Award No. 5682
Docket No. TE-5615

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Angus Munro, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

MISSOURI PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Missouri Pacific Railroad Company that

1. The Carrier violated the provisions of the agreement between the parties when on the approximate date of September 9, 1949, it suspended from work during regular assigned hours the employes listed in the attachment (Employes' Exhibit 1), plus such additional employes as it may be later developed were also suspended from work during regular hours, and continued that suspension from work daily thereafter until discontinued on October 24, 1949, or subsequent thereto; and

2. The Carrier shall now compensate, in accordance with the requirement of Rule 8 (f) of the agreement, each and every employe suspended from work during his regular assigned hours, for each and every day such compensation is due because of the violation of Rule 10 (e).

EMPLOYES' STATEMENT OF FACTS: 1. There is an agreement between the parties effective June 1, 1942, amended or supplemented, as to both rules and rates of pay at various times subsequent to the June 1, 1942 Agreement but neither amended nor supplemented as pertains to Rule 10 (e).

2. On the approximate date of September 9, 1949, the Carrier declared certain positions included in the agreement between the parties to be terminated. This action of terminating certain positions was preceded by a telegraphic notice which we quote:

"WESTERN UNION

1949 Sep 4 PM 2 33

SA081 PA219
P. WA1-260 IG Book DL PD—Washington DC 4118P
G E LEIGHTY PRESIDENT, ORDER OF RAILROAD
TELEGRAPHERS
3860 LINDELL BLVD STL—

BECAUSE OF DEFINITE STRIKE NOTICE EFFECTIVE 2:00 PM FRIDAY, SEPTEMBER 9, 1949, FROM ENGINE AND TRAIN-

During each of the revisions listed above, no contention was ever made that Rule 8 (f) or Rule 10 (e) prohibited the Carrier from abolishing positions covered by those agreements. Obviously, many positions have been abolished during the years since World War I, but never before, to our knowledge, have the Employes protested such abolishments on the grounds they were prohibited by the provisions of said rules. Long continued practice under said rules without protest during which time the agreement survived six revisions is conclusive, we think, that the parties to the agreement then in effect, as well as now, had a clear understanding as to the intent and purpose of the rules upon which the Employes now seek to rely in support of this claim.

Certainly it cannot now be honestly or effectively argued that Rules 8 (f) and 10 (e) can be so interpreted as to restrict or prohibit to the Carrier the exercise of its inherent right to abolish unnecessary positions, when, in the exercise of its managerial prerogative, it deems it necessary or proper to do so.

All matters contained in this submission have been the subject of discussion in conference and/or correspondence between the parties to this dispute on the property.

This claim should, therefore, be denied as being entirely without support under the provisions of the agreement, and wholly without merit as a matter of equity.

(Exhibits not reproduced.)

OPINION OF BOARD: This is a claim advanced by The Order of Railroad Telegraphers on behalf of telegraphers as a class. In particular Petitioner avers the hereinafter described acts, conditions and omissions on the part of Carrier to be repugnant to Schedule Articles 8 and 10 as well as all other Schedule Rules pertinent hereto.

On or about the 4th of September, 1949, Carrier caused to be sent by Western Union to Claimant's President the following message, "Because of definite strike notice effective 2:00 P. M. Friday, September 9, 1949, from engine and trainmen in road and yard service, Missouri Pacific Railroad, not including International-Great Northern or Gulf Coast Lines, regret it will be necessary within next 48 hours to serve notice job termination on majority of employes of Missouri Pacific Railroad represented by your Organization as operations will be stopped after strike date. Carrier has offered accept recommendations President Truman's Emergency Board every respect and nothing stands in way of terminating this emergency except absolute refusal engine and trainmen to likewise agree to dispose of the matter. Regret this situation which is not of our making but there seems to be no alternative."

On or about the 5th of September, 1949, Carrier caused to be issued to its employes covered by its Schedule with Claimant, substantially the following message: "Effective at the close of shift Friday, September 9th, your job as telegraph operator is abolished." Assuming but not, at this point, deciding Carrier may abolish jobs, the question arises with reference to the sufficiency of said messages especially the last above mentioned. The notice in question was similar to that in Award 5529 let by this Board on October 29th, 1951. In that case the notice was held to be sufficient; we will follow such ruling.

We must now determine whether Carrier may abolish a job bearing in mind the fact Schedule Rule 8 (f) has no tail. Schedule Rules 13 and 14 mention abolishing positions which, of course, can only mean it can be done. We find nothing in Rule 13 setting up a condition precedent to Carrier's exercising its right. Nor does Rule 14 place a restraint on Carrier, on the contrary Carrier may or may not intend to reestablish a job within a time certain subsequent to the act of abolishment and then there

is no prohibition relative to a change of intention concerning reestablishment. The Rule concerns itself with the method to be used in the process of reestablishment. It therefore follows the reason why Carrier may decide to abolish a job or jobs is immaterial. Accordingly Schedule Rule 8 (f) has no application in that there can be no regularly assigned employe to a job not in being or existence. Furthermore Petitioner repeatedly was concerned with what it styled as a bona fide abolishment thereby recognizing there can be such an act.

