AWARD NO. 1
CASE NO. 1

PUBLIC LAW BOARD NO. 4669

PARTIES TO DISPUTE) BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
) BOSTON AND MAINE CORPORATION

STATEMENT OF CLAIM

1. The Agreement was violated when the Carrier improperly abolished the position of Track Inspection Foreman M. P. Mitchell on April 25, 1986 without giving him at least five (5) working days' advance notice thereof and without first discussing and agreeing with the General Chairman as set forth in Decision MW-39 and when the Carrier subsequently terminated the Claimant's seniority.

2. As a consequence of the violations referred to within Part (1) hereof, the Claimant shall be restored to service without loss of seniority rights, vacation rights, health insurance and he shall be commentated for all wage loss suffered including overtime beginning on May 19, 1986.

OPINION OF BOARD

A. Background

The history behind this dispute is found in *Railway Labor Executives' Association v. Boston & Maine Corporation, et al.*, 808 F.2d 150 (1st. Cir. 1986), *cert denied*, 484 U.S. 830 and the parties' submissions.[1]

Essentially, due to reductions in the number of Maintenance of Way employees, the Organization served notice on the Maine Central of its intent to renegotiate various contract provisions targeted at the area of job protection. Efforts to resolve the dispute through bargaining proved unsuccessful. On March 3, 1986 the Organization struck the Maine Central. Secondary pickets were also established against the Carrier and the Delaware & Hudson.[2]

Upon the establishment of the secondary picket lines, the Carrier temporarily abolished the positions held by the employees. The Organization then sought injunctive relief in Federal Court. On April 4, 1986, the National Mediation Board recommended the establishment of a Presidential Emergency Board. On April 18, 1986, the Carrier

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[1] The First Circuit described the dispute as "the continuing labor saga of the Boston & Maine Railroad and related companies" (808 F.2d at 152).

[2] Guliford Transportation Industries is the holding Company for the Carrier, the Maine Central and the Delaware & Hudson.

decided to permanently abolish the jobs that were previously temporarily eliminated. The Carrier's reasons for doing so were clearly designed to avoid the effect of the consequences of the establishment of the Emergency Board and reinstatement requirements flowing therefrom. According to the Carrier (Car. Submission at 19-20):

> Faced with the probability of a Presidential Emergency Board establishing a "cooling off" period during which picket lines would be removed, the Carrier had to take Steps to avoid taking on the additional financial burden of a pre-strike work force.

The Presidential Emergency Board was established on May 16, 1986. The Organization, on behalf of the employees, then made unconditional offers to return to work to the involved carriers. The Maine Central accepted the offer and all striking employees were returned and retained through the week of May 19, 1986. During that week, the Maine Central issued abolishment notices to 447 employees, a figure approximately coinciding with the volume of lost business resulting from the strike. The Carrier and Delaware & Hudson assessed their work needs and then posted only 50% of the pre-strike positions.

On May 20, 1986, the RLEA sought a temporary restraining order against the Carrier and the Delaware & Hudson asserting that their actions violated the status quo provisions of the order establishing the Presidential Emergency Board. The District Court ruled that the order did not apply to the Carrier or the Delaware & Hudson.[3]

On May 27, 1986, all carriers unilaterally terminated the seniority of all employees who did not file their names and addresses in a timely fashion so as to retain recall rights.[4]

With respect to the Carrier (and the Delaware & Hudson), the Court of Appeals reversed the District Court's holding of an "anticipatory breach" of the Agreement and held (808 F.2d at 159-160 [emphasis in original, citations omitted]):

> The district court's opinion is significantly bare of any citations in support of this ruling. It would seem that *any* breach of an existing collective bargaining agreement, whether "anticipatory" or otherwise, is precisely what an arbitrable "minor" dispute is concerned with. ... Whether a party is in breach of a collective bargaining agreement, "anticipatorily" or not, requires "the interpretation [and] or application" of that agreement. *See* 45 U.S.C. § 153, First (l). Where such application or interpretation is central to the attempted exercise of allegedly existing rights, a "minor" dispute exists which should be litigated before the adjustment boards. ....
>
> It is undisputed that D & H and B & M

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3 A TRO request against the Maine Central was also denied with the reasoning that the Maine Central made a showing that the abolishment of positions was directly related to loss of business from the strike.

