AWARD NO. 5
CASE NO. 5

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 B&B Mechanic R. Dozois on May 17, 1986 without giving him at least five (5) working days' advance notice thereof.

2. As a consequence of the violation referred to within Part (1) hereof, the Claimant shall be allowed five (5) days' pay (40 hours) at his straight time rate of pay and he shall be allowed vacation credits and health and welfare benefits flowing therefrom.

OPINION OF BOARD

The history of this dispute and resolution of general arguments common to the cases before this Board are set forth in *Award 1* of this Board and are incorporated herein.

At the relevant time, Claimant held seniority as a B&B Mechanic. On January 10, 1986 (prior to the picketing involved in these cases) Claimant's crew (Commuter Extra B&B Crew #4829) was abolished. By letter dated January 15, 1986 notice was given by Assistant to Chief Engineer-Commuter Rail R. J. Leonard that "Notice of abolishment of your crew dated January 10, 1986 is canceled effective immediately." By notice of February 10, 1986, Claimant's crew was again abolished effective February 14, 1986.

It is undisputed that notwithstanding the February 14, 1986 abolishment of Claimant's crew, Claimant continued to work until the commencement of the picketing in early March 1986. After the picketing and while the court proceedings were being pursued along with the establishment of the Presidential Emergency Board, Claimant was sent another abolishment notice dated May 17, 1986 which stated that "Due to lack of project funding your crew is abolished effective immediately."

In its Submission at 1, the Carrier asserts that after his crew was abolished effective February 14, 1986 Claimant was in a furloughed status and was used on temporary vacancies in accord with Rules 4B, 16B, 26(h), 30(c) and Memorandum of Agreement dated May 15, 1942, Paragraph 1(b). *See also*, Chief Engineer K. F. Briggs' letter of July 23, 1986. Therefore, according to

the Carrier, given the rules under which Claimant was working after February 14, 1986, there was no requirement to give Claimant a further five day notice for the abolishment of his job.

The Organization takes the position that the February 1986 abolishment notice was never carried through and that "Claimant's crew continued to work until the secondary picketing on the Carrier's property stopped work." *See* Org. Submission at 8. Therefore, according to the Organization, the May 17, 1986 abolishment notice did not give Claimant the required five days' notice.

The Carrier acknowledges that Claimant was sent the May 17, 1986 abolishment notice. However, according to the Carrier (*see* Chief Engineer Briggs' letter of July 23, 1986), "[t]he ... notice of May 17, 1986 ... was obviously in error as notice had been given on February 14, 1986."

As a contract claim, the burden is on the Organization to demonstrate the elements sufficient to sustain its position. Here, it has not done so.

Specifically, in order for the Organization to succeed in this matter, it must demonstrate that notwithstanding the February 10, 1986 notice abolishing Claimant's crew effective February 14, 1986, that noticed abolishment was not carried through as the Organization asserts. By making that showing, it could be fairly be concluded that the Carrier was then be obligated to give the five days' advance notice as required by Rule 5-B as amended by Article III. *See Awards 1 and 2* of this Board.

In terms of analysis of the issues before us, the Organization's showing is sufficient to shift the burden to the Carrier to rebut the Organization's demonstration. We find that the Carrier has done so. The Carrier's showings as set forth in Chief Engineer Briggs' letter of July 23, 1986 letter raises the factual assertions that Claimant's position was, in fact, abolished effective February 14, 1986 and that Claimant was in a furloughed status filling vacancies after the abolishment and prior to the picketing. Most significantly, Briggs' letter raises the contention that the May 17, 1986 notice of abolishment (upon which the Organization's case hinges) was therefore sent in error.[1]

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[1] The Carrier attributes the sending to the May 17, 1986 notice to confusion resulting from the paperwork generated by the claims arising out of the effects of the picketing and the Carrier's actions.

In *Award 4* of this Board, that "mountain of paperwork" argument was not sufficient to excuse the Carrier's obligation to comply with the clear mandate in Article V with respect to responding to claims in a timely fashion. Here, the Carrier is not relying upon that argument as a reason for not complying with the terms of Agreement. All the Carrier is asserting is that because of the paperwork generated by the labor dispute, it erred in sending the May 17, 1986 notice.

In terms of deciding this case, we need go no further. There is nothing in the record aside from argument that stands to rebut or satisfactorily refute the Carrier's position that Claimant's crew was abolished effective February 14, 1986; thereafter any work Claimant performed was that of an employee in a furloughed status filling vacancies; and that the May 17, 1986 notice of abolishment was sent in error. Again, as a contract dispute, the burden is on the Organization to establish the elements of its claim. At best, in terms of *facts* necessary for resolving this matter, the record is in conflict and there is no basis for us to resolve the factual disputes. Given that conflict and given the burden the Organization must meet, we must find that the Organization has not carried its burden. The claim will therefore be denied.[2]

AWARD

Claim denied.

Edwin H. Benn
Neutral Member

R. E. Dinsmore
Carrier Member

W. E. LaRue
Organization Member

North Billerica, Massachusetts

Dated: 2/18/93

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[2] This claim was filed on June 16, 1986. Given that more than 60 days elapsed since the January 10 and February 10, 1986 notices of abolishment, under Article V ("All claims or grievances must be presented ... within 60 days from the date of the occurrence on which the claim or grievance is based"), the propriety of those notices is not before us.

Further, under the particular circumstances of this case we do not find that the Organization's argument (Org. Submission at 13) that to work Claimant as a casual employee after abolishing his crew violated Rule 16-B so as to change the result. This record is devoid of sufficient *facts* to determine the validity of such an assertion. Specifically, aside from the general assertion (albeit disputed) that Claimant was filling vacancies which is sufficient to refute the Organization's showing in this matter, we do not know sufficient detail concerning the specifics of the jobs performed by Claimant after the February 14, 1986 abolishment. While much can be hypothesized from the parties' positions, we find that because of these lack of specifics we are unable to definitively measure the impact of Rule 16-B on Claimant's status after February 14, 1986. The resolution of the Organization's argument on the impact of Rule 16-B will thus have to await another day. For our purposes though, in this dispute, given the lack of facts the Organization's argument does not change the result. The record remains in substantial conflict and that conflict defeats the Organization's ability to proceed in this matter.

We have considered the other positions advanced by the parties. In light of our determination concerning the result of this matter stemming from the conflict in the record, those additional arguments do not serve to change the result.