

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20259
Docket Number CL-20236

Frederick R. Blackwell, Referee

(Brotherhood of Railway, Airline and Steamship
(Clerks, Freight Handlers, Express and
(Station Employees

PARTIES TO DISPUTE: (

(Pacific Fruit Express Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood
(GL-7354) that:

(a) The Pacific Fruit Express Company violated the Clerks' Agreement when on August 27, 1970 it improperly abolished Position C-149 Iceman; and,

(b) The Pacific Fruit Express Company shall now be required to allow employee D. F. Gochenour eight (8) hours additional compensation at rate of Iceman for each date August 28, 29, 30, September 2, 3 and 4, 1970.

OPINION OF BOARD: On August 24, 1970, a strike occurred in the vegetable fields in the vicinity of Salinas, California; as a result, on August 26, to be effective August 27, the Carrier gave the Claimant sixteen (16) hours notice of abolishment of his position as Iceman C-149 at Council Bluffs, Iowa, a point about 2,000 miles from Salinas. The notice expressly stated that "Due to current strike...in Salinas" the work of C-149 "no longer exists." The Claimant was recalled to work on September 5, 1970, and again advised that his position would be abolished, effective September 11, 1970; in this instance, the Carrier gave five (5) days notice of the abolishment. Under date of September 8, 1970, the Claimant filed claim for time lost between August 26 and September 5, on the ground that Carrier should have given five (5) working days advance notice of the abolishment and that Carrier had violated Rule 13 (Reduction In Force) by giving only sixteen (16) hours notice of the abolishment. The Carrier's defense is that the prevailing facts entitled it to use the sixteen (16) hour notice provision in Rule 13(b) in lieu of the five (5) day notice provision in Rule 13 (a). Rule 13, in pertinent part, reads as follows:

'REDUCTION IN FORCE

Rule 13 (a) Advance notice in writing of not less than five (5) working days will be posted on bulletin boards or places accessible to employees affected of proposed reduction in regular and bulletined positions in all classes. When forces are reduced, seniority rights shall govern.

"(b) Not more than sixteen (16) hours' advance notice will be required of reduction in force under emergency conditions of flood, snow storm, hurricane, earthquake, fire or strike, provided the Company's operations are suspended in whole or in part and provided further that because of such emergency the work which would be performed by the incumbents of the positions to be abolished or the work which would be performed by the employees involved in the force reductions no longer exists or cannot be performed."

Paragraph (b) is an exception to paragraph (a) of Rule 13 and, since the Carrier invoked the exception, the burden is upon the Carrier to show that the requisite conditions which make the exception applicable do in fact exist. In Award 15858, involving the same text as Rule 13(b), this Board said:

"...the burden of proof is on the Carrier to show by a preponderance of evidence that the exception was to be activated in this case."

See also Award Nos. 15971 and 19123. But compare Award Nos. 18294, 17674, and Second Division Award 2095, which appear to be contra.

The Carrier's evidence, in justification of its use of Rule 13 (b), is found in the following extract from a November 25, 1970 letter of Carrier's Assistant General Manager.

"The question of the existence of emergency conditions of strike being prevalent in the Salinas, California shipping area should be unquestionable, since the jurisdictional dispute that erupted practically overnight on August 24, 1970, between the United Farm Workers Organizing Committee and the Teamster's Union was publicized nationally by all news media. Picketing of field operations in an effort to organize field workers immediately spread to all major growers in the area resulting in the closure of all lettuce coolers in the entire loading district.

PFE carload shipments dropped drastically to the point where it was obvious that an immediate force reduction was necessary due to curtailment of work caused by the decreased car loadings. As example, for the seven-day period August 19, 1970 to August 26, 1970 (the date of sixteen (16) hour notice given claimant of job abolishment under Rule 13(b)) there were a total of 2,093 perishable shipments that departed eastbound from the Roseville, California, concentration point for delivery to Union Pacific at Ogden. The subsequent seven-

"day period, August 26, 1970 to September 2, 1970, there were only a total of 1,212 perishable shipments, a decrease of 881 perishable shipments, or a 42 percent decrease in total perishable shipments moving overland across the Union Pacific railroad. Again, there should be no question regarding the necessity of the PFE to suspend in part the operations of the company under emergency conditions.

In regard to the question you raised in conference concerning the subsequent recall of claimant to report on September 5, 1970, and the immediate notice of abolishment of his position under Rule 13(a) with five (5) working days' notice, said position to be abolished effective with completion of work shift Friday, September 11, 1970. As explained in conference, the initial abolishment of this position was made under Rule 13(b) due to the existence of emergency conditions. At that point, there was no possible means to foretell the duration of such an emergency. As conditions became progressively worse and more confused with series of injunctions and lawsuits and countersuits between the UFWOC and the Teamster's Union, on September 4, 1970, it became apparent that this confrontation would carry through the remainder of the shipping season from the Salinas shipping district. It was decided at that point to recall all positions temporarily furloughed under Rule 13 (b), and abolish said positions with five (5) working days advance notice under Rule 13(a) due to the impending seasonal decline of perishable shipments originating from Northern California coupled with the decline caused by the emergency."

The foregoing shows that a farm workers' strike erupted unexpectedly in the Salinas, California, shipping area, resulting in a 42% decline in the eastbound shipment of perishable products. On this evidence we find that emergency conditions due to the Salinas strike did exist and that such conditions caused Carrier's operations to be "suspended....in part" within the meaning of Rule 13(b). Contrary to the Employees' argument, the term "strike" in Rule 13 (b) does not refer only to a strike by Carrier's own employees and thus the strike by farm workers meets the "strike" requirement in the rule. See Award Nos. 15858 and 18294, among others. We come now to the question of whether the facts also meet the requirements of the last proviso in Rule 13(b), namely:

"...that because of such emergency the work which would be performed by the incumbents of the position to be abolished or the work which would be performed by the employees involved in the force reductions no longer exists or cannot be performed."

The Carrier's evidence on this point is the same as the evidence previously mentioned, i.e., eastbound shipments declined by 42% because of the strike. On this point, however, the mere showing of a 42% decline in shipments does not, standing alone, show that the work of the abolished position "no longer exists." Neither in the November 25 letter of the Assistant General Manager, nor elsewhere in the record, does the Carrier assert or show that the work of the Iceman's position did not exist from August 26 to September 5. Also, although the 42% decline left 58% of the shipments in existence, the Carrier did not assert, or offer any evidence to show, that this 58% did not involve work of the abolished position. We therefore conclude, on the whole record, that the Carrier's evidence does not establish the existence of the last proviso in Rule 13(b) and, accordingly, we shall sustain the claim.

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 Employees involved in this dispute are respectively Carrier and Employees 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 violated.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

A.W. Parker
Executive Secretary

Dated at Chicago, Illinois, this 31st day of May 1974.