



Award No. 5675
Docket No. 5540
2-ART-CM-'69

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Gene T. Ritter when award was rendered.

PARTIES TO DISPUTE:

BROTHERHOOD RAILWAY CARMEN OF AMERICA
AFL-CIO (Carmen)

AMERICAN REFRIGERATOR TRANSIT COMPANY

DISPUTE: CLAIM OF EMPLOYEES:

1. That the American Refrigerator Transit Company violated the controlling agreement, particularly Rule 20(b), Pueblo, Colorado, when they furloughed O. J. Wotte, Carman, and T. J. Garber, Mechanical Refrigerator Repairman, on June 30, 1966, without giving proper notice in compliance with the provisions of Rule 20 (b).

2. That accordingly, the American Refrigerator Transit Company be ordered to compensate O. J. Wotte, Carman, and T. J. Garber, Mechanical Refrigerator Repairman, eight (8) hours each at the straight time rate for actual time lost June 30, 1966.

EMPLOYEES' STATEMENT OF FACTS: The American Refrigerator Transit Company, hereinafter referred to as the Carrier, operates a car repair shop at Pueblo, Colorado, where a force of carmen are employed, including Carman O. J. Wotte and Mechanical Refrigerator Repairman T. J. Garber, hereinafter referred to as the Claimants.

On May 18, 1966, the following bulletin was posted:

"Pueblo, Colorado
May 18, 1966

NOTICE

The Pueblo Shop will not work during the period of June 27 through June 30, 1966 for the purpose of taking annual inventory of material and supplies.

Only employes necessary for the taking of the inventory, the operation of the meat car wash track and mechanical refrigerator

repairmen will work June 27, 28, 29 and 30, 1966 as per Rule 20, Paragraph F of the present working agreement.

Shop operation will be resumed Friday, June 1, 1966.

/s/ B. M. Smith"

(Emphasis ours.)

The above quoted bulletin, signed by Shop Superintendent B. M. Smith, was in line with Rule 20(f) of the agreement reading:

"RULE 20.

REDUCTION OF FORCES

* * * * *

(f) During periods when annual inventory of material and supplies is being made by the Accounting Department, the shops may be closed for a period not to exceed four (4) days, during which period, insofar as using employes for inventory purposes and in order not to disturb outside train yard inspection forces, the provisions of Paragraph (c) Rule 19, and Paragraph (a) and (d) of Rule 20 are waived."

of which there is no complaint. The bulletin stated that certain employes, commonly referred to as a "skeleton force" would work June 27, 28, 29 and 30, 1966, per Rule 20(f), quoted above, and the two Claimants were included as part of the skeleton force.

The above referred to procedure by the Carrier and under the rule is in line with the controlling agreement; however, the two Claimants were sent home at the completion of their shift on June 29, 1966, and thereby deprived of working June 30, 1966, without proper compliance with reduction in force notice, particular reference to Rule 20(b) which will be dealt with later in the Employes' Position. The Claimants were deprived of one (1) day's work, which is the basis of the claim.

This matter has been handled up to and including the highest designated officer of the Carrier, who has declined to adjust it.

The Agreement of March 1, 1961, as subsequently amended, is controlling.

POSITION OF EMPLOYES: That the Carrier complied with Rule 20(f), quoted above, by posting bulletin shutting down the shop in part and retaining a skeleton force not only in the car department, but in other departments, and the purpose of this shutdown is well set out in Rule 20(f), i.e., account the Carrier taking inventory which was not to exceed four (4) days; however, it appears to develop that this inventory was completed within three (3) days, or at least the Carrier thought they could do without the two Claimants on June 30, 1966, as they were told on June 29th that they would not be allowed to work June 30, 1966.

Rule 20(b) reads:

"RULE 20.
REDUCTION OF FORCES

* * * * *

(b) Five (5) working days' notice will be given employes affected before reductions are made and a list of all men affected in force reduction will be furnished the Local Committee."

and is very specific that men being furloughed will be given five (5) working days' notice. The Claimants were furloughed without the five working days' notice in violation of Rule 20(b), quoted above.

There are no provisions in the agreement for sending men home for one (1) day, as in the instant case. The shop was closed down for a four (4) day period for inventory and a skeleton force, including the two Claimants, was maintained to work June 27, 28, 29 and 30, 1966, as specified in the bulletin, quoted above. The Carrier violated the agreement, specifically in view of the fact there are no provisions in the agreement for sending men home for one day, but to the contrary, Rule 20(b), quoted above, prohibits such procedure.

