that it will not "shut-down" its operations in retaliation for grievances asserted, or to be asserted by the Organization, for which the contract gives redress. Obviously the rule is attendant on grievance procedures and is designed to substitute orderly processes for settlement of labor disputes in place of economic pressures which might otherwise be employed by either party to the contract.

In the usual application of the rule, it is generally recognized that there must be some direct relationship between an unresolved dispute, existing under the Agreement, and the economic force employed. Therefore, the Organization, in order to sustain its position, must be able to show that the action which it considers objectionable was taken as a direct result of its

proposed or asserted grievance and not for some other reason. Being unqualifiedly of the opinion that the Carrier did not abolish positions and reduce its forces to retaliate for a dispute pending under the subject Agreement, but took the action in question for unrelated reasons, we find there has been no violation of Rule 12 (i). See Award 3723.

Included in the broader statement of the issue above set forth is the Organization's exceptions to the manner in which the Carrier reduced its forces and abolished positions. It is charged that there have been violations of Rule 14, Section 2, paragraphs (a) and (b); and Rules 16, 17, and 23. The contentions raised and the respective positions of the parties, in connection with this portion of the claim, are not new and by precedent there exists a storehouse of experience representing diverse views based on factual and rule differences.

On the basis of the facts presented and the rules under consideration, the Board held in Awards 3702, 3715, 4170 and 4171 that where employes had been taken out of service during strikes, under conditions not amounting to a bona fide abolishment of positions, there existed meritorious claims.

A contrary view is expressed by the Board where positions were abolished in fact under strike conditions. See Awards 4001, 3838, 3682, 4455 and 4787.

That there is a distinction between suspending operations during a strike and abolishing positions, depending on procedures employed, is recognized in Awards 3715, 4170, 4171. That distinction is best noted by quoting from Award 4170 as follows:

> "* * * The attitude, action and argument of the Carrier in this case leads us to believe that the Carrier does not comprehend the meaning of the term 'abolish.'
>
> If these positions were abolished they ceased to exist at the close of the work day on May 24th. The strike was brought to an end in the afternoon of May 25th. However, the Carrier states that on May 27th, the employes 'were returned to the positions formerly occupied,' and again, 'when the strike was settled on May 25th the jobs were restored and the men who had occupied them were permitted to return to same on the 27th.'
>
> If the positions had been abolished they could only be brought back into existence as new positions. Rule 5 (a) of the Agreement requires that all new positions, above the rank of laborer, which are expected to be of more than thirty (30) calendar days duration, shall be bulletined. This is an essential to the establishment of such new positions. The positions here in question included foremen as well as laborers. None of the positions was bulletined. The Carrier attempts to explain its failure to bulletin by saying that it was believed that 'it would be more beneficial to the men to return them to the positions formerly occupied.'"

In the instant case, the Carrier believed it would be more beneficial to the men to return them to the positions formerly occupied instead of bulletining new positions when it became necessary to increase forces on termination of the strike. But being unable to reach agreement with the General Chairman, the Carrier was alert to the implications of this Board's views that to return the men to their former positions, instead of bulletining same, would not constitute an abolishment of the position. Accordingly, it adhered to the seniority provisions of the Agreement, thereby avoiding procedural errors.

There is a presumption that action abolishing positions prior to settlement of a strike is bona fide. Award 4099.

It must be remembered, however, that the general rule is that before positions can be abolished, a substantial part of their duties must have disappeared and there must be an actual bona fide intent to permanently abolish them. Award 3884. On that basis the Organization argues that there was work belonging to its class or craft which could have been performed while there was no movement of trains. It makes a point that work of a similar nature, let by independent contract, was not interrupted because of potential liability for breach of contract.

There are many awards of this Board, both preceding and following the one last above cited which are authority for the rule on which the Organization relies. Those cases, like all legal precedents, stand as beacon lights in the process of judicial investigation to lead those interested in ascertaining the truth, under rules of human conduct, over charted paths. Once a contract interpretation has been established it should be given great weight. To fail to do so is to lay the foundation for the most restless instability. But to adhere to decisions when no other reason can be assigned, then it has been thus decided, without inquiry as to what influenced the decision in the earlier case would be to follow precedent blindly.

