

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 21262

Docket Number CL-21062

Frederick R. Blackwell, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and
(Steamship Clerks, Freight Handlers,
(Express and Station Employees
(The Chesapeake and Ohio Railway Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood,
GL-7738, that:

(a) The Carrier violated terms of the Clerks' Agreement and supplements thereto, and the Mediation Agreement of February 25, 1971, when effective with the close of business Wednesday, July 28, 1971, it improperly abolished the position of Rate Clerk, A-401, rate \$38.78 per day, located in the Zone Accounting Bureau, Richmond, Virginia under the provisions of Article VII, Paragraph (a), of the February 25, 1971 Agreement;

(b) That the Carrier shall now be required to compensate Mr. C. A. Martin, who was the incumbent of Position A-401, the difference between the rate of pay of position A-401, \$38.78 per day, and the rate of Bill Clerk, A-409, \$34.62 per day, for each work day beginning with Thursday, July 29, 1971, and continuing until the day he was returned to Rate Clerk Position A-401;

(c) That each employee who was subsequently displaced and/or adversely affected as the result of the improper abolishment of Rate Clerk Position A-401 be so compensated for any loss in earnings sustained during the period Position A-401 was temporarily abolished;

(d) That a joint check of the Carrier's records be made to determine the employees involved and/or adversely affected as the result of Clerk Martin's displacement on the position of Bill Clerk effective July 29, 1971.

OPINION OF BOARD: The Carrier issued a July 28, 1971 notice which abolished the Claimant's position of Rate Clerk, A-401, Zone Accounting Bureau, Richmond, Virginia, at the close of business that day. The Employees contend that such action was violative of the Agreement as the Claimant was entitled to five days notice of the abolishment. The Carrier says that its action was proper because its Richmond operations were subject to emergency conditions within the purview of Article VII of the February 25, 1971 Mediation Agreement. The conditions resulted, according to the Carrier, from a selective strike by the UTU against several

Carriers not including this Carrier; however, despite being omitted as a strike target, the Carrier says that the strike impacted on its connecting railroads to an extent which produced emergency conditions at its Richmond operations. The strike lasted from July 15 to August 4, 1971; the position in question was re-established effective August 4, 1971.

The parties agree that the confronting dispute is controlled by the following portion of Article VII of the February 25, 1971 Agreement:

"Rules, agreements, or practices, however established, that require advance notice to employees before abolishing positions or making force reductions are hereby modified to eliminate any requirement for such notices under emergency conditions, such as... labor dispute... provided that such conditions result in suspension of a carrier's operations in whole or in part. It is understood and agreed that such force reductions will be confined solely to those work locations directly affected by any suspension of operations."

The above provision allows immediate abolishment of positions when the conditions set out in the provision are factually established, and thus the effect of the provision is to provide an exception to the normal requirement of five working days pre-abolishment notice where the requisite conditions are met. Since the Carrier is the party invoking the provision or exception, the burden is on the Carrier to establish that the conditions which render the provision applicable did in fact exist. Award No. 15858.

On the property the General Chairman submitted data in a January 26, 1973 letter which reflected that the waybill volume at the Richmond Zone Accounting Bureau increased from 9,874 for the period June 21 to July 20, 1971, to 11,685 for the period July 21 to August 21, 1971, for a total increase of 1,811. The General Chairman's letter asserted that these data negated the notion of any emergency or suspension of operations and also suggested a joint check of the Carrier's records if the Carrier considered the waybill data insufficient to show that no emergency had occurred from the strike. The Carrier offered no evidence on the property to rebut the Employees' evidence, but the Carrier contends before the Board that the waybill data have no probative value because they reflect the activity for the period before, during, and after the strike and thus fail to show that business activity increased for the period limited to the strike. The Carrier further contends that an emergency is established by the fact that the strike resulted in the temporary suspension of its interchange with the Southern Railway, which was struck by the UTU.

In assessing the foregoing and the whole record, it is concluded that the Carrier has not met its burden to prove that the conditions which authorize the exception did in fact exist. A statement on the Southern interchange, at page 14 of the Carrier's Submission, reflects that a degree of decline in business at Richmond resulted from the strike, but this evidence is too limited in scope to be taken as a realistic indicator of the activity at Richmond during the strike period. The Carrier's factual contentions were sharply challenged by the Employees from the outset of this dispute and the Carrier was thus charged to provide evidence relative to the net decline, if any, in business activity at Richmond as a result of the strike. The Carrier failed to provide such evidence on the property and the exhibits (M, N, and O) submitted for the first time in its Rebuttal Brief come too late for consideration by the Board. The Carrier has thus not met its burden to prove that an emergency existed and the claim must therefore be sustained.

Having found the claim to be meritorious, it is now in order to comment on the parties' contentions concerning the substance of the compensatory Award. The Carrier contends that, even if the basic claim is allowed, paragraphs (c) and (d) of the claim should be dismissed because the Claimants covered by such paragraphs have not been named therein. The Employees respond that the omission of such names is insignificant because the entitled claimants can be readily identified. This issue has been resolved by numerous prior authorities with conflicting results. In this case the record indicates that the named Claimant held one of two positions which were abolished in the Richmond Zone Accounting Bureau by the Carrier's July 28, 1971 notice. Further, the record contains all of the facts necessary to adjudicate the direct effects of the Carrier's action upon the named Claimant. There is thus no necessity for the record to reflect the details of the indirect effects of the Carrier's action upon other employees. In short, all of the facts necessary to adjudicate the merit issue are before the Board and in addition there is no indication that the identification of the paragraphs (c) and (d) claimants will pose any undue burden for the Carrier. In these circumstances it is appropriate to sustain paragraphs (c) and (d) of the claim. Awards Nos. 3687, 5107, and 18447. The claim will accordingly be sustained as stated except that, in the implementation of the Award, such notice as was in fact given by the Carrier shall be taken into account.

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;

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That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

The Agreement was violated.

A W A R D

Claim sustained, with due consideration to be given to such notice as was in fact given by the Carrier.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

A. W. Pauls
Executive Secretary

Dated at Chicago, Illinois, this 15th day of October 1976.