Mr. B. M. Smith, Shop Superintendent, in his letter of August 24, 1966, addressed to Local Chairman J. J. Golob, stated:

"Pueblo, Colorado
August 24, 1966

Mr. J. J. Golob
Local Chairman
Brotherhood Railway Carmen of America
Pueblo, Colorado

Dear Sir:

In your letter of August 1, 1966, you quote the bulletin posted on May 18, 1966 concerning the annual inventory.

The bulletin states:

'Only employes necessary for the taking of the inventory, the operation of the meat car wash track and the mechanical refrigerator repairmen will work June 27, 28, 29 and 30, 1966, as per Rule 20, Paragraph F of the present working agreement.'

You will note the bulletin states 'only employes necessary.'

There were no mechanical refrigeration repairs necessary on June 29, 1966.

Therefore, your claim for time for Mr. T. J. Garber is disallowed.

Mr. O. J. Wotte completed his assistance on the inventory June 29, and there was no other work which could be done on June 30, 1966.

Therefore, your claim for time for Mr. O. J. Wotte is disallowed.

/s/ B. M. Smith"

and the Employes direct your Honorable Board's attention to the second paragraph of Mr. Smith's letter, quoted above, where he refers to the bulletin which stated, "Only employes necessary for the taking of the inventory . . . will work June 27, 28, 29 and 30, 1966 . . .", and he then made his selection, which included the two Claimants, but the Claimants were then only used three (3) days and furloughed without compliance with the provisions of Rule 20(b), quoted above. The Carrier violated the Agreement, and the Employes ask your Honorable Board to so find in favor of the Claimants.

Finally, the reasons hereinbefore set forth abundantly support the sustaining of this Statement of Dispute, and the Honorable Members of your Division are respectfully requested to do so.

CARRIER'S STATEMENT OF FACTS:

1. There is an agreement on file with your Board between the American Refrigerator Transit Company and its employes represented by the Brotherhood Railway Carmen of America and International Brotherhood of Firemen and Oilers, Roundhouse and Railway Shop Laborers effective March 1, 1961, which is on file with your Board and which is made a part hereof by reference.

2. The American Refrigerator Transit Company owns and maintains a fleet of refrigerator cars for loading of perishable products. The fleet of cars includes conventional ice bunker type of cars which are cooled by ice. Other cars are refrigerated mechanically.

3. The Company has two principal shops for the servicing, maintenance and repair of the fleet of cars. The principal shop is located at St. Louis. The Company also maintains an important shop at Pueblo, which performs all work on cars except dismantling and rebuilding.

4. The instant dispute arose at the Pueblo Shops. The force at the Pueblo Shops consists of a Shop Superintendent, a Foreman, a Clerk, and 27 hourly rated employes.

5. Each year it is necessary to take inventory at the two shops. At Pueblo the shop is shut down each year for four days for the purpose of taking inventory. Rule 20, entitled "Reduction of Forces", recognizes the necessity for shutting down for inventory purposes and permits laying off the employes for this period without posting the usual force reduction notice. This provision is found in Paragraph (f) of Rule 20, and simply states the shops may be closed for a period not to exceed four days for the purpose of making the annual inventory. The rule provides that the employes laid off during this period may not displace or disrupt car inspectors assigned in the train yard who are not laid off and continue to make the inspection of cars in the train yard as they arrive and depart in freight trains. For the convenience of your Board, Rule 20 is set forth here in its entirety:

"RULE 20.

REDUCTION OF FORCES

(a) When forces are reduced, the force at any shop point, or in any department, or subdivision thereof, may be reduced by laying off men, seniority as per Rule 23 to govern. When force is reduced or jobs are abolished, men affected will be privileged to place themselves according to their seniority, they to take the rate of position to which assigned. Employees so affected, desiring to exercise seniority rights to place themselves on jobs subject to bulletin, must be qualified and must file an application in writing to the General Foreman, with a copy to the Local Committee, specifying the job on which he desires to place himself. (Only men whose jobs are abolished or whose positions are suspended due to reduction in force will be permitted to so place themselves, rolling or bumping not being permissible.)

(b) Five (5) working days' notice will be given employees affected before reductions are made and a list of all men affected in force reduction will be furnished the Local Committee.

(c) Employees laid off, by reason of force reduction, desiring to retain their seniority rights, must file their name and address in writing with their Foreman and Local Committee within five (5) days and promptly notify both parties of any change in address thereafter.

