NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 24440
THIRD DIVISION Docket Number CL-24236

Ida Klaus, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks,
(Freight Handlers, Express and Station Employes
(
(Chicago, Milwaukee, St. Paul and Pacific Railroad Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-9473) that:

(1) Carrier violated the Clerks' Rules Agreement in Seniority District No. 1 when it arbitrarily reduced forces by abolishing positions starting at 11:59 p.m., February 29, 1980 and continuing to April 18, 1980 without giving the employes affected thereby "not less than five (5) working days advance notice" nor did it issue a standard permanent abolishment notice until April 18, 1980.

(2) Carrier shall now be required to compensate all employes affected by the temporary suspension of their positions an additional eight (8) hours pay at the rate of their assigned position which was abolished, or at their protected rate, whichever is greater, starting either on March 1, 1980 or on the date their respective positions were temporarily abolished, and for each workday until their positions were permanently abolished as of 11:59 p.m. April 18, 1980.

NOTE: Some of the claimants and positions held here are listed in Attachment A.

Where positions are not listed and/or where the occupants of positions are not listed in Attachment A, same to be determined by joint check of Carrier's records.

(3) Carrier shall be required to compensate all those employes who were displaced by employes whose positions were temporarily abolished as shown in Attachment A, an additional eight (8) hours pay at the rate of their assigned positions, or their protected rate whichever is greater, starting either on March 1, 1980 or on the date they were affected, and for each workday until April 19, 1980.

NOTE: The employes and monetary wage due those employes displaced by employes whose positions were abolished to be determined by joint check of payroll and other necessary records.

OPINION OF BOARD: This claim, brought by the Organization, challenges as a violation of the Agreement the Carrier's failure to give five working days advance notice to employes in Seniority District No. 1 of the abolishment of their positions on February 29, 1980. The Carrier responds that it was not required to give notice. The facts are not in dispute.

On February 25, 1980, the United States District Court, in proceedings for reorganization of the Milwaukee Railroad (the Carrier), granted the Trustee's request for an embargo of certain Milwaukee lines. The Court's Order (No. 290-A) is relevant to this dispute in two basic respects: It directed the Trustee to embargo all specified traffic as of 11:59 P.M., February 29, 1980. It further directed the Trustee to furlough employes specifically as follows, in pertinent part (paragraph 6):

> "As of 11:59 P.M., February 29, 1980, or as soon thereafter as is practical, the Trustee shall furlough all employees not required for the services and operations continued under this Order ... the Trustee shall pay all furloughed employees for services performed up to the date of furlough at the rate at which payments were actually being made prior to the date of furlough, shall make payments required by Paragraph 7 (out of specified funds) and shall provide medical and dental protection to furloughed non-union employees in accordance with the Debtor's existing plans ...." (Underscoring added.)

On February 26, 1980, the Carrier posted "emergency" force reduction notices to all employees in the Seniority District abolishing 33 specified positions, effective 11:59 P.M., February 29, 1980. The notice listed each position by position number and title. The positions were permanently abolished on April 18, 1980.

In a letter dated April 28, 1980, addressed to J. C. Manders, Manager-Accounting Administration, the Organization's General Manager set forth the basic claim now before us. The claim alleges a violation of Rule 12(a) of the Clerks' Agreement by failure to give employees affected by the abolishment advance notice of not less than five working days. It seeks compensation for two categories of employees: Those whose positions were abolished (Item No. 2) and those who were displaced by employees whose positions were abolished (Item No. 3).

A list of positions and of the names of incumbents in the first category is attached to the claim. The claim requests that positions and occupants not listed be determined "by joint check of the Carrier's records." Monetary payment for first category employees is sought for the period from the date of temporary abolishment on February 29, 1980, to the issuance of a standard permanent abolishment notice effective April 18, 1980.

For the individuals in the second category, i.e., those displaced, it asks that their names and the monetary wage due them be determined "by joint check of payroll and other necessary records."

The Carrier opposes the claim on both procedural and substantive grounds. Its procedural arguments, in essence, are directed to the jurisdiction of this Board. At the outset, it asserts that the claim is barred for untimeliness by Rule 36 of the Agreement. Rule 36 provides, in pertinent part:

> "(a) All claims or grievances must be presented in writing by or on behalf of the employe involved, to the officer of the Carrier authorized to receive same, within sixty (60) days from the date of the occurrence on which the claim or grievance is based." (Underscoring added).

According to the Carrier, "presented" means "received." Thus, since Mr. Manders did not receive the claim until April 30, 1980, which was 61 days after February 29 1980, the date of the embargo, it is barred from consideration and must be denied in its entirety. The Carrier cites a number of awards in support of its position.