For instance, Award 3884, turns on the proposition that the Carrier did not assign any reason for abolishing the positions nor did it show that the work of the positions had disappeared, or had been materially reduced. While the cited award, and those of similar import is not decisive of the issue here presented, it does negative, however, this Carrier's general statement of position that as long as it follows the procedure prescribed by contract, it may abolish positions indiscriminately. While it is the prerogative of management to abolish a position by following the procedure prescribed by contract, where the work of the position has disappeared either entirely or substantially, it may not arbitrarily abolish the position if the work of the position remains.

But here, as in all strike situations, we find the Carrier called upon to exercise its best managerial judgment in the face of a protracted and prolonged dispute with the operating personnel of its railroad. A strike vote had been taken and a cessation of operations was inevitable. That the work stoppage would be of long duration reasonably could be foreseen, and later became an established fact. That the Carrier had a right to reduce forces by abolishing positions during a long drawn out strike while railroad operations were practically suspended is no longer an open question in this forum. See Awards 4001, 3838, 3682, 4455 and 4787 above cited.

Having that right under its Agreement with the Organization, and the rules of construction promulgated by this Board, it is immaterial that there was no interruption of work covered by an independent contract. We are not here called upon to decide liability under another contract. Conceivably the Carrier very well could have been, and in fact, believed it was liable for damages thereunder, and this admittedly influenced its judgment not to halt or suspend operations under that contract. However, the right to cancel out under that contract is not before this Board. The Carrier's right to reduce forces under the working rules in effect on its property is, and with that we are alone concerned.

There remains only to be decided the questions, (1) whether the Carrier deviated from the express terms of its Agreement in the manner it invoked the rules for reducing forces, and (2) whether in so doing it acted contrary to related rules of the Agreement.

The record shows that the Carrier took meticulous care to comply with the contractual provisions for reducing forces, and no showing is made, as appears in some of the reported cases where claims have been sustained, that there was other than an absolute abolishment of positions to which seniority attaches, and a bona fide reduction in forces on other jobs. However, there remains open the charge that certain of the positions abolished

were subject to rules fixing a "guaranteed work week" and employment for a longer term in certain instances.

Superficially, Rule 14, Section 2, paragraphs (a) and (b) supports the claim of a "guaranteed work week" for all employes. Under a rule providing that "the regularly established work hours will not be reduced below eight (8) consecutive hours per day, nor will the regularly established number of working days be reduced below five (5) consecutive days per week," it was held in Award 3757 that the rule guaranteed work for five consecutive days per week.

That the Board will look to the purpose and intent of such a rule, however, and finding a contrary intent present will not sustain a claim for "weekly guarantees" is established by Award 3841.

The obvious purpose of the subject rule was to guarantee the senior employes of a craft or class regular and constant employment on regularly assigned positions during periods when there is a reduction and falling off in work. The intent is that junior employes shall be laid off instead of keeping a constant working force when to do so would result in a reduction in hours or days of the basic work week. This intent is clearly evidenced by the language, "to avoid making force reductions" and to this extent the rule is distinguishable from those present in Awards 3757, 3723, and 3661.

Our attention has been called to Award 805 where the phrase "to avoid making force reductions" was incorporated in a similar rule. In that case the purpose and intent of the rule was spelled out in another rule, but we think, even in the absence of such express language, the intent is clear that the Carrier not only has the right but is under a duty to reduce forces where the only alternative would be a reduction in the basic work week, prohibited except on express agreement with the Organization.

Award 805 is authority for the proposition that rules such as the one in question are not absolute guarantees, although the Carrier must exhaust "its possibilities of making force reductions through the laying off of junior men." But here the record shows this was done, and there remains no basis for holding the Carrier in violation of Rule 14, Section 2, paragraphs (a) and (b).

There is greater difficulty attendant on interpretation and application of Rules 16, 17 and 23. These rules are the subject of a Memorandum of Agreement, as is Rule 14, Section 2, paragraphs (a) and (b), between the Carrier and the Organization, containing revisions effective September 1, 1949, to certain rules in the July 1, 1938 Agreement and Supplemental Memorandum Agreement effective December 29, 1944, between the same parties. The September 1949 Memorandum Agreement is in compliance with provisions of the 40-hour week Agreement made at Chicago, March 19, 1949.

