PUBLIC LAW BOARD NO. 4669

AWARD NO. 6
NMB CASE NO. 6
UNION CASE NO. 6
COMPANY CASE NO. 6

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 the Carrier improperly abolished the position of Track Foreman M.C. Woodbury ...effective 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 prevented him from returning to a position to which his seniority entitled him.

2. The Carrier failed to disallow the claim (submitted under date of June 12, 1986) as contractually stipulated in Article V of the August 21, 1954 National Agreement.

3. As a consequence of the violations referred to in Parts (1) and/or (2) above, the Claimant shall be compensated for all wage loss suffered including overtime and shall have all vacation rights and health and welfare benefits restored beginning May 19, 1986.

PERTINENT CONTRACT PROVISIONS AND ANCILLARY DECISIONS:

ARTICLE III - ADVANCE NOTICE REQUIREMENTS

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 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.

ARTICLE V -- (August 21, 1954 National Agreement)

(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.

DECISION MW-7 (May 2, 1950)

... (2) Upon his return from such authorized absence [an employee] shall have the following rights--

(a) Return to the position held at the time he went on authorized leave.

(b) Take any position bulletined during his absence and awarded to an employee junior to him, which he could have secured in compliance with the rules of the controlling agreement had he not been absent, except where such position is the result of his own absence.

(c) Follow the procedure of (a) and be allowed seven (7) calendar days thereafter to exercise the right outlined in (b).

(3) If the position held at the time said employee went on authorized leave no longer exists or he has been properly displaced therefrom he shall have the right to exercise his seniority as provided by agreement rules or understanding.

DECISION MW-39 (April 5, 1972)

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 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 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.

OPINION OF BOARD:

The chronology of this rather convoluted case, and the judicial history which culminated in establishment of this Board, are set forth in detail in Award 1, of this Board, issued by then Neutral Member Edwin H. Benn. Accordingly, it is restated only briefly here. On March 13, 1986 the Organization struck the Maine Central Railroad. It subsequently extended its pickets to the other two railroads also held by Guilford Transportation Industries -- the Boston and Maine ("B&M" or "Carrier"), and the Delaware and Hudson. When the picket lines resulted in suspension of Carrier's operations, the Carrier abolished all BMWE contract positions. The abolishments were initially intended to be temporary, in response to the effects of the job action.

Subsequently, Carrier learned that the National Mediation Board (NMB) had recommended that the President appoint an emergency board to recommend a resolution of the dispute between

the BMWE and the Maine Central Railroad. Such an appointment would have the effect of ending the strike during a 60-day "cooling off" period, resumption of Carrier's operations, and probable return to work of all the Carrier's contract employees. In anticipation of that occurrence, under date of April 20, 1986, Carrier notified nearly all its BMWE employees, including Claimant, that their positions would be permanently abolished effective April 25, 1986. It is undisputed on the record that Claimant did not receive or gain knowledge of the contents of the abolishment notice until April 22, 1986. It was Carrier's intent that, should the President appoint an emergency board and thereby end the strike, the B&M would then advertise only those jobs necessary for continuing operations at a reduced post-strike level.

On April 21, 1986, Carrier issue a notice to the BMWE employees to report back to work. That notice read in pertinent part as follows:

> 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 he report to work within the time frame established by the April 21, 1986 notice.

A Presidential Emergency Board was established on May 16, 1986 to investigate the Maine Central dispute. At that time, all of the labor organizations representing the Carrier's employees made unconditional offers to return to work immediately. Maine Central accepted this offer and all striking employees returned to the positions they held before the strike and held them through the week of May 19, 1986. During that week, Maine Central issued job abolishment notices to 447 of its labor force covered by collective bargaining contracts, a figure roughly corresponding to the volume of business loss caused by the strike. The Boston and Maine, however, elected to hire only after determining its work needs in view of the effects of the secondary pickets. It then proceeded to post for bidding only the needed positions, or approximately 50% of Carrier's pre-strike positions.

On May 20, 1986, Carrier sent various employees, including Claimant, a standard recall notice from the Supervisor-Engineering Personnel:

> The Engineering Department is expanding track forces in the near future. If you are interested in returning to work, please contact me at my office at North Billerica, at (617)-663-6966, as soon as possible.

Prior to that date, Claimant had been provided with a bulletin advertising a position for which he applied, and was subsequently

assigned thereto according to his seniority. Claimant underwent a physical examination pursuant to Carrier's medical policy and reported to work on May 19, 1986.

Shortly after he reported to work on the 19th, Claimant was informed that his employment was terminated, and he was ordered off Carrier's property. Carrier later told the Organization that the Claimant's seniority with the Carrier had been forfeited because he failed to comply with Rule 13 of the Agreement (above) by failing to file his name and address with Carrier within ten days of the April 20, 1986, notice of the abolishment of his job.

By certified letter dated July 23, 1989, and mailed July 29, 1986, the Carrier notified Claimant as follows:

> This letter is to notify you that any previous notification to you that your seniority was terminated because of your failure to file your name and address under Rule 13 during the recent work stoppage is hereby rescinded.
>
> Your name is being restored to the seniority roster with your original seniority date.
>
> The above is in compliance with the Order of the U.S. District Court, District of Maine, dated July 21, 1986 which reads, in part, as follows:
>
> > (1) That losses of bumping rights during the strike and forfeitures of seniority imposed during and after the strike shall be fully abrogated.