4 The Court noted (808 F.2d at 154) that "the provision was not uniformly applied by the carriers."

> had the contractual right to abolish jobs. The action that they took was "arguably" within their contractual rights. Any challenge to this action which is not based on a violation of specific statutory rights, is without the court's jurisdiction and must be processed before the adjustment boards. .... The decision of the district court as to the D & H and B & M dispute is thus reversed and remanded with instructions that it be referred to the appropriate adjustment boards.

The disputes involving the Carrier are therefore before this Board.[5]

B. The Facts In This Case

At the time the strike arose, Claimant held a foreman's position in the Track Department. By notice dated April 20, 1986, Claimant and other employees were advised that:

> The following positions are permanently abolished at the close of work on April 25, 1986. This notice is given in accordance with the requirements of your agreement.
>
> * * *

According to the notice, copies of the notice were posted and sent to the Local and General Chairmen.

It does not appear to be disputed that Claimant did not receive or gain knowledge of the contents of the April 20, 1986 abolishment notice until April 22, 1986.[6]

By notice dated April 21, 1986, the Carrier informed the employees of the following:

> TO ALL EMPLOYEES WHO ARE NOT REPORTING TO WORK BECAUSE OF THE PRESENT BMWE STRIKE
>
> This constitutes notice that you are expected to report back to work on or before April 25, 1986. Employees who are not reporting for work or whose assignment has been abolished as well as employees furloughed prior to the strike should contact their supervisor for assistance in reassignment or other instructions. The seniority rights of employees who return will be observed, except that employees who have chosen not to work to this date will not be allowed to displace a junior employee with an employment relationship prior to March 4, 1986 who has been reporting to work.
>
> The assignments of employees who choose not to report back to work on or before April 25, 1986 will be filled with permanent replacements as required by the Carrier

Claimant did not file his name and address within ten days of receipt of the notice abolishing his position. Nor did Claimant report to work within the time frame set forth in the April 21, 1986 notice.[7]

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[5] Prior to getting to this point, *PLB 4517 (Procedural), Award 1* proceeded *ex parte* due to the Carrier's failure to participate in the hearing and held that because of the court decisions the Carrier was estopped from contesting arbitrability of the instant claims.

[6] *See* claim of June 12, 1986 ("... when on April 22, 1986, the Claimant received an improper notice of a job abolishment to be effective April 25, 1986"). The on-property handling does not show a dispute of that assertion by the Carrier. Indeed, in the Carrier's Submission at 20, the Carrier recognizes that the full five day period was not given when it argues that, if anything, Claimant should be entitled to be made "whole only to the extent that the abolishment notice did not afford the full period of advanced notification."

[7] As shown by the Carrier's Submission at 21 and as confirmed by the parties during argument in this case, Claimant was eventually restored to service in July 1986 subsequent to the removal of

Claim was filed on June 12, 1986 addressed to R. F. Dixon, Engineer-Maintenance of Way.[8] The Carrier's Chief Engineer, S. F. Nevero denied the claim by letter dated August 7, 1986. Further appeals were denied by the Carrier.

C. The Organization's Procedural Argument

As a threshold matter, the Organization argues that the wrong Carrier officer responded to the initial claim. According to the Organization, inasmuch as the claim was filed with Engineer-Maintenance of Way Dixon, Dixon and not Chief Engineer Nevero was obligated to respond to the claim and that Dixon's failure to do so requires a sustaining award.

The Organization's argument is not persuasive. Article V of the August 21, 1954 Agreement provides:

> (a) All claims or grievances must be presented in writing by or on behalf of the employee involved, to the officer of the Carrier authorized to receive same, within 60 days from the date of the occurrence on which the claim or grievance is based. Should any such claim or grievance be disallowed, the carrier shall, within 60 days from the date same is filed, notify whoever filed the claim or grievance (the employee or his representative) in writing of the reasons for such disallowance. If not so notified, the claim or grievance shall be allowed as presented, but this shall not be considered as a precedent or waiver of the contentions of the Carrier as to other similar claims or grievances.

Under a plain reading of the rule, while the obligation of the Organization is to file the claim with "the officer of the Carrier authorized to receive same", there is nothing in the rule that dictates that such designated individual must reply to the claim, else the claim is to be sustained. On the contrary, all the rule states with respect to the obligation to respond to the claim, is that "*the carrier* shall ... notify whoever filed the claim ... in writing of the reasons for such disallowance" [emphasis added].