The other procedural arguments urge that the request for payment to "unknown and unnamed" individuals has no valid basis in the Agreement and is in fact inconsistent with the requirement of Rule 36, that claims must be presented "by or in behalf of the employe involved."

The Carrier maintains further that there is no compelling contractual support for the request for a joint check of the Carrier's records for the purposes specified in both items.

Reserving its position on jurisdiction, the Carrier next addresses the merits of the claim. It defends the failure to give five working days notice of the job abolishment on the ground that the Court-ordered embargo created "emergency conditions" within the meaning of the exception described in Rule 12(a).

The exception eliminates from the scope of the rule:

> "... any requirement for such notices under emergency conditions, such as flood, snow storm, hurricane, tornado, earthquake, fire or labor dispute (a dispute involving the employees of another employer) ...."

In the Carrier's view, the "such as" enumerations are intended only as some examples, not as an exhaustive definition, of what is meant by "emergency conditions." The Carrier sees a similar example in the embargo because it occurred at a specified time and on a specific day, in order to avert a state of cashlessness.

The Carrier also points to a finding of the Interstate Commerce Commission (in a service order for one of the Carrier's lines) that an emergency exists "due to a threatened or existing embargo."

The Organization responds that no emergency within the intendment of the Rule 12(a) exception could be found to exist. This is so, it says, because the word "embargo" is not expressly mentioned in the exception and because, in any event, the particular facts do not establish the existence of an emergency under the exception.

We deal first with the procedural issues.

On the threshhold issue of timeliness, we conclude from a study of Rule 36 and a review of cited awards that the term "presented", as used in the rule, does not have a clear and unambiguous meaning.

The rule itself carries no definition, nor does it offer any helpful guidance as to what meaning the word was intended to have. Thus, the word "presented" is not used consistently in this and other parts of the rule to describe how a claim is effectively initiated. For example, at some points, the word "filed" appears to be used interchangeably with "presented", although the two words might be said to have different meanings elsewhere in the rule.

Awards cited by the Carrier do not, in our opinion, resolve the ambiguity. They do not reflect a uniform view of what the term "presented" means or reasonably should mean. For example, one award expressly found it to mean "received by the Carrier". Another award, however, implies that the claim was "presented" when written. The primary focus of other cited awards appears to be on questions not present in the instant dispute, such as the appropriate official to be addressed, the continuing nature of the violation, or the date of the triggering event.

For these reasons, we have considered it advisable to take a good fresh look at Rule 36 at this time.

The recognized purpose of a negotiated grievance or complaint procedure is to vindicate rights achieved by the agreement. In the process, unsettling uncertainties about those rights are effectively resolved. Bearing in mind that purpose, we deem it to be sound labor-relations policy that doubts as to the precise boundaries of time limits which shut off access to those procedures should, in general, be resolved against forfeiture of the rights sought to be vindicated.

Guided by that policy and by common business practice, we conclude that a fair and reasonable reading of the rule is that a properly addressed claim is effectively "presented" when delivered to the U.S. mails. (Williston on Contracts, Third Edition; Restatement of the Law, Contracts, 2d.). This holding is in no way intended to relax the time limits themselves.

We do not accept the Organization's view that the claim was effectively presented merely by the act of writing the letter stating the claim. It must be shown that the letter was placed in accepted channels of communication. We note the fact that the letter was sent by certified mail and bears an earlier certification number than a similar letter also dated April 28, 1980, (covering another seniority district) which was actually received by the Carrier on April 29, 1980. Accordingly, we find that the claim before us was delivered to the U.S. mails on the day it was written, April 28, 1980, and that it was effectively presented at that time.

We conclude that the claim was timely filed and that it is not barred from our consideration.

As to whether the claim has been validly made in behalf of unnamed employees, we note that the list of positions and names submitted by the Organization reflects a diligent effort on its part to make a precise identification of the claimants in the first category whose positions were abolished. Others in that category who were not named have been adequately identified as possible occupants on February 29, 1980, of the positions listed in the attachment submitted by the Organization. Their identity can be readily ascertained from the records in the Carrier's possession, and it is altogether reasonable to allow a joint check of the records. (See National Disputes Committee Decision 4). Such clearly identifiable individuals are presumed to be properly included among those in whose behalf the Organization, which represents them, has brought this claim (Rule 36, paragraph 4). If they have wrongfully suffered monetary loss by reason of any violation of the notice requirement as to them, they should be appropriately compensated.

As to the unnamed incumbents of unlisted positions in the first category (Item No. 2) and as to all those in the second category who may have been displaced (Item No. 3), we find differently. The record affords no ready or reasonable guidance as to who these individuals may be, or whether they exist at all. To direct the Carrier to ferret out and supply such essential information to the Organization would unfairly shift to the Carrier the Organization's responsibility to investigate and build its own case in the 60 days which the Agreement allows it for that purpose.

