NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 24446
THIRD DIVISION Docket Number CL-24211

Martin F. Scheinman, 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-9463) that:

(1) Carrier violated the Clerks' Rules Agreement in Seniority District No. 4 when it arbitrarily reduced forces by abolishing six (6) positions effective 11:59 p.m., October 31, 1979 without giving the employes affected thereby "not less than five (5) working days advance notice", nor did it issue a standard abolishment notice as required.

(2) The Carrier shall be required to compensate all employes affected an additional eight (8) hours pay at the rate of their assigned position which was abolished, or at their protected rate, whichever is greater, for November 1, 1979 and for each work day until they were returned to service.

Note: Claimants and position held are as follows:

| | |
|---|---|
| V. Zaric | -Position #23710 - Janitor |
| - | -Position #13530 - Clerk |
| D. Gahagan | -Position #13850 - Keypunch/Clerk |
| G. Rucks | -Position #23690 - Steno-Clerk |
| B. Plath | -Position #23620 - Clerk |
| - | -Position #13870 - Clerk |

Where occupants of positions are not listed, same to be determined by joint check of Carrier's records.

(3) Carrier shall be required to compensate all those employes who are displaced by employe whose positions were abolished, an additional eight (8) hours pay at the rate of their assigned position, or their protected rate, whichever is greater, for November 1, 1979 and for each workday until they were returned to service.

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 protests Carrier's abolishment, on October 30, 1979, of six bulletined positions without providing five working days' notice to the affected employees. The Organization maintains that the failure to give such notice violates Rule 12 of the Agreement. It seeks appropriate compensation for the incumbents of those positions as well as compensation for other employees displaced by the incumbents as a result of Carrier's abolition of the positions in question. Carrier defends on the grounds that the abolition occurred as a result of an emergency, thereby obviating the need for any notice to the affected employees, pursuant to Rule 12(a). Carrier also raises certain procedural objections to the filing of the claim which are discussed in detail below.

On December 19, 1977, Carrier filed a petition for reorganization under the Federal Bankruptcy Act, 11 U.S.C. § 205. Pursuant to that petition, Judge Thomas R. McMillen of the United States District Court- Eastern Division appointed Stanley E. G. Hillman, and later Richard B. Ogilvie, as trustee. On April 23, 1979, Trustee Hillman petitioned the Court to institute an embargo over approximately eighty per cent of Carrier's lines. On June 1, 1979, the Court denied the Trustee's embargo request.

On August 10, 1979, the Trustee filed a second petition with the Court seeking an embargo of certain of Carrier's lines as of October 1, 1979. On September 27, 1979, the Court ordered the embargo, effective November 1, 1979. In Addition, the Court's denial of the Trustee's first petition was reversed by the U. S. Court of Appeals for the Seventh Circuit on October 2, 1979.

Accordingly, on October 26, 1979, Judge McMillen issued Order No. 220C. That order directed Richard B. Ogilvie as Trustee of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company (Carrier) to embargo Carrier's freight operations on certain of its lines effective 12:01 a.m. (C.D.T.), November 1, 1979. The Order reads, in relevant part:

> "In accordance with Order No. 220A dated September 27, 1979, this Court's decision dated the same date, and the decision of the Court of Appeals for the Seventh Circuit in In Re Chicago, Milwaukee, St. Paul and Pacific Railroad Co., Nos. 79-1494, 79-1675, 79-1683, 79-1698 (7th Cir. Oct. 2, 1979), IT IS HEREBY ORDERED that:
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> 1. Richard B. Ogilvie, as Trustee of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company is directed to embargo at 12:01 a.m. C.D.T., on November 1, 1979 all of the Debtor's freight operations on lines which are not shown on Appendix A, either as solid or dotted lines, nor listed on Appendix B, or Appendix C.

"5. As of November 1, 1979, or as soon thereafter as is practical, the Trustee shall furlough all employees not required for the services and operations continued under paragraph 1 or for the administration of the estate, the protection of the Debtor's property or the finalization approval and implementation of a plan of reorganization..." (Emphasis supplied.)