Thus, the obligation concerning who specifically must deny the claim is not found in the rule. The rule generically refers to the Carrier as having to respond. When Chief Engineer Nevero denied the claim, he was doing so on behalf of the Carrier. Under the rule as plainly read, that is sufficient. *See Third Division Award 27590* involving the same language at issue in this rule:

> Article V Rules require that claims are to be filed with a specifically designated officer and that they are to be answered by the Carrier. If it was intended that the designated officer and only the designated officer be the one that could properly respond then it would have been a simple matter to state this result in the Rule, or some other accepted instrument ....

With respect to the Organization's citation to awards holding the contrary, given the plain reading of the rule, we agree with the observation of the Third

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the picket lines.

[8] The Organization filed individual claims for the affected employees.

Division in *Award 27598*:

> Accordingly, from out present examination of the "weight of authority" on this matter we are not persuaded that the decisions holding that only the individual that received the claim can answer the claim are a correct application of those Article V Time Limit Rules that have not been altered in some fashion as to express this specific intent. Unaltered Article V Time Limit Rules can not, in our judgment, be read so as to replace "Carrier" with "officer" in the second sentence of paragraph (a). To do so is clearly insertion of additional language within the Rule, something the drafters did not see fit to insert, something we must avoid.

The Organization's procedural argument is therefore without merit.[9]

D. The Merits

1. The Rules

The relevant rules provide:

RULE 4-A

Reduction in Force

Reduction in force shall be made in the crew which it is necessary to reduce or abolish.

* * *

RULE 5-B

Reductions

Gangs will not be laid off for short periods when proper reduction of expenses can be accomplished by first laying off the junior men. When practicable, five (5) days' notice will be given employees when reduction in forces is to be made.

* * *

ARTICLE III - ADVANCE NOTICE REQUIREMENT

Effective July 16, 1962, existing rules providing that advance notice of less than five (5) working days be given before the abolishment of a position or reduction in force are hereby revised so as to require not less than five (5) working days' advance notice. With respect to employees working on regularly established positions where existing rules do not require advance notice before such position is abolished, not less than five (5) working days' advance notice shall be given before such positions are abolished. The provisions of Article VI of the August 21, 1954 Agreement shall constitute an exception to the foregoing requirements of this Article."

* * *

RULE 13

Seniority Rights -- Retention During Furlough

Employees laid off by reason of force reduction, desiring to retain their seniority rights, must, within ten (10) days from date laid off, file their name and address, in writing, in triplicate, with their immediate supervising officer. The supervising officer will forward one copy to the Management and another to the Local Chairman.

In case a furloughed employee changes his address, he will again notify his supervising officer in the same manner.

Employees failing to comply with this rule, or failing to return to service within ten (10) days after being notified by the Management at their last known address, will be considered out of the service; unless prevented by sickness or

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9 During argument on this matter, the Organization asserted that the Carrier failed to argue rule support for its position on the property but relied upon assertions on its theory concerning the decision of the District Court as it existed at that time. The claimed impropriety raised by the Organization is insufficient. In this matter, the obligation still remains with the Organization to demonstrate a violation of a specific provision of the Agreement.

disability, in which case they must request leave of absence as per Rule 12-A.

An employee who has been out of the service for a period of more than one (1) year will lose his seniority rights and be dropped from the roster at time of next revision unless he notifies his immediate supervising officer prior to December 1st of each year, in writing and in duplicate, of his desire to be retained on the roster.

* * *

DECISION MW-39

8. (A) Inspection and Repair Crews will consist of a minimum of one (1) Foreman and one (1) Trackman.

No rearrangement of Inspection and Repair Crews will be made unless by Agreement between the parties to this Agreement.

(B) Maintenance Crews will consist of a minimum of a Foreman, a Chauffeur and assistant Foreman as provided in paragraph 8(D) hereof.

Maintenance Crews will not be abolished until after conference with General Chairman except as permitted by the provisions of the February 10, 1971 National Agreement. Conference will be held within thirty (30) calendar days of notification by Carrier. This will not apply to reductions in individual positions in a crew.

2. Timeliness Of The Notice Of Abolishment Of Jobs

The above facts show that on April 20, 1986, notice was given that Claimant's position was to be "permanently abolished" effective April 25, 1986. Again, it does not appear to be disputed that Claimant did not receive notice of this action until April 22, 1986.

Rule 5-B, as amended by Article III, requires "not less than five (5) working days' advance notice" for "abolishment of a position or reduction in force". Clearly, Claimant did not receive the benefit of that provision. Therefore, the Organization has shown a violation of Rule 5-B as amended.