(d) In the restoration of forces, employees will be restored to service in accordance with their seniority if available within fifteen (15) days, and shall be returned to their former positions if possible. The Local Committee will be furnished with a list of all employees to be restored to service. Employees restored to service will not be laid off again without the five (5) days' advance notice provided in this rule. Employees failing to report will lose their seniority, unless extension is granted.

(e) In reducing forces the ratio of apprentices will be maintained.

(f) During periods when annual inventory of material and supplies is being made by the Accounting Department, the shops may be closed for a period not to exceed four (4) days, during which period, insofar as using employees for inventory purposes and in order not to disturb outside train yard inspection forces, the provisions of Paragraph (c) Rule 19, and Paragraph (a) and (d) of Rule 20 are waived."

6. Each year a notice is posted in the shop announcing when the shop will be closed for inventory. The shop is normally closed during the summer when loading of perishable produce is light. In 1966, the year in which this claim arose, notice was posted on May 18, 1966 that the Pueblo Shop would be closed during the period of June 27 through June 30, 1966, for the purpose of taking the annual inventory. The notice which was posted in the shop reads as follows:

"Pueblo, Colorado
May 18, 1966

N O T I C E

The Pueblo Shop will not work during the period of June 27 through June 30, 1966 for the purpose of taking the annual inventory of material and supplies.

Only employes necessary for the taking of the inventory, the operation of the meat car wash track and the mechanical refrigerator repair men will work June 27, 28, 29 and 30, 1966, as per Rule 20, Paragraph (f) of the present working agreement.

Shop operation will be resumed Friday, July 1, 1966.

/s/ B. M. Smith"

7. Pursuant to the foregoing notice, all of the men in the shop were laid off during the period June 27 through June 30, as provided in Rule 20 (f). The car inspector in the train yard was not disturbed. Three employes were used to assist the supervisors in taking the inventory. Carman Miller was used on June 27, 28, 29 and 30. Carman Wotte was used on June 27, 28 and 29, and Carman Garber was used on June 27, 28 and 29. Carman Garber serviced mechanical units during this period as well as assisted in taking inventory of parts for the mechanical refrigeration equipment. The inventory of the other material was sufficiently completed by the close of work on June 29, 1966, so that Carman Wotte was not needed on June 30. The taking of the inventory of parts for mechanical refrigeration equipment was completed on June 29, and Carman Garber was notified that he would not be needed on June 30.

8. As previously stated, the shop is closed down each year for inventory, and only those employes who are needed to assist in taking the inventory and to service the mechanical units work during this period. Your Board will note that in the year in which the claim was filed three hourly rated employes of the total of 27 were used to take inventory. One additional man worked in the train yard during this period. In order that your Board may see the practice which has been followed through the years of laying off all employes not needed for the purpose of taking inventory, we have shown below the dates on which employes worked in the year 1965, 1966 and 1967 taking inventory:

Year	Inventory Period	Date Employes Used					
		Miller	Golob	Roop	Stinnett	Garber	Wotte
1965	July 27-30	27, 28 29	*27, 28 29, 30	27, 28	*27, 28 (8A-10:30A)	*27	27, 28
1966	June 27-30	27, 28, 29, 30				*27, 28, 29	27, 28 29
1967	June 27-30	27, 28, 29, 30		28, 29		*27, 28, 29, 30	27

*Serviced mechanical equipment and assisted in taking inventory of parts for mechanical equipment.

Your Board will note that Carman Garber worked on July 27, 1965, but was granted permission to visit his folks in Missouri for the remainder of the inventory period. Carman Miller worked on July 27, 28 and 29, and completed his assigned job on July 29 and did not work on July 30. No claim was filed because Miller did not work on July 30, 1965. Carman Roop worked on July 27 and 28 and completed his assigned job on July 28, and did not work July 29 and 30. No claim was filed because Carman Roop did not work on July 29 and 30. Carman Wotte worked on July 27 and 28, but also completed his assigned job on July 28 and did not work on July 29 and 30. Again, no claim was filed for those two dates.

In 1966, Carmen Garber and Wotte completed their assigned jobs on June 29, 1966, as explained above, and did not work on June 30.

9. In 1967, Carman Roop worked on June 28 and 29 and completed his assigned job on June 29 and did not work June 30 (Roop did not work on June 27 because it was his birthday). No claim was filed this year because Roop did not work on June 30. Carman Wotte worked June 27 on inventory and was off the rest of the period. Again no claim was filed for the days he was off.