Claimant subsequently returned to work with the Carrier with his seniority rights unimpaired, but the Carrier declined to grant him back pay for the time he was held out of service.

Claim was filed by the Organization on behalf of Claimant on June 12, 1986, to Engineer-Maintenance of Way R.F. Dixon. By

letter dated August 7, 1986, Chief Engineer Nevero denied the claim. The claim was subsequently appealed up to and including the Carrier's highest appellate officer.

The Organization's claim encompasses three separate alleged Carrier violations of the Agreement: 1) The abolition of Claimant's job as of April 25, 1986 without the five (5) working days notice provided by the Agreement; 2) Preventing Claimant from returning to positions to which his seniority entitled him; and 3) Failing to disallow the claim submitted under date of June 12, 1986 as contractually stipulated in Article V of the August 21, 1954.

The third alleged violation is procedural, and thus must be addressed first. In his Award No.1 on this Board, Referee Benn found the Organization's procedural objection without merit. In that Award he held:

> 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 state 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 his]
>
> 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 he rule as plainly read, that is sufficient.

In the absence of compelling argument or evidence to the contrary on this record, we see no reason to disturb the finding of

Referee Benn on this issue.

With respect to the first part of the first alleged violation, in Award No. 1 on this Board, Referee Benn held that the Organization had shown that Carrier violated Rule 5-B as amended by Article III. Specifically he noted that:

> The Carrier's argument that "not less than five (5) working days advance notice" language "contemplates that the employee whose position is being abolished is working"...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,"...[they] 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 remedy, Referee Benn awarded the Claimant in Award No. 1 two days' pay--the amount of time that the notice was deficient. This Board finds no evidence on the record before it to support diversion from Referee Benn's decision in this matter. Thus, as remedy in the instant case, Claimant shall receive two (2) days' pay.

Moreover, we are not in disagreement with Referee Benn, when he finds, <u>in the particular circumstances</u> giving rise to this Board, that Carrier did not violate MW-39 when it abolished positions which, when taken together, constituted "crews", without prior conference with the General Chairman. Specifically, Referee Benn held

> 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 8). 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 (Elkouri and Elkouri, 4th ed., at 354). 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 (sic) 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.

Referee Benn also added in footnote 13 of his Award that his holding in this matter was narrow and "limited to the unique facts of this case where the cause of the reductions was the economic action of the Organization." In view of that caveat, this Board finds no evidence to warrant a departure from Referee Benn's findings.

With respect to the remainder of Part 1 of the Organization's claim, however, we must take issue with Referee Benn's determination in Award No. 1 on this Board. The issue of whether, as Referee Benn maintains, Claimant could have complied with Rule 13 by mailing his name and address to his supervisor within ten days of the abolishment notice is moot. By its order

of July 11, 1986, the District Court for the District of Maine ordered Carrier to reinstate the employes affected by the seniority termination, with seniority and vacation rights unimpaired. Carrier acknowledged and confirmed its compliance with that order in its July 23, 1986, notification to Claimant:

> This letter is to notify you that any previous notification to you that your seniority was terminated because of your failure to file your name and address under Rule 13 during the recent work stoppage is hereby rescinded.
>
> Your name is being restored to the seniority roster with your original seniority date.
>
> The above is in compliance with the Order of the U.S. District Court, District of Maine, dated July 21, 1986 which reads, in part, as follows:
>
> > '(1) That losses of bumping rights during the strike and forfeitures of seniority imposed during and after the strike shall be fully abrogated.'

In its opinion concerning the District Court's rulings with respect to Carrier, the First Circuit Court of Appeals reversed the lower Court's ruling with respect to Carrier's right to abolish jobs and remanded that issue to the NRAB. At no time, however, did Carrier retract its July 23, 1986, memorandum restoring the bumping rights of those employees covered by that document. In the absence of such rescission, Carrier's action in removing Claimant's seniority must be considered to be void ab initio.

However, restoration of contractual seniority rights to Claimant (per Carrier's July 23, 1986 memorandum), is not a remedy which can stand in isolation. Implicit in the restoration

of those rights is restoration as well of those rights which accrue to Claimant inexorably with his seniority rights, including bidding and bumping rights, and vacation rights. (Elkouri and Elkouri, 4th ed., at 590.) Since, implicit in Carrier's July 23, 1986 memorandum, Claimant was erroneously deprived of his seniority on May 19, 1986, he must be made whole for that error. Accordingly, Claimant is entitled to receive back pay for wages he would have earned, but for the erroneous removal of his seniority on May 19, 1986; for the interval between that date and the date of his assumption of the position to which he was properly entitled, following restoration of his seniority on July 23, 1986. He is also entitled to restoration of any vacation rights he may have lost as a consequence of the erroneous removal of his seniority.

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AWARD

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

Elizabeth C. Wesman

Elizabeth C. Wesman, Chairman
Dated at Ithaca, New York on 3 December 1993

M. E. La Rue
Union Member
Dated at Southfield, MI
on April 20, 1994

R.E. Dinsmore - D dissent
Company Member
Dated at No. Billerica, MA
on June 3, 1994