The Carrier's argument that "not less then five (5) working days advance notice" language "contemplates that the employee whose position is being abolished is working" (Car. Submission at 13) is not supported by the rule. Had the parties intended that "working days" meant that the employee had to be actually working, as opposed to the normal distinction between "working days" and "calendar days", following the same analysis used above for determining the Carrier's rather than a specific individual's obligation to respond to a claim, the parties could have stated the obligation as requiring the Carrier to give "five working days' advance notice to those employees working". The parties did not do so. As before, "... it would have been a simple matter to state this result in the Rule. ... To do so is clearly insertion of additional language within the Rule, something the drafters did not see fit to insert, something we must avoid." *Third Division Award 27590.*

As a remedy, Claimant is therefore entitled to compensation for the amount

of time that the notice was deficient, *i.e.*, two days' pay. *See Third Division Award 27986* (cited by the Organization) where the employees were told on October 18, 1983 that their crew would be abolished October 24, 1983 (four working days later) and the rule required five working days' notice. In that case, the affected employees were given one day's pay because they received four and not five working days' notice.[10]

[10] In its Submission at 8, the Carrier asserts that because of court actions instituted by the Organization, there may be an overlapping of relief should the Organization prevail in its various actions and thus "This Board is urged to insure, should it decide to sustain any of these claims, in whole or in part, that such Award language guard against any double recovery on the part of these claimants." It is not the function of this Board to anticipate or factor in remedies that may be achieved in other forums. At this point, it is the function of this Board to address the contractual questions before it and to fashion make-whole relief consistent with existing authority for any violations found. Should relief fashioned by this Board overlap with relief fashioned in other forums, then it is for the parties to sort that out when it comes time to actually compensate those employees entitled to relief. If disputes remain, then the parties can bring those questions to the forum of competent jurisdiction (be it the courts or this or another board) for resolution.

Nor does the fact that Claimant did not work as a result of the strike and picket lines moot the Carrier's obligation to give notice as required by the rule or diminish Claimant's entitlement to the fashioned monetary relief. The Carrier's obligation to give not less than five working days' notice was mandated by the rule and there were no negotiated exceptions to that rule that exempted the Carrier from compliance in this case. Given the clarity of the requirement, the Carrier's obligation was independent of Claimant's status at the time the notice was given. To find otherwise would indirectly read language into the rule that requires the employee to be working in order to receive the benefit of the notice period. Again, had the parties intended such a result, they could have easily said so.

3. Did The Carrier Violate The Agreement When It Abolished Claimant's Job?

As the First Circuit noted, 808 F.2d at 159, "It is undisputed that D & H and B & M had the contractual right to abolish jobs". But the Organization nevertheless argues that Claimant's position was abolished in violation of the Agreement. We disagree. This record shows that the strike was effective in terms of imposing economic harm upon the Carrier.[11] There is nothing in the cited provisions that precludes the Carrier from abolishing *a position* in the face of the serious economic loss it was facing.

Specifically, the Carrier did not violate Decision MW-39 as argued by the Organization when it abolished Claimant's position without consent of the Organization or prior conference with the General Chairman. On its face, Paragraph 8 of Decision MW-39 requires agreement for a "rearrangement of Inspection and Repair Crews" and further provides that "Maintenance Crews will not be abolished until after conference with General Chairman ...." But the record does not disclose that there was a "rearrangement of Inspection and Repair Crews" or the abolishment of a

[11] *See e.g.*, Org. Exh. 1 at p. 42 showing a drop of carloadings in February 1986 to April 1986 from 10,690 to 6,694.

"Maintenance Crew" in the unusual circumstances of this case. From a literal reading of the relevant provisions, the notice to the employees of April 20, 1986 speaks to the abolishment of "positions", and not a "crew". This matter involved the abolishment of Claimant's "position" - something that Decision MW-39 specifically excludes from the requirements of prior conference with the General Chairman [emphasis added]:

> This will not apply to reductions in individual *positions* in a crew.

We recognize that a very narrow and literal reading could effectively negate the terms of Decision MW-39 in that the Carrier could effectively abolish or rearrange crews but disclaim any obligation for prior agreement or conference by taking the position that it was abolishing positions and not the crews. That kind of restrictive interpretation would not be appropriate in that the abolishment of all positions on a crew would amount to a "de facto elimination" of the crews. *See PLB 3561, Award 28.* Therefore, under ordinary circumstances, the Carrier could not circumvent the requirements of Decision MW-39 by effectively abolishing or rearranging crews without the precondition of prior agreement or conference as the case may be.