On October 30, 1979, Mr. L. W. Harrington, Carrier's Vice President-Management Services, issued a memorandum addressed to "Employes Affected by Force Reduction" in which he advised the recipients that as a result of the Court ordered embargo of certain Milwaukee Road lines their positions "may be affected by force reduction effective November 1, 1979."

Also on October 30, 1979, Mr. N. H. McKegney, Division Manager, issued a notice to "the following BRAC employees at Milwaukee Shops:

Position #23710 - Janitor
Position #13530 - Clerk
Position #13850 - Keypunch/Clerk
Position #23690 - Steno-Clerk
Position #23620 - Clerk
Position #13870 - Clerk"

The notice provided, in relevant part, that:

"In view of the U. S. District Court directed embargo of certain Milwaukee Road Lines, your position is abolished effective 11:59 p.m. (C.S.T.), October 31, 1979 under the emergency force reduction provision of your union contract. This will confirm verbal advice given you in this regard."

As a result of Carrier's action, the Organization filed the instant claim on December 12, 1979 with Mr. R. H. Stinson, Assistant Division Manager-Administration. It was denied by him on January 21, 1980. The claim was subsequently handled in the usual manner on the property, whereupon it was appealed to this Board for adjudication.

The Organization contends that the Carrier's abolition of the above referenced positions violates the Agreement between the parties, particularly Rule 12.

Rule 12 reads, in relevant part:

"Rule 12 - Reducing Forces

(a) In reducing forces, employes whose positions are to be abolished will be given not less than five (5) working days advance notice except:

1. Rules, agreements or practices, however established,

"that require advance notice to employes before abolishing positions or making 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 labor dispute other than as covered by subparagraph 2 below, provided that such conditions result in suspension of a carrier's operation 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. It is further understood and agreed that notwithstanding the foregoing, any employe who is affected by an emergency force reduction and reports for work for his position without having been previously notified not to report, shall receive four hours' pay at the applicable rate for his position. If an employe works any portion of the day he will be paid in accordance with existing rules.

* * *

(c) When bulletined positions are abolished, notice will be placed on all bulletin boards in the seniority district affected and a copy of same will be furnished to the local and general chairman. Such bulletin notice shall include the names of employes filling the positions abolished at the time abolished." (Emphasis supplied.)

In the Organization's view, Rule 12(a) is clear and unambiguous in that employes whose positions are abolished must be given five (5) working days' notice of such abolishment except for the emergency circumstances listed in the rule. Obviously, the Court ordered embargo is not a "flood, snow storm, hurricane, tornado, earthquake, fire or labor dispute." Thus, the Organization asserts that it is not an emergency under Rule 12(a).

Furthermore, according to the Organization, the embargo cannot be considered an emergency even if other events not listed in Rule 12(a) are deemed to constitute emergencies. This is so because Carrier was well aware as of September 27, 1979 that its lines would be embargoed on November 1, 1979, unless the Court of Appeals reversed the District Court. Also, the Organization contends that on October 26, 1979, the date of Judge McMillen's final order, it advised Carrier's representatives that they would be in violation of the Agreement if Carrier did not give proper notice of the abolishments resulting from the embargo order.

Additionally, the Organization argues that Carrier's actions in this dispute violate Rule 12(c), second paragraph. That clause requires that when all bulletined positions are abolished, "notice will be placed on all bulletin boards in the seniority district affected and a copy of same will be furnished to the local and general chairman." Rule 12(c) is explicit and allows for no exceptions. Thus, the Organization contends that Carrier violated the rule when it failed to send copies of the abolishment notices to either its local or general chairman.

Accordingly, the Organization seeks additional eight hours compensation for the incumbents of the abolished positions for November 1, 1979 and each work day thereafter until they were returned to service (Item 2 of claim). Additionally, the Organization asks that all employees displaced by those holding the bulletined positions listed above be similarly compensated (Item 3 of claim).

Carrier, on the other hand, both denies that any violation of the Agreement exists and raises two procedural objections to the form of the claim. First, Carrier insists that even if a violation of the Agreement is proven, any award by this Board granting monetary damages would be in the nature of a penalty and, absent clear language authorizing penalty payment, violative of the Railway Labor Act. In Carrier's view, the Organization is seeking sums of money for certain employes for work they did not perform. Thus, these employes would be receiving a windfall and Carrier would be burdened with a penalty were the claim to be sustained as to monetary damages. Carrier notes that the Agreement does not provide for penalty payment. Therefore, for this Board to award monetary damages where none had been incurred by the employes involved would mean, in Carrier's view, that this Board would be modifying the provisions of the existing Agreement. Clearly, the Board does not have the authority to add to, subtract or in any way, modify those provisions. Accordingly, Carrier concludes that this Board is without jurisdiction to order any monetary damages in this case.