Such unknown individuals therefore are not presumed to be included among those in whose behalf the Organization has brought this claim. It would be unreasonable, moreover, to extend to them the benefits of any compensatory award. See: Third Division Award 21135. We will dismiss the claim as it relates to them.

We turn to the merits of the dispute.

The narrow question for resolution is whether, as the Carrier contends, the embargo as such created "emergency conditions" under the 12(a) exception, relieving the Carrier of the five-day notice obligation. On the record before it, particularly the terms of District Court Order No. 290-A, the Board concludes that the embargo did not create such an emergency.

Rejecting the Organization's restricted reading, we agree with the Carrier that the "such as" phrase is simply an enumeration of examples, not an exhaustive definition. We do not agree, however, that an embargo as such constitutes an emergency under the exception.

As numerous decisions of this Board have recognized from the examples listed, the key to the existence of a Rule 12(a) emergency is the sudden, unforeseeable, and uncontrollable nature of the event that interrupts operations and brings them to an immediate halt. We do not believe that an embargo, caused though it may be by an imminent threat of cashlessness, is in itself typically that kind of event. In the instant situation, for example, Order No. 290-A plainly shows that the Trustee sought the embargo. The embargo did not overtake him. In short, it was a planned event, made to occur for reasons of grave business concern. It did not partake of the essential characteristics common to the listed examples.

The Carrier's bare reference to seven isolated instances of abolishment of a single position at each of various locations is inadequate, in our opinion, to establish an accepted rule on this property that an embargo constitutes an emergency condition under the exception.

Nor can we consider the emergency provisions of the Interstate Commerce Commission statute to be controlling for purposes of the exception to Rule 12(a) of the negotiated agreement. The term "emergency", as used in that statute in connection with a threatened or existing embargo, has a special meaning specifically associated with the authority of that agency to direct service. See: ICC Service Order No. 1399, citing 141F Supp. 576.

Even if we were to assume that a court-ordered embargo generally creates an emergency under the Rule 12(a) exception, we could nevertheless not find on the record before us that the particular embargo of February 29, 1980, had that effect. Looking at the Court order, we note that: It did not impose an absolute obligation on the Trustee to furlough employees at the same time as the embargo of traffic. If circumstances required him to wait beyond the time of the embargo, he could furlough employees "as soon thereafter as is practical."

It is the Board's opinion upon a close reading of the Order's paragraph 6 that the need to fulfill the five-day notice obligation may reasonably be viewed as the kind of circumstance that made it necessary to postpone the date of furlough.

Paragraph 6, which deals in its entirety with the matter of furloughs, reflects the Court's concern for the relevant interests of affected employees. While it makes special provision for the protection of certain interests of "non-union employees", it makes no reference at all to "union employees." It is altogether reasonable to infer from the scope and focus of the order that the Court was aware of the Carrier's relevant special obligations toward "union employees" and believed them to be adequately protected by applicable negotiated agreements. There is no hint of an intent to override those obligations. It is thus reasonable to infer further that the Court allowed time for the Carrier to discharge those obligations when it used the phrase, "as soon thereafter as is practical."

Indeed, in its rebuttal statement, the Carrier has acknowledged the practical impossibility of giving no less than five working days' notice in advance of the embargo. It has not explained, however, why it did not take the additional time authorized by the Court to abolish the positions and furlough the employees.

Accordingly, for all the foregoing reasons, we conclude that the embargo did not constitute an emergency condition under the 12(a) exception and that the Carrier violated the rule by failing to give the employees properly encompassed within the claim no less than five working days advance notice of the abolishment of their positions. We will sustain Item No. 1 of the claim. We turn now to a consideration of the remedy appropriate to the violation found.

It appears that none of the employees properly included in Item No. 2 received the required number of notice days, although some apparently were given greater notice than others. Each employee is accordingly entitled to be compensated for each working day, up to five days, for which he/she was not given notice, at the rate of his/her protected rate, whichever is greater.

These payments are plainly remedial, for they compensate the employees for work they would have performed had they been given the requisite notice. Indeed, the Court's order clearly implies that they shall be paid for those days at that rate. The Carrier's "penalty" argument is simply not applicable here.

There is no valid basis, however, in the Agreement or in the Court's order or in the nature of the violation found, for the Organization's request that affected employees be paid for all days not worked until the standard permanent abolishment notice effective date of April 18, 1980. That request will be denied insofar as it relates to other than the five days of required notice of the force-reduction abolishment of their positions.

As already stated, unnamed incumbents of unlisted positions in Item No. 2 and employees referred to in Item No. 3 are not entitled to any remedy.

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 violated.

A W A R D

Claim disposed of in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: Acting Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 29th day of June 1983.