But these were not ordinary circumstances. The Organization struck the Maine Central and extended the picket lines to the Carrier. As a result of the Organization's effective economic action and the employees' honoring those lines the available work for these employees was drastically reduced. The Organization's resort to self-help thus caused the Carrier's need to reduce the crews. It is a fundamental rule of contract construction that agreements are to be construed so as to avoid harsh or absurd results.[12] Under the circumstances, we believe it would be inconsistent with this rule of construction to construe the cited portions of Decision MW-39 to require the Carrier to obtain consent or to engage in conference in order to abolish crews from or with the very entity that was the direct cause of the need to abolish or rearrange those crews as a result of the strike and picketing.[13]

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[12] *See* Elkouri and Elkouri, *How Arbitration Works* (BNA, 4th ed.), 354:

> When one interpretation of an ambiguous contract would lead to harsh, absurd, or nonsensical results, while an alternative interpretation, equally consistent, would lead to just and reasonable results, the latter interpretation will be used.

[13] We do not view this conclusion as inconsistent with our obligation not to insert language into the parties' agreements where they chose not to do so as discussed in other aspects of this matter. *Third Division Award 27986, supra.* Our conclusion concerning the Carrier's ability to abolish positions or rearrange crews without prior consent or conference in the face of this particular economic action by the Organization is a conclusion reached applying the basic rules of contract construction to language that is not totally clear. Our discussion in this matter concerning who is required to respond to claims, the Carrier's obligation to give five working days'

Therefore, the fact that there was no prior conference or that the Organization did not agree to the abolishment of Claimant's position does not dictate a sustaining award.[14]

Nor can we find that the Carrier violated Rule 4-A. Rule 4-A permits a "[r]eduction in force ... in the crew which it is necessary to reduce." Under these unique circumstances, because of the effectiveness of the picket lines, there is no showing that the crews were not reduced in accord with the provisions of this rule.

Similarly, we find no violation of Rule 5-B concerning the order of layoffs chosen by the Carrier. Giving the benefit of the doubt to the Organization that this was a layoff "for [a] short period", given the effect of the strike and picket lines and the refusal of employees such as Claimant to report, we cannot find that a "proper reduction of expenses [could] ... be accomplished by first laying off the junior men."

4. Did The Carrier Violate The Agreement With Respect To Claimant's Seniority?

Rule 13 is clear. "Employees laid off by reason of force reduction, desiring to retain their seniority rights, must, within ten (10) days from date laid off, file their name and address, in writing ... with their immediate supervising officer." The consequences of failure to comply with that provision are equally clear in the rule. Employees failing to do so "will be considered out of the service ...."

Because of the picket lines and after the April 20, 1986 notification that his position was abolished, Claimant did not file his name and address as required by the plain language of the rule. Under the clear language of the rule, then, the Carrier had the right to consider Claimant as out of service. The rule is clear and mandatory. If laid off, the employee "must" file. Claimant's position was abolished and he did not make the requisite filing. On its face, the rule

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notice prior to taking such actions and the employees' obligations to file their names and addresses comes from the clear language of the governing provisions which require no construction given the clarity of the relevant terms.

We stress the narrow holding of our conclusion concerning the obligations under Decision MW-39 for prior consent and conference. Our holding is limited to the unique facts of this case where the cause of the reductions was the economic action of the Organization.

[14] *PLB 3561, Award 28, supra* relied upon by the Organization is not on point so as to change the result. In that matter, the carrier therein "abolished all Trackman positions in the line gang at Brockway, Pennsylvania, and transferred the headquarter of the gang to Johnsonburg, Pennsylvania" and "also abolished all Trackman positions in the line gang at Springville, N.Y. and moved the gang's headquarters to Buffalo, N.Y." which the Board found amounted to "de facto elimination of the track gangs at those locations." The Carrier's actions were further tied to subcontracting. Here, we cannot find a similar action. The Carrier took a severe blow in its business as a result of the establishment of the picket lines. It then eliminated *positions*. For reasons discussed above, Decision MW-39 cannot be read to require the Carrier to obtain prior consent or have a conference.

is self-executing. By not filing, Claimant placed himself out of service.

