NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 24445
Docket Number MW-24073

Herbert L. Marx, Jr., Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Chicago, Milwaukee, St. Paul and Pacific Railroad Company

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

(1) The Carrier violated the Agreement when it laid off Mr. Jerry Francisco on October 31, 1979 without benefit of five (5) working days' advance notice (System File C#232/D-2403).

(2) The claimant shall be allowed twenty-four (24) hours of pay at his straight-time rate because of the violation referred to in Part (1) hereof."

OPINION OF BOARD: Pursuant to Order No. 220-C issued by the United States District Court for the Northern District of Illinois, Eastern Division, the Carrier complied with an order to embargo its operations as of November 1, 1979. In connection therewith, the Carrier notified the Claimant (among many others) on October 31, 1979 that he would be laid off at the end of scheduled work that day.

While not contesting the need for the layoff, the Organization argues that the Claimant was improperly denied five working days' notice of such layoff and is entitled to pay for 24 hours. (Claimant was otherwise scheduled to work on November 1, 2 and 3; scheduled off on November 4 and 5; and recalled to work on November 6.)

The Organization cites Rule 9 (d) and its subsequent modification by Article VI of the February 10, 1971 National Agreement, which read in pertinent part as follows:

"RULE 9

...

(d) Not less than five (5) working days' advance notice will be given to regularly assigned employes, not including casual employes or employes who are substituting for regularly assigned employes, whose positions are to be abolished before such reductions in force are made, except:

> Not more than sixteen (16) hours, advance notice will be required under emergency conditions such as flood, snow storm, hurricane, earthquake, fire or strike, provided the Carrier'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 employes involved in the force reductions no longer exists or cannot be performed."

"ARTICLE VI - EMERGENCY FORCE REDUCTION RULE

(a) Rules, agreements or practices, however established, that require advance notice before positions are temporarily abolished or forces are temporarily reduced are hereby modified so as not to require advance notice where a suspension of an individual carrier's operations in whole or in part is due to a labor dispute between such carrier and any of its employees.

(b) Except as provided in paragraph (a) hereof, rules, agreements or practices, however established, that require advance notice to employees before temporarily abolishing positions or making temporary force reductions are hereby modified to eliminate any requirement for such notice under emergency conditions, such as flood, snow storm, hurricane, tornado, earthquake, fire, or a labor dispute other than as defined in paragraph (a) hereof, provided that such conditions result in suspension of a carrier's operations in whole or in part ..."

The Board has no difficulty in determining that the Court-ordered embargo was an "emergency". The Organization argues, however, that it was not a "flood, snow storm, hurricane, tornado, earthquake, fire, or a labor dispute" and claims that because an embargo was not listed among these exceptions, it was not intended to be included. Such would indeed be the case, under well established principles of contract interpretation, but for the inclusion of the phrase "such as" which makes the cited events common examples but not an all-inclusive list. Award No. 19755 (Rubenstein) makes this point in reference to a similar rule:

"We cannot agree ... that Rule 25 is limited to derailments, washouts, snow blockades, fires and slides. If that were so, the phrase "such as" would have been superfluous. The inclusion of that phrase makes the intent of the Rule clear and unambiguous. It intends to apply not only to emergencies listed, but also to others of similar nature."

The Organization further argues that the Court order was dated October 26, 1979, thus permitting the Carrier to give its employes notice prior to October 31 of the November 1 shutdown. This is speculation unsupported by probative evidence. It is not known when the Carrier received the Order what steps might have been in process to delay or set aside the Order. Had the facts been properly developed in this Area it is possible we might have a different result.

In sum, the circumstances are such that the Carrier's compliance with the embargo order, including last-minute notice to the Claimant, was not in violation of the cited rules.

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: Acting Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

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