We have found the Schedule contains no inhibition with reference to abolishing jobs and that notice of intention was sufficient. We now pass to the question of whether said abolishment was bona fide. It is well settled by a long line of authorities the test is what acts, conditions, and omissions were subsequently committed by Carrier, that is to say, was the work in fact abolished and did Carrier subsequently strictly comply with Schedule rules in creating new jobs. As evidence of Carrier's state of mind, Petitioner alleged Carrier in several instances did not comply with the time element referred to in Rule 13 (c). Assuming but not deciding such allegation to be true we do not see how the validity of the abolishment notice is effected thereby. The rule only means when an employe is served with the type of notice here before the Board he is entitled to 5 days' compensation before the notice becomes effective. We do not understand the Organization to contend the second paragraph of said section (c) to be here involved; however, in event such be the case we think unquestionably Carrier's act constituted a suspension rather than a job abolishment in so far as a particular employe is concerned. But such observation concerns a matter not here before us.

Petitioner further averred, as evidence the various jobs coming within the scope of the Schedule were not abolished, the fact that subsequent to the effective date referred to in the several notices work remained and in fact was performed by the respective holders of the various jobs. In particular, Petitioner alleges said work to consist of the following services, viz: furnishing information to the public, selling tickets, delivery of paychecks, make up time roll and register applicants for unemployment insurance benefits. We do not mean to say the foregoing list of duties is all inclusive, there may have been others. Nor are we finding that each individual who worked as aforesaid performed each and all of said duties. We are not dealing with a situation concerning a gradual decrescence of work but on the contrary with a sudden or abrupt discontinuance of many duties pertaining to a job followed by a total cessation within a relatively short space of time. Under the authority of Award 439, opinion by Arthur M. Millard, a carrier may discontinue or abolish a job before all of the work disappears. Is that situation different from the case before us? In Award 4759, opinion by Charles S. Connell, it is held a job may be abolished when a substantial amount of the work thereof has ceased to exist. In Award 5127, A. Langley Coffey found when there is no longer need for a full-time position extra employes may be used to perform casual or intermittent service where such situation occurs by reason of a decline in business. The case before us goes further than a decline in business, it includes a complete closing down of business. It seems to us therefore we have a more compelling reason to find nothing to compel Carrier to continue a regular assigned position for the performance of the casual duties especially since they also soon ceased to exist.

Petitioner further alleged, in the alternative, that the above mentioned casual duties were performed by parties not within the Schedule. Assuming but not deciding employes within the Schedule do have the exclusive right to perform any or all of the alleged acts said employes must place themselves in a position of availability in order to enjoy said right. By this we mean one who is affected by a notice of abolishment must first comply with the terms and provisions of Schedule Rule 13 in order to complain of Carrier's acts as aforesaid. No such showing has been made.

Petitioner further alleged Carrier's acts in restoring its operations as being indicative the said notice of job abolishment was not bona fide. We

find nothing wrong in Carrier's proposing a plan to Claimant to avoid Schedule Rule 14. The proposal was rejected and that is that. The question then arises, did Carrier comply with Schedule Rules relative to establishing new positions or, stated another way, did Carrier deny to any employe the exercise of those rights he had acquired under and by virtue of the Schedule seniority rules? The record does not reflect such action. In the absence of an exercise of rights Carrier did only what normally might be expected, viz: place on the newly created positions those employes who had occupied similar abolished positions.

Our attention was directed to a newspaper statement issued by Carrier's chief executive as indicating an intention on the part of Carrier to consider the work attached to the jobs in question as suspended rather than abolished. The evidence being hearsay it is entitled to little or no probative value. The facts of record do not support the conclusion drawn by Petitioner from said statement.

We now pass to the question of non-release of those employes who were under bond. Unquestionably the matter of bonding an employe is for the benefit of Carrier since it pays the premium thereon. We find no provision requiring Carrier to release an employe from his bond when his position is abolished and we think it highly significant that Carrier has not charged any employe during the time his job was abolished with malfeasance or misfeasance of office.

Nothing we have said herein is to be construed or interpreted as holding any individual employe is hereby precluded from claiming compensation for services or duties performed by him or for services or duties he was entitled to perform but in fact were performed by a person or persons outside the Schedule subsequent to the abolishment of his job or that Carrier acted in derogation of his rights to a particular job when it created and established same. Such matters were not included in the claim before us.

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 evidence of record does not warrant an affirmative finding.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Acting Secretary

Dated at Chicago, Illinois, this 13th day of March, 1952.