10. Claim was presented to the Shop Superintendent at Pueblo on behalf of Carmen Garber and Wotte account not used on June 30, 1966 for the purpose of taking inventory. The claim was declined for the reason that the Carrier is not prohibited from closing the shop for the purpose of taking annual inventory as provided in Rule 20 (f). The claim was subsequently appealed and discussed in conference, but no merit could be found to the claim, and it was declined on January 10, 1967, as follows:

“January 10, 1967

Mr. C. J. Ogle, General Chairman
Brotherhood of Railway Carmen of America
721 Bartolet Avenue
Lemay, Missouri 63125

Dear Mr. Ogle:

Referring to your letter of December 28 in connection with time claim of Carman O. J. Wotte for 8 hours at pro rata for Carmen and T. J. Garber, MRR Man, for 8 hours at the pro rata rate for MRR Men, alleging violation of Rule 20, Paragraph B, when they were furloughed by the Shop Superintendent without giving proper notice.

I find no violation of the agreement. Shop Superintendent Smith posted a bulletin on May 18 over a month prior to the 4 day inventory period, June 27-30, 1966, indicating that the shop would be closed during that time, and only employees necessary would work.

It is my understanding that Carman O. J. Wotte assisted in taking the inventory, and MRR Man T. J. Garber worked on mechanical refrigerator service work in addition to assisting in taking inventory of materials and supplies for mechanical refrigerator units. When the service of these two men was no longer necessary, they

were advised by Shop Superintendent Smith on the afternoon of June 29 that it would not be necessary for them to work on June 30, and they were, therefore, furloughed. Claim is respectfully declined.

Yours very truly,

/s/ Thos. E. Fox"

The Employes subsequently appealed the claim to your Board.

POSITION OF CARRIER: It is the position of the Company that claimants were properly laid off during the period the shops were closed for inventory except the days on which they were needed to assist in the taking of the annual inventory of parts and supplies. Since the claimants may properly be laid off during the inventory period without posting the usual notice of force reduction, there is no basis for the Employes' contention that the Company was compelled to work the two carmen on the date of claim. The rules do not support the Employes' position for a day's pay for each of the two claimants, and it follows that the claim should be denied.

The inventory of material and supplies in the shop at Pueblo has been taken annually for many years. Each year the shop has been shut down for this purpose, as it was in 1966. Each year only those employes who are required to assist supervision in the taking of inventory are used during the period the shop is closed. In addition to the employes used to assist in taking the inventory, the regularly assigned car inspector works during this period in the train yard. He is not affected by the closing of the shop. In addition, a mechanical refrigerator repair man is sometimes needed for all or a part of the period to service and maintain the mechanical units on refrigerator cars which are equipped with mechanical cooling devices and are moving through the Pueblo Terminal at the time of the inventory period.

In 1966, notice was posted on May 18 that the shop would be closed during the period June 27 through June 30. The notice follows the usual form and gave the employes more than a month's notice that the shop would be closed. The notice refers specifically to Rule 20 (f) of the Agreement. No complaint has been received from the 23 employes who were laid off and not used to take inventory. The employes used to take inventory were utilized until the work needed to make the inventory was completed. After the physical count of the material and supplies is made by the employes, the reports must be completed by the supervisors. As the Carrier has shown in the Statement of Facts above, claimants were not needed for the entire four-day period. Claimants were notified on the 29th that they would not be needed on the 30th. Claimants were used only on the days they were needed to take inventory in accordance with past practice and Rule 20. Claims have not been filed in other years when an employe has been used for only a part of the time the shop was closed for taking inventory.

Rule 20 (f) is clear that the shops may be closed for a period not to exceed four days for the purpose of taking inventory. The rule is also clear that employes may be used for inventory purposes. Stated another way, all of the employes in the shop are furloughed during the period for taking inventory, but the company may use employes to the extent needed for purposes of taking inventory. Since the counting of the materials and supplies

was completed on the 29th, Shop Superintendent Smith advised the two claimants on the afternoon of June 29 that their services would not be needed on the next day, June 30. This is in accordance with the practice at Pueblo and in accordance with the provisions of Rule 20 (f) of the agreement. The last portion of the rule anticipates the problems that will arise by the use of two or three employes out of the force of 27 men for the purpose of taking inventory. Rule 20 (f) waives the requirement in Rule 19 (c) that men who are furloughed be paid off by voucher. The requirement in paragraph (a) of Rule 20 that seniority govern when men are laid off is also waived, so that the company may select the men needed for inventory purposes. Lastly, Rule 20 (f) waives the requirement that furloughed employes be given 15 days' notice before being required to return to work as provided in paragraph (d). By waiving these requirements, the company may use as many employes as necessary for as long as necessary for inventory purposes. Otherwise, the Shop is closed during the inventory period. The Employes have no rule support for this demand that the claimants be used on the date of claim, the fourth day of the inventory period.

