PUBLIC LAW BOARD NO. 301

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES	"	
	"	AWARD
-vs-	"	DOCKET NO. 2.
NEW YORK, SUSQUEHANNA & WESTERN R. R.	"	

BEFORE: ALBERT W. EPSTEIN, MERITS NEUTRAL MEMBER
C. W. SCHROEDER, CARRIER MEMBER
A. J. CUNNINGHAM, EMPLOYEE MEMBER

CLAIMS:

1. Carrier violated the effective Agreement by furloughing Trackmen Charles J. Grace, John Amardi, Rocco Nigitg and Martinez as of the close of work Friday, October 27, 1967.

2. Carrier shall now reimburse these claimants for all work time lost by them on this account beginning Monday, October 30, 1967 and continuing for all days and hours thereafter until this violation of the Agreement is corrected.

FACTS

As of Friday, October 27, 1967, the four claimants held regular assignments as Trackmen in the employ of the Carrier. They were notified that as of the close of work that day their positions were abolished and they were furloughed. The applicable Agreements between the Carrier and the Brotherhood were the Agreement effective December 1, 1950 and a Supplemental Agreement thereto dated June 12th, 1963, and the Mediation Agreement Case No. A-7128 dated February 7th, 1965. The Supplemental Agreement dated June 12th, 1963 provided:

> (1) It is agreed, effective August 1, 1963, the number of employes, rates of pay, and headquarters shall be as is listed in the attached Appendix "A", which becomes and is a part of this supplemental agreement, and shall not be reduced in any manner except by agreement between the General Chairman and the Chief Engineer of the Railroad, or their designated representatives. Prior to the effective date of this Memorandum all positions of Track Foremen, Assistant Track Foremen, and Trackmen will be bulletined in accordance with Rule 12 of the current agreement.

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(7) There shall be no abolishment, elimination, or re-arrangement of any of the positions listed on the attached Appendix except by agreement between the Chief Engineer of the Railroad and the General Chairman, or their designated representatives.

Appendix A to that Agreement provided:

"(Number of Trackmen: 26)".

As a result of the furlough of the four claimants, the work force of the Carrier was reduced below 26 Trackmen. On November 1st, 1967, the General Chairman of the Brotherhood wrote to the Acting Chief Engineer of the Carrier asserting a claim on behalf of the claimants for compensation for all days and hours involved from October 30th, 1967 until the condition complained of was corrected. The General Chairman complained that the action of the Carrier in furloughing the four claimants was a violation of the Agreement of February 7th, 1965, and Supplemental Agreement to the Agreement dated December 1, 1950, which states that track employes will not be reduced below 26. On December 28, 1967, the Chief Engineer of the Carrier replied to the General Chairman of the Brotherhood, stating that the four claimants did not enjoy protective status under the Agreement of February 7th, 1965, and further stating that the Agreement covering "stabilized track forces is not involved". On February 5, 1968, the General Chairman wrote to the Chief Engineer, rejecting his denial and on the same day the General Chairman wrote to the Director of Personnel, appealing the claim to the Director of Personnel for consideration. No response was received from the Carrier and on August 12, 1968, the General Chairman wrote to the Carrier asserting that the claim be paid since it was not denied by Management within the time prescribed in Article V of the August 21, 1954 Agreement.

POSITIONS OF THE PARTIES

The Brotherhood contends that the action of the Carrier in furloughing the four claimants violated the Agreements of June 12, 1963 and February 7, 1965 and that the claimants are entitled to be compensated for the time lost as a result of such action on the part of the Carrier. The Brotherhood further contends that under a National Agreement identified as the August 21, 1954 Agreement, it is mandatory that the Carrier pay the

claimants because the Carrier failed to reply to the claimants within 60 days after February 5, 1968, the date when the appeal to the Director of Personnel was taken. The Brotherhood also contended the furloughing of claimants reduced the trackmen work force to 24 men, which was a violation of the Agreement of June 12, 1963.

The Carrier contends that none of the claimants are protected employes under the Agreement of February 7, 1965, and that the furloughing of the four claimants was permissable under the Agreements.

At the Hearing on March 26, 1970, the Carrier for the first time raised the contention that the employes had failed to notify the Carrier of their desire to preserve the provisions of the Agreement of June 12, 1963 within 60 days from February 7, 1965, and that pursuant to Article VI of the Agreement of February 7, 1965, the Agreement of June 12, 1963 is no longer in effect between the parties. The Brotherhood replied to this contention by showing that this contention was not raised on the property.

In its brief, the Brotherhood cited various decisions of the National Railroad Adjustment Board which established the proposition that any arguments not considered on the property may not be considered by the Board.

The Board met again on August 4th, 1970 to consider such contentions.

OPINION OF THE BOARD

The evidence before the Board includes the Agreement of December 1, 1950, the Supplement thereto dated June 12, 1963, the Mediation Agreement dated February 7, 1965, and provisions of the National Agreement identified as the August 21, 1954 Agreement.

The original claim dated November 1, 1967, asserted that two of the claimants were entitled to protection under the Agreement of February 7th, 1965. That contention was denied by the Acting Chief Engineer and there is no evidence before the Board to establish that anyof the claimants are protected employes under the Agreement of February 7, 1965.

The response of the Acting Chief Engineer to the claim filed by the General Chairman states that the Agreement covering stabilized track forces was not involved.

No other reason than the aforementioned is set forth for the rejection of the claim.

The rejection of the claim by the Chief Engineer was appealed to the Director of Personnel, who did not respond to the appeal. Under Article V of the National Agreement of August 21, 1954, it is provided that should any claim or grievance be disallowed, the Carrier shall within 60 days from the date on which it is filed, notify whoever filed the claim or grievance of its disallowance. If not so notified, the claim or grievance shall be allowed as presented. The August 21, 1954 Agreement further provides that the aforementioned requirements shall govern in appeals taken to each succeeding officer. The facts of the instance case establish that an appeal was taken to the Director of Personnel, within the allowed time. There is no evidence in the record of any action taken on that appeal. In view thereof, the appeal must be considered as having been allowed as presented.

The contention of the Carrier that the Agreement of June 12, 1963 is not valid because of failure of the Brotherhood to notify the Carrier of the election to continue the Agreement of June 12, 1963 in effect, cannot be considered by this Board since that argument was not raised on the property.

AWARD

Claim 1 is sustained.

Claim 2 is sustained to the extent of awarding to claimants the amount of compensation lost. Said amount is to be determined by conference between the Brotherhood and Carrier.

Dated, August 7, 1970.

/s/Albert W. Epstein
ALBERT W. EPSTEIN - MERITS
NEUTRAL MEMBER

/s/ C. W. Schroeder Dissent
C. W. SCHROEDER, CARRIER MEMBER

/s/A. J. Cunningham
A. J. CUNNINGHAM, EMPLOYE MEMBER