The Organization's reliance upon the April 21, 1986 recall notice does not change the result. While that notice stated that employees were "expected to report back to work on or before April 25, 1986", a reading of the remainder of that notice shows that the Carrier was not recalling all employees in variance of the April 20, 1986 notice that certain positions were abolished. The April 21, 1986 notice stated certain exceptions to the recall. Specifically, for those employees such as Claimant whose positions were abolished, the April 21, 1986 notice stated that "Employees ... whose assignment has been abolished ... should contact their supervisor for assistance in reassignment or other instructions." The April 21, 1986 notice cannot be read as the Organization argues to negate the April 20, 1986 notice of abolishment as that notice applied to Claimant. Therefore, we cannot find as the Organization argues (Org. Submission at 17) that the Carrier "recalled him to service".

The Organization's argument (Org. Submission at 17-18) that because of the circumstances of the strike and picket lines "the employees affected thereby would not be able to comply with the Carrier's demands" also does not change the result. There is nothing in the Agreement cited by the Organization that exempts Claimant from the operation of the rules because of a labor dispute. Had the parties intended such a result, they could have easily placed language to that effect into the Agreement. Again, for us to accept that argument, we would be required to modify the negotiated terms of the Agreement. We do not have that authority. "To do so is clearly insertion of additional language within the Rule, something the drafters did not see fit to insert, something we must avoid." *Third Division Award 27590, supra.*

We cannot find that Claimant was unable to comply with the requirements of the rule. Nothing in the rule required Claimant to cross the picket line to comply with the filing requirement. The rule does not require an in-person filing. Claimant could have mailed in his name and address and been in compliance with the rule.[15]

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[15] With respect to the termination of seniority for failure to file names and addresses, the First Circuit observed (808 F.2d at 154-155):

> On May 27, 1986, the carriers unilaterally terminated the seniority of all employees who did not file their names and addresses in a timely fashion. But even then, the provision was not uniformly applied by the carriers. For example, although 145 B & M employees were notified of the seniority loss by that carrier, D & H did not apply that provision to its signalmen employees. This provision was then selectively enforced by the carriers.
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> This dispute deals with the B & M's actions. While there may have been disparity of applica-

Nor does this record support the Organization's assertion that "the Carrier's actions had their basis in the Carrier's desire to punish the affected employees." There is insufficient evidence in the record to warrant such a conclusion.[16] The action taken against Claimant was the result of a self-executing rule.

The Organization's further argument (Org. Submission at 19) that Claimant's seniority was affected as the result of "an illegal abolishment of that employee's position" is similarly not persuasive. As found above, it has not been shown that the abolishment of Claimant's position violated the terms of the Agreement or Decision MW-39.

AWARD

Claim sustained in part. Claimant shall receive two days' pay.

Edwin H. Benn
Neutral Member

R. E. Dinsmore
Carrier Member

W. E. LaRue
Organization Member

North Billerica, Massachusetts

Dated: April 21, 1993

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tion of the rules *between carriers* affected by the strike, there is nothing in this record showing that *the B & M* did not uniformly apply the provisions to its employees.

[16] *Third Division Award 19601* cited by the Organization is distinguishable. There, the employees did not cross the picket lines because they were told by police to go home and "they feared immediate physical harm or subsequent reprisals to their persons or property if they attempted to protect their assignment." The Board found that the employees did not take part in the picket line and that the Carrier could not discipline the employees for not crossing the lines. Those facts are not present here. Nor was the type of self-executing rule that is present in this case present in *Award 19601*.

LABOR MEMBER'S DISSENT
TO
AWARD NO. 1 OF PUBLIC LAW BOARD NO. 4669
(Referee Benn)

One school of thought adhered to by certain railroad industry advocates is that writing dissents is an exercise in futility because they are neither read nor considered by subsequent arbitrators. This advocate does not belong to that school. For, to accept the theory that dissents are meaningless, is to accept by implication that reason does not prevail in railroad industry arbitration. Despite all the faults built into this system, the Organization is not ready to conclude that reason has become meaningless. Therefore, the Organization Member has no alternative but to file this emphatic dissent.

This dissent has three central themes. First, the Majority exceeded its jurisdiction by deciding the case on new argument which was not properly before it.[1] Second, the Majority's ruling was contrary to the clear rules in the collective bargaining agreement and well-reasoned award precedent. Finally, the Majority relied upon principles of contract interpretation that simply did not apply to the contract language involved.[2]

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[1] This error was compounded by failure to allow the Organization a reasonable opportunity to rebut the new argument after it was improperly raised and accepted.