Second, Carrier asserts that to the extent the claim asks for compensation for unnamed individuals or to the extent that it seeks to ascertain the names of certain individuals by a check of payroll records, it is invalid. Carrier points out that Item 3 of the claim seeks compensation for "those employes who are displaced by employes whose positions were abolished." (Emphasis supplied.) The Organization adds, under Item 3, that "the employes...displaced by employes whose positions were abolished (are) to be determined by joint check of payroll and other necessary records."

Carrier further notes that in Item 2 of the claim only four of the six individuals whose positions were abolished are named. The other two are only identified as follows:

> "...Position #13530 - Clerk
> ...Position #13870 - Clerk
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> Where occupants of positions are not listed, same to be determined by joint check of Carrier's records."

Carrier maintains that Item 3 of the claim is invalid in that it seeks compensation for individuals who are both unnamed and unknown. Rule 36 of the Agreement requires that "all claims or grievances must be presented in writing by or on behalf of the employes involved." Thus, according to Carrier, where the claim is presented, as here, on behalf of unknown and unnamed individuals, it must be dismissed.

In addition, Carrier argues that absolutely no schedule rule and/or agreement between the parties provides for a joint check of Carrier's records to determine the names of individuals **allegedly** aggrieved. Thus, it is Carrier's position that to the extent that Items 2 and 3 require such a check to ascertain the names of aggrieved individuals, they are similarly invalid.

As to the merits of the dispute, Carrier contends that the embargo ordered by Judge McMillen on October 26, 1979 clearly constitutes an emergency of the type contemplated by Rule 12(a). Carrier notes that the list of emergencies in that rule is not all-inclusive. The phrase "such as" clearly indicates that "flood, snow storm, hurricane, tornado, earthquake, fire and **labor dispute**" are only examples of the type of emergencies which may occur.

In Carrier's view, a court ordered embargo, to begin at a specific time on a specific date, constitutes an emergency of the utmost magnitude. In fact, according to Carrier, on at least seven prior occasions the parties to this dispute have recognized that an embargo constitutes an emergency, thereby allowing for temporary position abolishments under the provisions of Rule 12(a)1. Furthermore, Carrier notes that the Interstate Commerce Commission has specifically recognized that embargoes and even threatened embargoes constitute emergencies.

Thus, according to Carrier, the embargo order of the Federal Court clearly was an emergency within the meaning of Rule 12(a)1. As such, Carrier was not obligated to give five working days' notice when it abolished six positions as a result of the embargo order. Therefore, Carrier asks that the claim be denied on its merits as well as on procedural grounds.

Both parties have cited numerous awards of this Board in support of their respective positions.

We believe that to the extent the claim refers to unnamed and unknown individuals, it must be dismissed. Item 3 of the claim seeks compensation for "those employes who were displaced" by the employees whose positions were abolished. It is simply not possible to determine from this record just who are the employees referred to in Item 3. It is incumbent upon the Organization to prove that certain employees were, in fact, displaced as a result of the job abolishments enacted on October 30, 1979. This it has not done. We reached a similar conclusion in Award No. 16490 (Referee O'Brien) wherein we dismissed a claim seeking reimbursement to "any employe who may have been adversely affected by displacement for loss of earnings from the abolishment of jobs at Riverside Engine House. Such wage losses shall be determined by a joint check of the Carrier's payroll records." Item 3 of the instant claim is similarly vague and indefinite and thus must be dismissed (see also Awards 13559; 13652).

The Organization's request that the employees referred to in Item 3 be ascertained through a search of Carrier's records is also not persuasive. Carrier is simply not required to assist the Organization in asserting a claim. See, again, Award 16490, as well as Awards 15394 and 15759.

