Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 28529
THIRD DIVISION Docket No. SG-28199
90-3-87-3-718

The Third Division consisted of the regular members and in addition Referee Robert W. McAllister when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(
(Delaware and Hudson Railway Company

STATEMENT OF CLAIM: "Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Delaware and Hudson Railway Company (D&H):

Case No. 1

Claim on behalf of the following signal employees, dates and compensation:

Name	Headquarters	Lost Days - 1986	Total Compensation Due
B. M. Velasco	Oneonta, N.Y.	5/19 - 5/27	$ 820.96
A. J. Tucker		5/19 - 5/29	861.12
B. E. Snow	Delanson, N.Y.	5/19 - 5/27	820.96
A. D. Wright	Delanson, N.Y.	5/19 - 5/28	765.44
W. B. Loucks	Oneonta, N.Y.	5/19 - 5/28	765.44
R. J. Oliver	Oneonta, N.Y.	5/19 - 6/1	956.80
G. A. Akulis	Ninevah, N.Y.	5/19 - 5/29	861.12
G. L. Schneider	Oneonta, N.Y.	5/19 - 7/14	3,952.40
S. A. Schneider	Oneonta, N.Y.	5/19 - 7/14	3,952.40
F. F. Schuler	Taylor, Pa.	5/19 - 7/14	4,808.48
J. C. Farrell, Jr.	Taylor, Pa.	5/19 - 5/29	867.60
J. L. Congdon	Taylor, Pa.	5/19 - 7/14	3,922.88

Account of Carrier violated the current Signalmen's Agreement, as amended, particularly, the Scope Rule and Rules 39, 39 1/2, 42 and 51, when it failed to properly abolish Claimants positions during BMWE strike. Carrier file: SI-1-86. General Chairman file: USG 75-1-86.

Case No. 2

Claim on behalf of the following signal employees, dates and compensation:

Name	Headquarters	Lost Days - 1986	Total Compensation Due
P. J. McDermott	Fort Edward, N.Y.	5/19 - 5/28	$ 938.00
W. C. Miller	Willsboro, N.Y.	5/19 - 5/28	765.44
S. Jerdo	Ticonderoga, N.Y.	5/19 - 7/14	3,922.88
S. J. Sorrell	Willsboro, N.Y.	5/19 - 7/14	3,922.88
B. Trombley	Willsboro, N.Y.	5/19 - 7/7	3,444.48
M. W. MacDougal	Willsboro, N.Y.	5/19 - 5/28	938.00
G. C. Kross	Fort Edward, N.Y.	5/19 - 5/28	771.20
T. M. Daniels	Colonie, N.Y.	5/19 - 6/1	964.00
W. C. Wade	Colonie, N.Y.	5/19 - 6/2	1,060.40
R. G. Carter	Colonie, N.Y.	5/19 - 6/2	1,052.48
C. M. Acker	Colonie, N.Y.	5/19 - 6/2	1,052.48
R. E. Bronson	Fort Edward, N.Y.	5/19 - 5/28	765.44
R. C. Rawson	Saratoga, N.Y.	5/19 - 5/28	765.44
K. B. Kross	Colonie, N.Y.	5/19 - 5/28	920.04

Account of Carrier violated the current Signalmen's Agreement, as amended, particularly, the Scope Rule and Rules 39 and 39 1/2 when it failed to properly abolish Claimants positions during BMWE strike." Carrier file: SI-2-86. General Chairman File UGC-147-2-86.

FINDINGS:

The Third Division of the Adjustment Board upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

This case arises out of the March 3, 1986, strike by the Brotherhood of Maintenance of Way Employes (BMWE) against the Maine Central Railroad Company and the Portland Terminal Company, companies owned by Guilford Transportation Industries, Inc., as is the Carrier herein. Within two weeks of the onset of the strike, the BMWE established pickets on the Carrier and on the Boston & Maine, another Guilford property. When its employees honored the picket line and refused to come to work, the Carrier abolished jobs under the Rule applicable to emergency force reductions, Rule 39 1/2.

On or about April 20, 1986, the Carrier notified its employees, including the Claimants, that their jobs were permanently abolished effective April 25, 1986. Claimants were also sent a letter notifying them the Carrier would be hiring permanent replacements. On April 26, 1986, the various Guilford railroads, including the Carrier herein, obtained a temporary restraining order against the unions representing other than Maintenance of Way employees, including the Organization herein. This temporary restraining order enjoined the unions from picketing the Carriers and was conditional upon the Carriers not implementing plans to hire permanent replacements. The temporary restraining order did not affect the BMWE pickets or the fact that other employees honored the BMWE picket line.

On May 16, 1986, the President of the United States invoked Section 10 of the Railway Labor Act and established an emergency board to investigate the Maine Central-BMWE labor dispute. On that same date, the Claimants reported to work, but were sent home by supervisory forces. According to the Organization, the Claimants were told their jobs had been abolished during the strike and that they would have to wait for jobs to be rebulletined and awarded. The failure to return the Claimants to the positions they held prior to the Maine Central strike resulted in the two Claims herein being filed on July 14, 1986.