To summarize, notice was posted on May 18, 1966 using the same language and in the same manner as in previous years that the Shop at Pueblo would be closed from June 27 through June 30, 1966 for inventory purposes. The Shop was closed during this period. Three employes were used for a part of the period for inventory purposes. None of the employes had a right to be called for work during the period the shop was closed. The claim for a day's pay for June 30 for each of the two claimants is entirely lacking in merit. Rule 20 (f) specifically recognizes the right of the Carrier to close the Shop. It follows that the claim should be denied.

(Exhibits not reproduced.)

FINDINGS: The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

Carrier operates a car repair shop at Pueblo, Colorado, where a force of Carmen are employed, including the two named Claimants. This dispute requires interpretation of Rule 20(b) and 20(f), and the notice given by Carrier under Rule 20. The pertinent part of Rule 20 is as follows:

“(b) Five (5) working days' notice will be given employes affected before reductions are made, and a list of all men affected in force reduction will be furnished the Local Committee.”

“(f) During periods when annual inventory of material and supplies is being made by the Accounting Department, the shops may be closed for a period not to exceed four (4) days, during which

period, insofar as using employes for inventory purposes and in order not to disturb outside train yard inspection forces, the provisions of Paragraph (c) Rule 19, and Paragraph (a) and (d) of Rule 20 are waived."

On May 18, 1966, Carrier in pursuance to the above quoted Rule 20 (f), posted the following bulletin or notice:

"Pueblo, Colorado
May 18, 1966

NOTICE

The Pueblo Shop will not work during the period of June 27 through June 30, 1966 for the purpose of taking the annual inventory of material and supplies.

Only employes necessary for the taking of the inventory, the operation of the meat car wash track and the mechanical refrigerator repair men will work June 27, 28, 29 and 30, 1966, as per Rule 20, Paragraph (f) of the present working agreement.

Shop operation will be resumed Friday, July 1, 1966.

/s/ B. M. Smith"

The record discloses that the two named Claimants were included as part of the skeleton force referred to as "only employes necessary" for the taking of inventory. These Claimants worked in accordance with the above quoted notice, on June 27, 28 and 29, 1966, but were not allowed to work on June 30th, 1966. The Organization contends that the Claimants were wrongfully deprived of one day's work for the reason that Carrier failed to comply with Rule 20(b), which requires a 5 working days' notice prior to the furloughing of an employe. The Organization further contends that the above quoted notice or bulletin placed a mandatory duty on Carrier to work these Claimants the full four days set out in said notice. Carrier contends that the inventory did not require 4 days, and that in the years (1965, 1966 and 1967), the Carrier gave an identical notice although it did not require employes to work the full four days, thereby proving that the practice on this property did not require Carrier to work the skeleton force the full four days.

This Board finds that the wording of the notice furnishes the key to resolving this dispute. This notice contains the words "will work June 27, 28, 29 and 30, 1966." The fact that no claim was filed during the years 1965 and 1967 is not evidence that the Agreement was not violated during those years. This Board has repeatedly held that violations of an Agreement can not be condoned by proof of past violations. In this dispute, the notice must be interpreted in connection with the above quoted portions of Rule 20. There is no doubt that the Carrier could have charged the Employes with insubordination if they had refused to work the full four days. These Employes could not make plans for any period during the four days contained in the notice, and, although they did not work the full four days, these Employes were subjected to the discretion of Carrier during the entire four day period. For the reasons above stated, this claim will be sustained. This Board

might have ruled differently if the notice had been worded to the effect that the skeleton crew would work during this four day period or as much time as was required in making the inventory. By wording a notice to the effect that the Employees "will work June 27, 28, 29 and 30, 1966", Carrier bound itself to guaranteeing four days' work for "employees necessary for the taking of the inventory * * *."

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this twenty-third day of April, 1969.