Rules 16, 17 and 23 in the present Agreement are substantially the same as in the 1938 Agreement. Changes have to do primarily with effecting overtime. From all three rules, the words to "cover all services rendered" have been deleted, but the affect thereof was partially nullified when by letter agreement dated July 16, 1949, the parties agreed that despite the elimination of those words there was to be no change in the practice of employes making necessary reports and "time rolls" without additional pay.

The Employes look upon the foregoing rules as monthly guarantees. Some of the earlier decisions of this Board lend weight to that argument. Of particular significance is Award 759 involving a dispute on the same property between these same parties. The question in that case went to the propriety of the Carrier laying off for a few days of the month regular monthly rated employes not paid overtime for work outside their fixed hours. The Board dismissed from consideration all argument about "monthly guar-

antees" and sustained the claim on the general proposition of law that a hiring at a stipulated rate of pay for a term, will, in the absence of evidence to the contrary, be deemed to be a hiring for the term.

Thus, the last cited award is no authority that the rules in question are "guarantee" pay rules. There is even conflict of authority for the general rule of law on which this Board at the time relied. The award is on authority of early English jurisprudence where the method of making industrial labor agreements has a history and effect unlike our experiences in this country. Today, the legal texts hold that the modern and majority rule in the United States is that the hiring at a specified sum per week, month or year is, in the absence of special circumstances, an indefinite hiring which may be terminated at will.

The latest pronouncements of this Board on the subject of applying "guarantee" rules to strike situations are found in Awards 4099 and 5042, wherein it is held in effect that "guarantee" rules are not enforceable during strikes.

The last cited awards adhere more to the basic philosophy of labor agreements. Traditionally, it has come to be accepted in railroad employment practices that when a position has been abolished for legitimate reasons, the rules of the agreement no longer apply to it because the position has ceased to exist. Collective bargaining agreements are not contracts of employment for a term in any true sense. One reason why they cannot be said to fix the term of employment is that the employe is free to withdraw from the service of one employer and enter the service of another at any time he sees fit and the employer has no remedy either for damages or specific performance. Accordingly, there is a total absence of mutuality of obligation, if it can be said on the one hand the employer is compelled to retain the employe for a definite term, but the employe is not compelled to remain in the Carrier's service. Even though a monthly rate of pay should be held to indicate a hiring for the month, the right given the Carrier by Rule 3 of the subject agreement to reduce forces for legitimate reasons, subject to seniority rights, dispels any idea of permanency, or the hiring for a term, in any given position.

We think it better to look upon these agreements for what they really are—rules governing wages, hours of service, and working conditions of employes as long as they remain in the service of the employer, and leave to the Courts questions of general contract law. Therefore, when an employe is taken out of service for legitimate reasons and in accordance with mutually agreed upon procedures, his rights under the agreement for compensation, hours of service, and other conditions of employment are restricted to the extent provided for in the agreement.

The basic philosophy above outlined is not new. In Award 4849, wherein the Board denied the claim, it was stated, in part:

> "The foregoing rule provides for paying the employes within it on a monthly basis. It is not a monthly guarantee rule. The collective Agreements with which we here deal are not contracts of employment as to time. The Carrier agrees to give all work of a class to that class and fixes the rate of payment therefor. When there is no work of a position to be performed, the position may be abolished."

See also Award 5052.

We are not unmindful of earlier precedents which construe rules similar to those present as guarantees under different conditions. Those cases have been carefully examined factually and for rules. It is not the purpose here to overrule those precedents, but rather to permit them to stand as authority for whatever reason they may be found persuasive in dealing with the same

or similar fact situations as are there present. This Board, as it is constituted, and being compelled from time to time to call on the services of referees, must apply and construe the rules of agreement on a case by case basis and can concede infallibility to the views of no one referee as against those of another.

In this case, however, the Board, being of the opinion the agreement was complied with by the manner in which the Carrier reduced forces, and the same was for a bona fide reason and not to evade any obligation by contracts as to employment rights, nor to deny to the employes any other rights enjoyed by them under the agreement, it has been concluded the claim is without merit.

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 has not been violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 26th day of October, 1950.