We must, however, reach a different conclusion with respect to the unnamed claimants referred to in Item No. 2. Here, while the claimants are unnamed, they are specifically identified as the holders of Bulletined Positions No. 13530 and 13870. Thus, each of the claimants referred to in Item 2 is either specifically named or readily identified or identifiable. This finding is in accord with similar findings in Award No. 10059 and Third Division Docket No. MW-11914. In the latter case, the National Disputes Committee ruled that the identification of claimants as individuals "assigned to B&B Gang No. 1" on December 9, 10, 11, 12, 15 and 16, 1958 was sufficiently explicit as to deny Carrier's contention that claimants were not identified. In the instant dispute, claimants are clearly known and identifiable, for they are the holders of positions No. 13530 and 13870, as of October 30, 1979. Accordingly, all claimants referred to in Item No. 2 of the claim are either specifically identified or identifiable and are, therefore, proper claimants under Rule 36 of the Agreement.

Carrier maintained that any monetary damages granted would constitute a penalty payment which this Board is without jurisdiction to award. We do not agree. The purpose of a provision such as Rule 12(a) is to give notice to employees whose positions are abolished. This is done so that those affected may continue to be compensated for a minimal period of time (here five days) while they seek work elsewhere or otherwise makes appropriate future plans.

In addition, such a rule is also intended to give affected employees five days of actual work. That is, the notice requirement contemplates that individuals whose positions are abolished will actually work during the notice period. Thus, adherence to the rule does not mandate a penalty payment. Rather, it requires that Claimants be compensated for work which they should have been scheduled to perform.

In this dispute, Claimants received but one working day's notice prior to the abolition of their positions. Therefore, they had only one day in which to make appropriate arrangements for the future and they were denied the opportunity to work four additional days. As such, they were not made whole if, as the Organization contends, Claimants were entitled to five days' notice of the abolition of their positions.

The merits of the dispute centers on the definition of the term "emergency" as contemplated by Rule 12(a) of the Agreement. If the court ordered embargo constituted an emergency, then Carrier was not required to give any notice to employees whose positions were abolished thereby. Conversely, if the embargo was not an "emergency" then Carrier clearly violated rule 12(a) for it did not give the requisite five working days' notice which that rule mandates.

After a careful review of the record, we are convinced that the embargo ordered by the Federal District Court on October 26, 1979, is not an "emergency" as is contemplated by Rule 12(a).

An "emergency" is defined as an "unforeseen situation calling for immediate action" (Webster's New American Dictionary - 1955) and a "sudden or unexpected occurrence" (Oxford Universal Dictionary - 1955). Common to both definitions is the concept of "unforeseeability" or "suddenness." Here, the embargo was clearly sought by the Court appointed Trustee, pursuant to Carrier's petition for reorganization. It was a planned occurrence, made necessary by grave business concerns. As such, the embargo did not overtake the Trustee; instead it was the logical result of a series of events set in motion by Carrier. Accordingly, it simply did not constitute an emergency of the type contemplated by Rule 12(a).

Furthermore, the sequence of events leading up to the actual embargo reinforces its foreseeability. On September 27, 1979, the District Court reversed its earlier position and ordered the embargo, effective November 1, 1979. Moreover, on October 2, 1979, the Court of Appeals reversed the District Court's earlier denial of the Trustee's petition for an embargo. Thus, as of that date Carrier knew that, absent extraordinary circumstances, many of its lines would be embargoed on or about November 1, 1979. While that knowledge was not absolutely confirmed until October 26, 1979, the date of Order No. 220C, it was within the reasonable contemplation of the parties that the embargo would occur on or about the date it actually took place.

In addition, we note that paragraph 5 of Order No. 220C does not require the Trustee to furlough employees affected by the embargo on November 1, 1979. Instead, it permits the Trustee to furlough unneeded employees "as soon thereafter as is practical Thus, the Court allowed the Trustee discretion to consider relevant factors which would make it impractical to furlough employees on November 1, 1979. Clearly, Carrier's obligations under an existing collective bargaining agreement would be one such relevant factor in determining the actual furlough date. Thus, it is manifest that the Court ordered embargo of November 1, 1979 was not an emergency for it permitted the Trustee to furlough employees after the embargo took place.

