Award No. 14705
Docket No. CL-14180

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

David Dolnick, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES

WABASH RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5408 that:

(1) Carrier violated the Schedule for Clerks' Agreement, Rule 20—Reducing Forces, paragraph (b) as amended by Article III of the National Agreement signed at Chicago, Illinois on June 5, 1962, effective July 16, 1962 when it failed to give the required five (5) working days notice on the abolishment of the position of Warehouse Foreman at Ft. Wayne, Indiana.

(2) The position of Warehouse Foreman be re-established until proper notice has been given in full compliance with the rules of the Agreement effective May 1, 1953.

(3) The occupant, at the time of the abolishment, Mr. L. A. Hullinger be paid the difference between the rate of Warehouse Foreman of $21.7224 per day and that of Assistant Cashier $20.4424 per day or $1.28 per day for August 7, 1962 and all subsequent work dates until this claim is settled.

NOTE: The monetary wage loss of Mr. Hullinger to be determined by joint check of payroll and other necessary records.

EMPLOYES' STATEMENT OF FACTS: On July 9, 1962, bulletin notice signed by Superintendent F. C. Flynn was posted on the Montpelier Division which reads as follows:

"WABASH RAILROAD COMPANY

Montpelier, Ohio, July 9, 1962

Clerical Employes All

Position Warehouse Foreman — Agents Office

c— Fort Wayne, Indiana — Salary D—$21.7224 day

Bid will be accepted up to and including July 14, 1962.

CARRIER'S STATEMENT OF FACTS: Prior to August 7, 1962, Mr. L. A. Hullinger was assigned to the position of warehouse foreman in the freight house at Ft. Wayne, Indiana, from 8:00 A. M. to 5:00 P. M., with one (1) hour off for lunch, Monday through Friday, rate $21.7224 per day.

Ft. Wayne, Indiana is a point located on the main line of this Carrier between Peru, Indiana and Detroit, Michigan, being 147 miles west of Detroit.

There has been a steady decline in the volume of less than carload business at Ft. Wayne for several years.

During the year 1961, Ft. Wayne handled a total of 1,317,094 pounds of less than carload freight and from January to July, inclusive, in the year 1962, handled 741,628 pounds of less than carload freight, which is considerably less than in the year 1938 when a total of 10,075,935 pounds of less than carload freight was handled and considerably less than in the year 1946 when a total of 21,817,069 pounds of less than carload freight was handled.

The position of warehouse foreman at Ft. Wayne, Indiana had been established many years ago when the amount of less than carload business handled to and from the freight house in drayage transfer to connecting lines at Ft. Wayne was of far greater volume than now, such in turn necessitating the supervision of far greater freight house forces than are in existence at the present time.

The volume of work at Ft. Wayne was analyzed by Division officers. The result of their study indicated that the force at Ft. Wayne was excessive for the work to be performed and that the business and force at Ft. Wayne is no longer such as to warrant the employment of a warehouse foreman, and a bulletin was issued dated August 1, 1962, abolishing the position of warehouse foreman upon completion of work Monday, August 6, 1962.

Mr. Hullinger worked his position of warehouse foreman on August 1, 2 and 3, 1962 (was off on his rest days, August 4 and 5, 1962) and was then absent for one week vacation with pay commencing Monday, August 6, 1962, being paid one day at the warehouse foreman's rate for each date, August 6, 7, 8, 9 and 10, 1962 (Monday through Friday).

A bulletin was issued on August 7, 1962, advertising for bid Position No. 7, Assistant Cashier at Ft. Wayne, Indiana, assigned to work from 8:30 A. M. to 5:30 P. M., with one hour out for lunch, Monday through Friday, rate $20.4424 per day.

Mr. Hullinger bid for and was assigned to Position No. 7, Assistant Cashier at Ft. Wayne, Indiana, commencing work thereon Monday, August 13, 1962, the first work day subsequent to his week of vacation.

Copy of all of the correspondence had between the parties to this dispute is attached hereto and made a part hereof, marked Carrier's Exhibit "A".

(Exhibits not reproduced.)

OPINION OF BOARD: Rule 20 (b) of the applicable Agreement reads:

> "(b) In case of reduction of force or abolishment of position (except temporary positions) notice of same will be posted five (5) days prior to the effective date of such reduction or abolishment."

Article III of the June 5, 1962, Agreement amended Rule 20 (b) as follows:

> "Effective July 16, 1962, existing rules providing that advance notice of less than five (5) working days be given before the abolishment of a position or reduction in force are hereby revised so as to require not less than five (5) working days' advance notice. With respect to employes working on regularly established positions where existing rules do not require advance notice before such position is abolished, not less than five (5) working days' advance notice shall be given before such positions are abolished. The provisions of Article VI of the August 21, 1954 Agreement shall constitute an exception to the foregoing requirements of this Article."