[2] This error was compounded by the fact that principles of contract construction which were applied (strict reading of the language versus "reasonable" results) seems to shift without reason.

NEW ISSUES

At this point in the history of railroad industry arbitration, it is beyond cavil that arbitration tribunals are restricted to considering the evidence and argument raised during the "on-property handling" of the case. Moreover, Article V of the August 21, 1954 Agreement provides that if a claim is disallowed by the carrier, the carrier must notify the employe or his representative "in writing of the reasons for such disallowance". The Majority apparently recognized this hornbook principle and the clear restrictions of Article V as is evidenced by Footnote 6 at Page 3 where it accepts an assertion by the union as fact because, "*** The on-property handling does not show a dispute of that assertion by the Carrier. ***" Despite the well-established nature of the new argument prohibition and even the apparent recognition of that principle at Footnote 6, the Majority not only accepted new argument from the carrier concerning procedural and merits issues, but then proceeded to decide the case based on that new argument.

Railroad arbitration is not de novo arbitration. The Board is restricted to considering the record developed in the correspondence on the property. In that record, the carrier never disputed the Organization's position on the central issues in the case, particularly the violation of Decision MW-39. The NRAB has repeatedly and consistently held that where fundamental contract issues, including issues as fundamental as scope coverage, are not

raised on the property, they may not be considered by the Board. See Third Division Awards 20230, 20258, 23354 and 26212 which are but a few of the many awards holding to this effect. Typical thereof is Award 20230 which held:

> "Secondly, Carrier urges a denial because the Organization failed to show that the work in question was historically, customarily and traditionally performed by bargaining unit employees to the exclusion of others, citing Award 16640 (McGovern) concerning these same parties. We are unable to find that Carrier raised that issue on the property, but rather, relied upon an assertion that the facilities in question were leased to Eggar Construction. Accordingly, the Carrier's 'customary' defense is not properly before us."

In this case, the union set forth the facts, applied the rules to the facts and asserted a violation of the rules, particularly Decision MW-39. During the handling on the property, the carrier never disputed the facts or the violation of Decision MW-39. Consequently, the carrier was prohibited from contesting those facts or the application of Decision MW-39 before the Board. Notwithstanding this clear prohibition, the carrier raised, and the Majority accepted, new argument and evidence at the oral hearing. To add insult to injury, the Majority not only considered new issues, but then compounded that error by failing to allow the Organization a reasonable opportunity to rebut the new evidence and argument raised for the first time at the oral hearing.

CLEAR LANGUAGE

While this case had multiple facets, the central merits issue was whether the carrier could abolish or rearrange crews without the precondition of prior agreement or conference pursuant to Decision MW-39. In this connection, the controlling language is clear and unambiguous. Inspection and repair crews cannot be rearranged without agreement and maintenance crews cannot be abolished until after a conference with the General Chairman. In this case, there clearly was no agreement and there was no conference. Hence, the carrier clearly violated Decision MW-39 when it abolished the positions in question to discriminate against and punish employes who exercised their rights to honor picket lines.

CONTRACT INTERPRETATION

Perhaps the most troubling aspect of this award is the vacillating and, in fact, downright contradictory application of contract interpretation principles. The first issue addressed in the award is the procedural issue concerning Article V of the August 21, 1954 Agreement. The basic question was whether the same carrier officer who is designated to receive a claim or appeal is obligated to respond to that claim or appeal. Numerous arbitrators have reviewed precisely the same contract language and held that a reasonable reading of the rule supported the union's position that

the same carrier officer who received the claim was obligated to respond. Despite this well-established precedent, the Majority in this case opted for a strict construction standard and found that a "plain reading" of the rule did not support the union's position. Of course, absent this finding, it would have been necessary to sustain the union's position in full.

The next issue addressed by the award is the timeliness of the notice of the job abolishments. The Majority once again opted for a plain reading and refused to insert additional language in the rule by implication. This was the one and only instance in which a plain reading or strict construction actually favored the union. Unfortunately, this was a relatively minor point of little consequence relative to the aforementioned procedural argument and the central substantive issue discussed below.