While these events were occurring, the various unions also sought redress through the judicial system. On March 24, 1986, the Railway Labor Executives' Association (RLEA) filed a complaint in the U. S. District Court in Maine[1] seeking, inter alia, to enjoin the Carrier from retaliating against its employees who refused to cross BMWE's picket lines. In a decision rendered July 11, 1986, the Court determined the permanent job abolishments were primarily for the purpose of avoiding the Carrier's obligation to return employees to work immediately upon the cessation of the strike by the establishment of the emergency board. The Court then held the permanent abolishments were "nothing less than a deliberately calculated, anticipatory breach of those obligations which the Carriers recognized they would incur under the agreements and the RLA provisions upon the ending of the strike."[2] Thus, the Court ruled that the permanent job abolishments were illegal and ordered the employees affected by them be entitled to be returned to work.

[1] Railway Labor Executives' Association v. Boston & Maine Corp., et al., 639 F. Supp. 1092 (Me. 1986).

[2] Id. at 1109.

On December 22, 1986, the U. S. Court of Appeals for the First Circuit[3] held the question of "whether a party is in breach of a collective bargaining agreement, 'anticipatorily' or not, requires 'the interpretation (and) or application' of that agreement,"[4] and is a "minor" dispute which should be litigated before an adjustment board. Accordingly, the decision of the District Court as to this dispute was reversed and remanded with instructions that it be referred to the appropriate adjustment board.

Under the provisions of Rule 39, there are no restrictions upon the Carrier's right to abolish jobs, except that the affected employees must be given not less than five (5) working days' advance notice. The Scope Rule, however, places specified work within the scope of the Agreement. This places a restriction upon the Carrier to the extent that covered work may be performed only by employees working under the Agreement. Thus, while Rule 39 gives the Carrier the right to abolish all jobs, it would not have the right to have non-covered employees do the work of the employees whose jobs were abolished.

Rule 39 is modified by Rule 39 1/2 to the extent that the Carrier is not required to give more than sixteen (16) hours notice of job abolishments under certain emergency circumstances. These include strikes where the Carrier's operations are suspended in whole or in part and when, because of the emergency, the work which would be performed by the employees involved in the force reductions no longer exists or cannot be performed. Such job abolishments are considered to be temporary for the duration of the emergency.

At issue in this case is whether the Claimants' jobs were abolished under Rule 39 or Rule 39 1/2 and whether or not the Carrier had a duty to recall the Claimants to service. Further, if such a duty existed, how quickly must it have been carried out?

Even though the Carrier had first abolished the jobs under Rule 39 1/2, it later served a five (5) day notice that it was permanently abolishing the jobs. Whatever its motive may have been, the Carrier's action in doing so was not proscribed by the Agreement. The Carrier would have been free to permanently abolish all of the jobs prior to the arrival of the pickets or once they appeared had it met the notice requirement. There is no basis for concluding it could not have done so one month after the picket line was up. Having satisfied the five (5) day notice requirement, the Carrier was no longer limited to the emergency conditions specified in Rule 39 1/2.

[3] Railway Labor Executives' Association v. Boston & Maine Corp. et al., 808 F. 2d 150 (1st Cir. 1986).

[4] Id. at 159

As noted above, however, once the jobs are abolished, the Carrier may not use non-Agreement personnel to perform covered work. (We note that none of the Claims herein covers dates when the Claimants refused to cross the picket line, so we need not address the right of the Carrier to use non-covered personnel while the picket line was up.) Throughout the handling of these Claims on the property, the Organization alleged the Carrier "required and/or permitted supervisory and non-BRS members to perform craft work." This allegation was never refuted by the Carrier and must now be taken to be true.

If the Carrier hired new employees to perform covered work while the Claimants refused to cross the picket line, those employees would come within the scope of the Agreement. Having less seniority than the Claimants, however, they would be subject to displacement by them under either Rule 42 or Rule 51. By not allowing the Claimants to displace, the Carrier was in violation of the Agreement. The performance of covered work by supervisors when the Claimants were available is also a violation of the Agreement.

In developing a remedy, we must be cognizant of the fact the failure to recall the Claimants, per se, is not the violation. As the emergency force reduction rule did not apply, the Carrier was under no obligation to recall any of the forces. It is the fact that junior and non-Agreement employees performed the work that must be remedied. Accordingly, we direct that the Carrier allow the Claims in the order of the seniority of the Claimants to the extent that the number of Claimants paid is equal to the number of new hires still working after May 19, 1986, plus the number of supervisors who performed covered work after that date. The balance of the Claims, if any, are denied.

We note the Organization has argued the Carrier is in violation of the time limit rule because Claim No. 2 was never denied upon initial presentation. It failed, however, to state this in its Statement of Claim. According to Circular No. 1, this Board requires that "(u)nder this caption the petitioner or petitioners must clearly state the particular question upon which an award is desired." This Board has no power to go beyond the issues raised in the original Statement of Claim. Third Division Awards 19790 and 21543.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 28th day of August 1990.