It is admittted that Carrier's notice to abolish the position did not meet the strict requirements of Article III. It gave only four (4) working days notice instead of five (5). It is also admitted that Claimant was paid for five (5) working days after August 1, 1962. He was on vacation from August 6 through August 10 and he was paid for those days at the rate of pay for the abolished position.

The basic issue is whether the defective notice nullified the abolishment or whether it merely postponed the abolishment until the expiration of the five (5) working days.

Award 6354 is directly applicable to the issue here in dispute. Article 37 of the Agreement in that case provided:

> "Before a position is abolished the employe(s) directly affected shall be given not less than 48 hours' advance notice."

We held as follows:

> "Article 37 provided for a 48-hour notice. The failure of the Respondent to give such notice was a violation of the Agreement but each employe adversely affected is entitled to compensation only in such sums as would have accrued to him had the notice provision of the Article been complied with."

The Agreement involved in Second Division Award 1738 provided that in reducing the work force, "Four days' notice will be given employes affected * * *" In sustaining the claim, that Division said:

> "It should be understood that individual claims should be limited to the time such claimant actually lost from his regular assignment by reason of the carrier's failure to give the notice. **In no instance should such allowance be for more than four days.**" (Emphasis ours.)

In Award 11488 this Division sustained the claim for three days' pay at the pro rata rate. The agreement provided for "at least seventy-two (72) hours advance notice" when a position is abolished. The notice was defective and the Claimant requested compensation "for January 16, 1958 and each subsequent day to and including May 5, 1958."

This Board has no authority to direct the Carrier to reestablish the abolished position.

The purpose of advance notice before a position is abolished is to advise the incumbent employe and to give him time to exercise his seniority rights and thus reduce, if not eliminate, probable loss of earnings.

Since Claimant did not sustain any loss of earnings during the five (5) working days following the date of the notice, he is entitled to no further compensation.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

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 Carrier violated Rule 20(b) as amended by Article III of the Agreement of June 5, 1962.

That Claimant has sustained no loss of earnings.

AWARD

Part (1) of Claim sustained.

Part (2) and (3) denied, all in accordance with the Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 29th day of July 1966.

LABOR MEMBER'S CONCURRENCE AND DISSENT TO AWARD 14705 (DOCKET CL-14180)

The Referee correctly found, as admitted by Carrier in the Record, that a 4-day, rather than the required 5-day, notice of abolishment of the position was issued.

Granted, having been on paid vacation, the Claimant lost no money as a result of Carrier's premature abolishment notice. Therefore, the Referee permitted Carrier to violate the Agreement, imposing no deterrent and giving it the green light to repeat its action in future instances and defy the unambiguous terms of the Agreement.

One day's time was involved. One day is fatal to the Employes' claimed violation if a time limit elapses, being barred from filing a particular claim a second time because of the time lapse the first time. In such a claim, it is

actually considered as not having been filed, due to a 1-day violation of time limits.

Rule 20(b) of the involved Agreement is also a time limit rule, the provisions of which in this case were violated by Carrier. In conformity with what the Employes must accept with regard to time limits, the Referee should have found that such 1-day violation by Carrier likewise rendered the notice of abolishment a nullity, that such notice had never been issued.

Certainly, no provision of the Agreement permits Carrier to violate it just because no employe suffered loss of pay as a result of such violative action. In this dispute, the Referee has failed to exercise the authority vested in the Board to deter the violator.

The Findings in Award 11701 of this Division, with Referee Nathan Engelstein participating, amply support the reason for this dissent:

> "We are of the opinion that the fundamental factor in this dispute is the violation of the Agreement. For Carrier to concede the breach and then to assert that Claimant is not entitled to reparations is virtually to ignore its responsibility as a party to the Agreement. For an Agreement to be effective, both parties must uphold the terms. It is not enough to recognize the breach without expecting the violator to accept the consequences for its act. We, therefore, cannot sustain Carrier's position that Claimant must show that he 'was in some manner adversely affected by the action of the Carrier' for this factor is irrelevant and distracts attention from the real issue of the admitted violation of the Agreement. The argument that compensation to Claimant would be in the nature of a penalty is likewise extraneous, for it brushes aside the sanctity of the Agreement. Claimant's behavior or employment income are not the conditions that caused the breach. We regard the claim as one for damages rather that a claim for a penalty. Accordingly, we hold that Mr. Swafford is entitled to full indemnification for his claim."

Except for a few ill-advised instances, prior and subsequent decisions of the Board have upheld that priniciple, primarily and correctly following, in the writer's opinion, the Report of the Emergency Board created by the President of the United States on February 8, 1937, to wit:

> "The penalties for violations of rules seem harsh and there may be some difficulty in seeing what claim certain individuals have to the money to be paid in a concrete case. Yet, experience has shown that if rules are to be effective there must be adequate penalties for violation."

For the above reasons, I dissent.

C. E. Kief
Labor Member
8-8-66

Labor Members Concurrence and Dissent to Award 14705 (Docket CL-14180).

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