The central substantive issue in the case was whether the carrier violated Decision MW-39 when it abolished the position in question to punish those employes who exercised their right to honor picket lines. On this issue, a plain reading of the Agreement would have required a sustaining award. However, in a dramatic departure from the standards of contract interpretation that had been applied to the first two issues addressed in the award, the Majority abandoned the plain reading standard and inserted, by implication, new language in the Agreement to achieve

"reasonable results".[3] Despite the fact that there are clearly no applicable exceptions in Decision MW-39 for economic adversity caused by a strike or otherwise, the Majority created just such an exception in this case to avoid sustaining the claim. The very reasoning which is cited to support this interpretation shows the infirmity of the interpretation. At Footnote 12, the Majority points to the following Elkouri and Elkouri quote to support its position:

> "When one interpretation of an ambiguous contract would lead to harsh, absurd, or nonsensical results, while an alternative interpretation, equally consistent, would lead to just and reasonable results, the latter interpretation will be used."

The obvious error in the Majority's opinion is that there is nothing "ambiguous" about Decision MW-39, hence, the principle quoted from the Elkouris simply had no application here. The Majority apparently recognized the unstable ground upon which it was treading because it next attempted an apologia in Footnote 13 at Page 8. The apologia fails for the same reason that Footnote 12 fails to support the Majority's position. Both footnotes are based on the premise that Decision MW-39 is somehow ambiguous. That premise itself is false. In fact, the Majority, at Page 7, plainly states "*** On its face, Paragraph 8 of Decision MW-39 requires agreement for a 'rearrangement of Inspection and Repair Crews' and

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[3] It remains a mystery as to how aiding an openly hostile anti-labor carrier in its quest to punish employes for honoring picket lines could be construed as a "reasonable result".

"further provides that 'Maintenance Crews will not be abolished until after conference with General Chairman ....' ***" Since the Agreement was clear "on its face", there was no rationale for moving beyond a plain reading of the rule and engaging in the mental gymnastics necessary to arrive at a so-called "reasonable result". To quote the Elkouris, "If the language of an agreement is clear and unequivocal, an arbitrator generally will not give it a meaning other than that expressed. *** Thus, the clear meaning of language may be enforced even though the results are harsh or contrary to the original expectations of one of the parties. ***" [Elkouri and Elkouri, *How Arbitration Works*, 4 Ed. at 348-349 (1985)].

The next issue involved in the award is the termination of the claimant's seniority for failure to file his name and address following the improper abolishment of his crew. On this issue, the Majority flip-flopped back to a plain reading or strict construction standard. In complete contradiction to its finding that economic harm resulting from a labor dispute acted as an implied exception to the crew abolishment prohibitions in Decision MW-39, the Majority found, at Page 10, that, "*** There is nothing in the Agreement cited by the Organization that exempts Claimant from the operation of the rules because of a labor dispute. Had the parties intended such a result, they could have easily placed language to that effect into the Agreement." It seems that labor disputes can

be implied to relieve the carrier of its obligations under the Agreement, but no such exception can be implied for the employes.

The final error in the award appears at Page 11 where the Majority finds that there is no evidence to support the conclusion that the carrier's actions had their basis in the carrier's desire to punish the affected employes. On this point, the Majority places itself in direct conflict with the U.S. District Court, District of Maine. After three days of testimony by carrier and union witnesses, the Honorable Eugene Carter held:

> "Regardless of the various reasons given for these abolishments by the carrier, the Court finds that the effect of the permanent abolishments was to discriminate against employes who exercised their rights to honor picket lines. The fact that only employees who honored BMWE's picket lines had their jobs abolished leads the Court to conclude that the purpose of this action was to discriminate against and to punish employees who had continued to honor BMWE's picket line." (RLEA v. Boston & Maine Corporation, et al., D.C., Maine, 1987)

It is clear that the carrier was seeking to punish the employes for honoring picket lines. Hence, even if Decision MW-39 could be construed as ambiguous (which we deny) interpreting Decision MW-39 so as to support the carrier's punishment of the claimants could hardly be deemed a just and reasonable result.

In conclusion, it is clear that the basic reasoning in this award is invalid. Decision MW-39 is not ambiguous, in fact, it is clear on its face. Hence, instead of applying principles of

contract interpretation that apply only to ambiguous contracts, the Majority should have given Decision MW-39 its plain meaning. Inasmuch as the precedential value of an award is no greater than the reasoning in the award, this award has no precedential value. Therefore, I must respectfully, but emphatically, dissent to this award.

W. E. LaRue
Employe Member