PUBLIC LAW BOARD NO. 2960

AWARD NO. 86
CASE NO. 107

PARTIES TO DISPUTE:

Brotherhood of Maintenance of Way Employes

and

Chicago & North Western Transportation Company

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it abolished the positions of the employes listed in Employes' Exhibit "A-1" without the benefit of a five (5) working day written notice. (Organization File T4-3622; Carrier File 81-83-62).

(2) Each of the Claimants listed in Employes' Exhibit "A-1" shall be allowed sixteen hours of pay at their respective straight time rate.

OPINION OF THE BOARD

This Board, upon the whole record and all of the evidence, finds and holds that the Employe and Carrier involved in this dispute are respectively Employe and Carrier within the meaning of the Railway Labor Act, as amended, and that the Board has jurisdiction over the dispute involved herein.

The basic facts are undisputed. By notices dated November 24, 1982, the Claimants were advised during the course of their work day that their assignments would be abolished effective with the end of the shift on November 30, 1982. These notices were subsequently

supplemented to make the effective date of the abolishment the end of the shift on December 1, 1982. The Claimants' jobs were then abolished in accordance with the amended notice. The claim was originally presented seeking 16 hours pay for each Claimant on the basis that they were not afforded a five-day notice. It was subsequently agreed with the General Chairman that the Claimants worked and were compensated for December 1, and the claim was then reduced to 8 hours pay. It is also noted that November 24 was a Wednesday; November 25 was Thanksgiving; November 26 was a work day; November 27 and 28 were rest days. The next work day was Monday, November 29.

The case involves the interpretation and application of Rule 12 which requires that "...not less than five (5) working days notice..." be given when positions are abolished. Rule 12(a) is quoted in its entirety below:

> "(a) When positions are abolished the employes affected shall be given not less than five (5) working days notice in writing prior to the effective date of abolishment, with copy of same furnished to the General and Local Chairmen. Such notice shall include the name of the permanent assignee of the position at the time abolished and the name of the employe filling the position at the time abolished (if different.)"

The question posed in this case is bi-fold; to wit whether the first day the notice is posted is to be counted toward the five-day notice requirement and whether Thanksgiving is to be counted. In any event, in this case if it is determined that either day counts the notice must be deemed proper because including either of these days, an aggregate of five days notice would have been given inasmuch as the Claimants worked December 1, November 30, November 29 and November 26. Only if both days are determined not to count would the claim for compensation for December 2, be valid.

First, with respect to Thanksgiving, it is the opinion of the Board that under the language which requires advance notice based on "working days" that a holiday cannot be considered toward the requisite minimum number of days. This result easily flows from the language itself. Also, see Third Division Award 19226.

Regarding the second part of the question, the language is somewhat more ambiguous. Both parties make appealing arguments and cite cases in support of their positions. The Carrier cites Second Division Award 5196 and the Organization cites several including third Division Awards 17219, 21766 and 15839.

After reviewing the arguments and the citations, the Board must find more persuasive value in the arguments made and cases cited by the Petitioner. For instance, Second Division Award 5196 cited by the Carrier turned on the fact there was an undisputed past practice of including the first day. In the instant case, however, no practice is asserted or evidenced in the record. Thus, the ambiguity in the agreement cannot be resolved by reference to the parties' practice. Accordingly, we are left in the position to interpret the somewhat ambiguous language on its face. The preferred interpretation is therefore the one which is most reasonably consistent with the language as it stands independently, as there is no evidence of past practice, bargaining history or prior interpretations between the parties.

The language implies a minimum notice in that it states that "employes affected shall be given not less than five (5) working days notice." Thus, a notice posted in the afternoon hours of the 24th is more reasonably susceptible to the conclusion that this day is not to be counted as it was less than a full working day.

Moreover, greater weight was given to the Organization's interpretation because the greater portion of arbitral authority supports their position. For instance, Third Division Award 17219 is instructive. While the language involved there required a "minimum of five working days," it is similar to this language which says "not less than five (5) working days notice" will be given. The Board, noting there was no practice, stated the following:

> "Carrier failed to adduce any proof as to past practice, however, said Rule 14(b) is clear and unambiguous as to said minimum notice time period. It explicitly provides for a minimum of five working days' advance notice in writing and a past practice of less notice time period could be contrary to said rule. Further, we do not agree with Carrier's arguments that the working day, during which Claimant received said notice in this instance, must be included in computing said 'five' working days advance notice. See Award 15839 and 15954."

Also, it was stated in Third Division Award 21766:

> "Carrier concedes that 'five working days notice must be given,' but it contends that Friday, May 9, 1975 was one of those days. In other words, it asserts that the working day during which notice was given is properly included in computing the five (5) working days advance notice.
>
> "The Board has consistently ruled to the contrary. See, for example, Awards 14928, 15839, 15954 and 17219."

In view that both the first day and Thanksgiving are deemed, based on this record, not to count toward the minimum five-day notice period, the Claim must be sustained.

AWARD:

In view of the foregoing, the Claim is sustained and the Carrier is directed to pay the Claimants for eight (8) hours for December 2, 1982.

Gil Vernon, Chairman

H. G. Harper, Employe Member

J. D. Crawford, Carrier Member

Dated: May 8, 1985