This is not to say that an embargo or even a threatened embargo can never constitute an "emergency" under Rule 12(a). However, here, the embargo was readily foreseeable by the parties. In fact, the Federal Court order of September 27, 1979 (Order 220A) initially set the date of the embargo as November 1, 1979. Furthermore, there were meetings or attempts to set up meetings before the date of the embargo (November 1, 1979). Thus, in this case, the embargo did not constitute an emergency while in other circumstances it may.

A review of the types of emergencies listed in Rule 12(a) is in accord with our finding here. That rule listed exigencies "such as flood, snow storm, hurricane, tornado, earthquake, fire or labor dispute." We agree with Carrier that the phrase "such as" means that the list is not all inclusive. However, common to the occurrences listed is the unexpected and essentially unpredictable timing of each event. As noted above, the court ordered embargo was neither unexpected nor unpredictable, though the exact date it was to take effect may not have been known with certainty for a period of time.

In addition, we note that our finding is in accord with a number of other awards rendered by this Board. In Second Division Award No. 8119 Referee Eischen found that the unanticipated breakdown of the 1000 ton press constituted an emergency under language identical to that found in the instant dispute. Clearly, the breakdown of the press was unforeseeable and unpredictable, while the embargo which occurred on November 1, 1979 was foreseeable and predictable.

Carrier cited Second Division Award No. 9005 in support of its position. In that case, Carrier's largest customer, the Wisconsin Steel Works, notified Carrier on March 23, 1980 that its plant would be immediately shut down. Referee Marx found that such an event constituted an "emergency" thereby relieving Carrier of the obligation to provide five working days' notice to employees whose positions were abolished as a result of the shutdown. However, the decision does not indicate to what extent, if any, that Carrier was aware of the impending shutdown. Thus, the facts in that case are not on point with the facts in the instant dispute.

Furthermore, Referee Marx concluded, "There is no evidence that Carrier withheld notice to its employees for any period after learning of the cessation of the need for its services." (Emphasis supplied.) Here, Carrier was made aware of the Court order 220C on October 26, 1979 that the embargo would take effect on November 1, 1979. We acknowledge, as Carrier argued, that it faced a difficult task in giving the employees whose positions were to be abolished five working days' notice of the abolishment. However, Rule 12(a) contains no exceptions to the notice requirement based on the difficulty or even practicality of notifying Claimants that their positions will be abolished in five days. The only exception to the notice requirement occurs when an emergency exists. Here, as noted above, the Court-ordered embargo issued on October 26, 1979 did not constitute an emergency.

Moreover, the record reveals that Carrier did not immediately notify the affected employees as soon as it learned of the exact date of the embargo. Rather, Carrier waited from October 26, 1979 to October 30, 1979 to so notify the employees involved, even though the Organization alerted Carrier to possible rule violations. This delay was never satisfactorily explained.

Finally, we note that the Interstate Commerce Commission's conclusion that this or any other embargo or threatened embargo constitutes an emergency is simply not binding upon this Board. We are required to interpret the provisions of this Agreement and not the rules of the I.C.C. In addition, we would point out that the I.C.C.'s determination of an emergency was made so as to "promote service in the interest of the public and of commerce." (I.C.C. Service Order No. 1399). Under Rule 12(a), however, an emergency requires the existence of unexpected or unforeseen conditions. Clearly, then, an event may be foreseeable and yet may also drastically interfere with both public and commercial interests. Thus, it might well constitute an emergency under the rules of the I.C.C. but not under the rules of the Agreement. Such is the case here. Therefore, our determination does not conflict with that of the I.C.C.

We now address the issue of the proper remedy for the incumbents of the position listed in Item No. 2 of the Organization's claim. Each incumbent was entitled to five working days' notice of the abolition of his or her position. However, each was given, apparently, only one working day's notice since the notice to the affected employees was posted on October 30, 1979 and Carrier abolished their positions effective 11:59 p.m. on October 31, 1979. Thus, each employee is entitled to eight hours' pay at the rate of his or her assigned position or protected rate, whichever is greater, for November 1, 1979 and for each day until he or she returned to service, up to a maximum of four days' pay.

For the reasons set forth above, we will sustain Items (1) and (2) of the claim to the extent indicated in the Opinion. We deny Item 3 of 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 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 sustained 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.