NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 19968
Docket Number MW-19710

C. Robert Roadley, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Burlington Northern Inc.
((formerly Spokane, Portland and Seattle Railway Company)

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

(1) The Carrier violated the Agreement when it laid off Messrs. J. Gonzales, R. Ramirez, R. Taskey, D. Dodge, L. Scully, M. Gallagher, A. Munoz, D. Crook, P. Delk, C. Irwin, M. Hubbell, D. Preston, F. Jones, D. Barton, D. Lowry, F. Banucles, R. Sork, C. Reed, S. Knecht, S. Johnson and J. Hurd on September 21, 1970 without five (5) working days' advance notice (System File 334 F/MW-32 - 2/1/71).

(2) Each of the above-named claimants be allowed forty (40) hours of pay at their respective straight time rates because of the violation referred to in Part (1) hereof.

OPINION OF BOARD: This claim covers twenty-one (21) employees who were assigned as Laborers on various Gangs in the Carrier's Track Department and whose services were terminated on September 21, 1970. All of the employees had worked periods of less than ninety (90) days at time of termination of employment. Petitioner alleges that Claimants are entitled to forty (40) hours pay at their respective straight time rates account not having received five (5) days advance notice as contemplated in Article III of the June 5, 1962 National Agreement covering "Advance Notice Requirements."

Petitioner has asserted that the involved employees were regularly assigned employees, had acquired seniority as provided by Rule 1 of the Agreement, were the victims of a reduction in force, and were entitled to the provisions of the Agreement including the five (5) days notice provision referred to above.

Carrier, on the other hand has stated that the employees were each in the status of a probationary employee, none having completed the ninety (90) day probationary period covered by Rule 3 of the Agreement, had not acquired seniority, and that the employees were terminated account their applications having been disapproved and that they were not placed on furlough or the subjects of a reduction in force. Carrier readily admits that had the employees been furloughed then they would have been entitled to the five (5) days advance notice, but such was not the case.

As exhibits "A" through "J", Petitioner has presented copies of Carrier "Change in Force Report" in an effort to substantiate its position that a force reduction was the cause of the action taken. These Reports are made by the employee's Foreman and carry, as part of the information furnished, a space headed "Nature of Change." It is interesting to note that many of the Reports showed the Nature of Change to be Force Reduction, some showed Dismissed and some showed T.C. (time check - issued to terminated employees). Additionally, Petitioner pointed out that one of the employees involved was subsequently re-employed on October 19, 1970 in an effort to demonstrate, therefore, that the applications for employment of the Claimants had not been rejected by the Carrier.

The record shows that none of the employee exhibits "A" through "J" were discussed on the property but were introduced for the first time with Petitioner's submission to the Board. Consequently, these exhibits are not properly before us. However, even if such exhibits were to be given weight in our determination the inconsistency in the "Nature of Change" entries, as noted above, contributes little toward reaching a logical conclusion. On the other hand, the fact that one of the affected employees was later re-hired as a new employee is conclusive evidence that, at least as far as he is concerned, he was not in the status of a furloughed employee, at the time of re-hire, less than one month after the claim date in this case.

Article II, Rules 1 and 3 are fairly standard agreement rules. Rule 1 establishes an employee's seniority date as the date of "the first paid service", providing (under Rule 3) that said employee's work is satisfactory and his application for employment has not been declined by the Carrier within ninety (90) calendar days from date of hire. Rule 3 grants new employees temporary seniority pending approval of their applications for service. Obviously, if an application for service is not approved and such employee is terminated prior to the ninety (90) day period specified in the Rule then, under those conditions, the employee acquires no seniority at all. Since all of the Claimants were in their probationary period on September 21, 1970 the Carrier had the right to terminate them; nothing in the Agreement provides otherwise.

Article III, of the June 5, 1962 Agreement, states in pertinent part:

> "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) days' advance notice."

Petitioner has not shown by substantial evidence of probative value that there was either a job abolishment or a reduction in force involved in the instant case. On the contrary, it is clear that the Claimants were probationary employees, had not acquired the status of being permanently employed, and held only temporary seniority pending the approval of their applications for service. Under these circumstances the Carrier did not violate either Rule 3 of the Agreement or Article III of the June 5, 1962 Agreement as alleged. We will therefore deny the claim.

For further discussion on the status of probationary employees see Awards 19117, 19674, 13600 and many others.

Also, see Award 13301 dealing with the distinction between termination and furlough which was the subject of a similar claim for five days' advance notice where probationary employees were terminated.

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 the Agreement was not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 28th day of September 1973.