Award No. 643
Docket No. MC-657-3
2-UP-I-'41

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Upon failure of the Division to agree upon its jurisdiction to hear and decide this case, individually submitted, the Carrier Members of the Division invoked the services of the National Mediation Board for the appointment of a referee to break the deadlock, as provided in Section 3, First (L) of the Railway Labor Act. Upon certification the National Mediation Board appointed Sidney St. F. Thaxter for that purpose.

Following is the case in question, the opinion and award of the Second Division with Referee Thaxter sitting as a member thereof.

PARTIES TO DISPUTE:

ARNOLD HILDEBRAND, PETITIONER

vs.

UNION PACIFIC RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES: Arnold Hildebrand of Junction City, Kansas, claims that he is employed as a machinist by Union Pacific Railroad Company in its shops at Junction City, Kansas; that said carrier refuses to recognize his proper seniority in its service and consequently lays him off in times of slack business sooner than he should be laid off and recalls him to its service later than he should be recalled, and thereby prevents him from earning wages during such periods of improper idleness. He asks that he be compensated for time already so lost and be given proper seniority for the future.

EMPLOYES' STATEMENT OF FACTS: Said company is a carrier by railroad in interstate commerce and it and this employe are subject to the jurisdiction of this Board. On July 25, 1922, this employe was first employed by said carrier as a machinist in its shops in Kansas City, Kansas, and continued in said employment at said place until August 31, 1927. About March 1, 1927, said company through its master mechanic, W. Kirsh, requested this employe to move to Junction City, Kansas, to be there employed in said carrier's shops as a machinist in charge of a pumping job. This employe declined such employment for the expressed reason that he would by such move lose his seniority. Thereafter this employe had several conferences with said master mechanic, with one George Kern, district foreman for the carrier, and with this employe's shop committee over a period of about six months at which this employe and his committee insisted upon retaining his seniority and the officials of the carrier urged him to move to Junction City.

On August 30, 1927, said Kern, or one of his assistants, exhibited to this employe a telegram from the carrier's district foreman at Junction City to the effect that all the machinists at Junction City had signed a waiver by virtue of which this employe would retain at Junction City the seniority which he had acquired at Kansas City and this employe was verbally assured by said official that if he would move to Junction City his seniority there would date from his original employment at Kansas City, July 25, 1922. Such a waiver

Transfer of Mr. Hildebrand from Kansas City, Kansas, to Junction City, Kansas, was handled strictly in accordance with the above rule. Transfer of an employe from one seniority district or point to another with their full seniority rights is a very unusual and extraordinary procedure. Thorough search of the files and records discloses no correspondence nor record covering the alleged transfer of Mr. Hildebrand with full seniority rights from Kansas City, Kansas to Junction City, Kansas, with a seniority date of 7-25-22.

Petition dated August 29, 1927, has been located, however, and is set forth below, showing employes signing and indicating in each instance by the word "Yes" or "No" as to whether or not they were agreeable.

"We, the undersigned members of the Machinist Craft, Lodge No. 13 SEA at Junction City, do hereby waive all rights to job as Machinist-Air Brake, covered by item 20, Art. 34, with the understanding that whoever is assigned to this job, will hold no rights as a Machinist at this point, in case this job is abolished or cut off:

C. M. Crawford	Yes	P. P. Hammons	Yes
Geo. Boline	Yes	Bert Phinney	Yes
R. J. Bibb	Yes	D. D. Rawley	Yes
O. G. Presson	Yes	Jake Davis	Yes
A. L. Blessing	Yes	J. J. Johnston	No
Geo. Blaker	Yes	R. V. Blanchard	No
Robt. A. Darby	Yes	J. R. Gross	Yes
H. C. McDowell	Yes	L. R. McChristy—	
S. L. Hamilton	Yes	K. B. Brooks	No
J. J. Schonberner	Yes	J. J. Hurley	Yes
J. H. Comer	Yes	J. Jenkins	Yes
B. H. Esker	Yes	P. L. Higgins	Yes
K. Blaker	Yes	Bob Roberts	Yes
Walter F. Koepcke	Yes	A. B. Kennedy	Yes"

From this petition it will be noted three employes were not agreeable and one employe failed to designate acquiescence or declination, and from information obtained, as a result of all employes not being agreeable, the matter was dropped.

Mr. Hildebrand has handled this case in accordance with the provisions of the agreement effective November 1, 1934, between the Union Pacific Railroad Company and the International Association of Machinists, the duly accredited representative of employes of his class, and in each instance it has been found that his claim is without merit.

It is the position of the carrier that Mr. Hildebrand has been accorded a correct seniority date as a machinist at Junction City, Kansas, namely 9-1-27, as provided for in the agreement with System Federation No. 105, Railway Employes' Department, American Federation of Labor, effective November 1, 1934 governing the working conditions of the shop crafts.

OPINION OF THE DIVISION: This case is presented to this Board sitting with the referee solely on the question of jurisdiction. If it shall be determined that the claim is properly before the Board, the merits will be disposed of at a later time.

