PUBLIC LAW BOARD NO. 4669

AWARD NO. 11
NMB CASE NO. 11
UNION CASE NO. 11
COMPANY CASE NO. 11

PARTIES TO THE DISPUTE:

Boston and Maine Corporation

- and -

Brotherhood of Maintenance of Way Employes

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The Agreement was violated when, as of July 18, 1986, the Carrier abolished the Inspection and Repair (I&R) Crew to which Track Inspection Foreman M. Woodbury and Trackman B. Baker were regularly assigned without first having reached an agreement with the General Chairman.

2. The Agreement was violated when the Carrier assigned and used supervisors above the rank of foreman to perform track inspection work beginning on July 23, 1986 instead of assigning Track Inspector Foreman M. Woodbury and Trackman B. Baker to do so.

3. As a consequence of the violations referred to in Parts (1) and/or (2) above, the Claimants shall be returned to their positions and compensated for all wage loss or difference in loss of earnings from July 23, 1986 until restored to their positions.

RELEVANT DECISION LANGUAGE:

Decision MW-39

...Section 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 Crew will be made unless by Agreement between the parties to this Agreement.

Section 9

The work functions presently performed by Patrol Foreman and Flange Oiler Inspectors will be performed by the Inspection and Repair Crews.

OPINION OF BOARD:

The facts and judicial history leading up to this dispute are set forth in detail in Awards No. 1 and No. 6 on this Board. The specific incident precipitating the instant case was Carrier's issuance on July 16, 1986 of the following notice:

> Subject to the approval of the U.S. District Court, District of Maine the following positions are abolished at the close of work on Friday, July 18, 1986. This notice is given in accordance with the Emergency Force Reduction provisions of your agreement.
>
> CREW NAME, NUMBER AND POSITIONS:
>
> [Among the crews listed was Claimants' I&R Crew]

On July 21, 1986 the U.S. District Court for the District of Maine issued an "Order on Application for Approval of Proposed Job Abolishments" which read in pertinent part as follows:

> After hearing counsel, record waived, and on review of the written submissions of the parties on the Application For Approval of Proposed Job Abolishments, the Court hereby APPROVES the Defendant carriers' Application to abolish seven hundred twenty-five (725) positions for the reasons and on the following terms and conditions to wit:
>
> (1) That losses of bumping rights during the strike and forfeitures of seniority imposed during and after the strike shall be fully abrogated;
>
> (2) That abolishments shall accord with the terms of the non-emergency notice provisions of the Agreements. [Capitalization in the Court's document.]

* * *

(5) That such abolishments will not be the cause of any violation of the scope rules applicable to contract labor.

* * *

The provisions of this Order are not an adjudication in any respect that job abolishments approved herein are in fact in compliance with applicable agreements and/or employee protective conditions or provisions.

By letter of August 28, 1986, the Organization filed a claim with Carrier on behalf of the Claimants. In that Claim the Organization alleged Carrier violations of Decision MW-39 (reproduced in Award No. 6), and the Scope Rule of the Agreement between the Parties--specifically,

> when on July 23, 1986 and there after (sic) [Carrier] allowed non-agreement, Management Personnel to perform the work which we feel has historically, traditionally and by agreement been performed by Maintenance of Way Employes.

In its claim, the Organization also made reference to Decision MW-39, Sections 8(A) and 9 (reproduced above).

As the Carrier has noted in its submission, Award No. 3 on this Board, decided by then Neutral Member Edwin Benn, involved a nearly identical case. In that Award, Referee Benn found that the Organization had not met its burden of persuasion with respect to the portion of its claim concerning alleged use of supervisors to perform work reserved to the BMWE. Upon careful review of the record before us, this Board finds no grounds for overturning the findings in Award No. 3, on that matter. Accordingly, Part 2 of the Claim before the Board is denied.

With respect to Part 1 of the Claim, however, evidence

before the Board and prior decisions on this Board provide greater support for the Organization's position. In its July 16, 1986 announcement of the abolishment of certain positions as of July 18, 1986, the Carrier stated that such notice was "given in accordance with the Emergency Force Reduction provisions of [the] agreement." The District Court, however, in approving the job abolishments, specifically stipulated that such abolishments must "accord with the terms of the non-emergency notice provisions of the Agreements."(Emphasis mine). Thus, the District reimposed upon Carrier the contractual notice requirements associated with abolishment of the positions in question.

As noted in Award No. 1, and confirmed by Award No. 6 on this Board, however, in light of the special circumstances precipitating the position abolishments, Carrier is not here held to the standard enunciated for abolition or "rearrangement of crews." Rather, Carrier is held to the less stringent requirements of Article III (reproduced in Award No. 6), of "not less than five (5) working days' advance notice" for "abolishment of a position or reduction in force." Clearly, an announcement made on July 16, 1986 of the abolishment of positions effective two working days later, does not meet even this reduced standard of contract compliance.

With respect to remedy, Carrier notes that Claimants were fully employed at the time any alleged violation occurred, a fact not disputed by the Organization, and are therefore not entitled

to compensation, even if, arguendo the Board should find in any part against the Carrier. A long tradition of NRAB decisions supports Carrier's position on this matter. (See for example Awards 3-26174; 3-23354). In keeping with that tradition, and in light of the unusual circumstances precipitating the cases on this Board, Part 1 of the instant claim is sustained, and Part 3 is denied. Carrier is placed on notice, however, that future failure to comply with the notice provisions clearly established by the Agreement between the parties may subject it to monetary penalties irrespective of whether the affected employes suffered actual monetary loss (Award 3-27001; 3-29303).

AWARD

Claim sustained in part, in accordance with the findings of the above Award.

Elizabeth C. Wesman

Elizabeth C. Wesman, Chairman
Dated at Ithaca, New York on 11 December 1993

W E LaRue

Union Member

Dated at Southfield, MI

on March 10 1994

R.E. Dinsmore - D dissent

Company Member

Dated at No. Billerica MA

on June 3, 1994