Both sides assume that the issue before us is whether or not an employe has the right to present his claim individually to the Board. But a categorical answer cannot be given to this question; for its solution depends on the circumstances of each case. We can, however, decide this specific case and in doing so we may solve the procedural problems in others, or at least indicate the course which should be followed.

On the issue before us there is no dispute as to the facts. The claimant was a machinist employed by the carrier and covered by an agreement effec-

tive November 1, 1934, applicable to his particular craft. Rules 35 and 36, which govern the presentation of grievances, read as follows:

> **Rule 35.** Should any employe subject to this agreement believe he has been unjustly dealt with, or any of the provisions of this agreement have been violated, the case shall be taken to the foreman, general foreman, master mechanic or shop superintendent, each in their respective order, by the duly authorized local committee or their representative, within ten days. If stenographic report of investigation is taken the committee shall be furnished a copy. If the result still be unsatisfactory, the duly authorized general committee, or their representatives, shall have the right of appeal, preferably in writing, to the higher officials designated to handle such matters in their respective order and conference will be granted within ten days of application.
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> All conferences between local officials and local committees to be held during regular working hours without loss of time to committeemen.
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> **Rule 36.** Should the highest designated railroad official, or his duly authorized representative, and the aggrieved employe, or his representative, as provided in first paragraph of rule 35, fail to agree, the case shall then be handled in accordance with the Railway Labor Act.
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> Prior to assertion of grievances as herein provided, and while questions of grievances are pending, there will neither be a shutdown by the employer nor a suspension of work by the employes.

The claim of the employe relates to his seniority rights, and the record shows that it was handled in the dealings with the carrier in accordance with the provisions of these rules and in compliance with the requirements of the statute. Railway Labor Act U. S. C. Title 45, Ch. 8, Title I, Sec. 3 (i). In particular, the grievance was presented by the committee, which was the duly designated representative of the employe, to the proper railroad official and there was an agreement between them that the claim was without merit. Not being satisfied with this decision, the employe then filed a claim before this Board.

This Board derives its power solely from the Congress which by act created it. It has no authority that is not given specifically by the terms of the statute; and the parties, even by mutual consent, can confer on it no added power. The procedure prescribed by Congress must be followed implicitly if the Board is to have jurisdiction to render an award.

Such being the case, what does the statute require?

The first two sections of the Act are more or less general in their terms. They relate to the purposes of the enactment and to the general duties of the carrier and the employes, and of the Mediation Board. Section 2, Sixth, reads as follows:

> "In case of a dispute between a carrier or carriers and its or their employes, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conferences shall be held: Provided, (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the

receipt of such notice: And provided further, That nothing in this Act shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties."

We do not believe that this provision requires that conferences must be held only with the **representatives** of an employe. (Of course the agreement between a carrier and its employes, as in the present case, may properly contain such a requirement.) The language of this clause is rather a recognition of the fact that usually and in the orderly presentation of grievances the employes will act through their chosen representatives and not as individuals.

The important provisions of the statute, insofar as they bear on the problem now before us, are contained in Section 3, under the terms of which this Board is established and its authority defined. Subsection (i), which is particularly applicable to the problem now before us, provides for certain conditions precedent to any action by this Board. This subsection reads as follows:

"(i) The disputes between an employe or group of employes and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes."

There can be no question that two requirements must be met before this Board can assume jurisdiction over a dispute—first, the dispute must have been handled "in the usual manner" with the chief operating officer of the carrier designated to handle such dispute, and, second, the parties, having followed this procedure, must have failed to reach an adjustment.

What is "the usual manner" was discussed in two awards, 514 and 515. It is pointed out in the opinion in Award 514 that the determination of this question depends ordinarily on the provisions of the different agreements between carriers and employes. In the present case the procedure was covered by Rules 35 and 36, supra, of the agreement, and this was followed. This requirement of the statute was, therefore, complied with.

With respect to the second condition precedent, the story is entirely different. This Board has jurisdiction only in case the parties fail "to reach an adjustment." Here the parties did not fail to reach an adjustment. They decided that the claim was without merit. The statute does not say that the dispute must be settled in a manner satisfactory to the employe individually. Mr. Hildebrand designated the representatives of his union to act for him; they conferred with the proper representatives of the carrier; they came to a decision with the carrier, and, so far as any further proceedings under this statute are concerned, that decision is final. This Board has no authority to review it. Its jurisdiction would attach only if the parties, acting through their duly designated representatives, have failed to settle the controversy themselves.

This interpretation of the statute is not only in accord with its letter, but with its spirit. It is its purpose to provide for the settlement of disputes, preferably by the parties themselves, and only when they are unable to do so, does this Board have jurisdiction over the controversy. This is shown very clearly by the language of Section 2, Second, of the Act, which reads as follows:

"Second. All disputes between a carrier or carriers and its or their employes shall be considered, and, if possible, decided, with all expedi-

tion, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employes thereof interested in the dispute."

If every carrier or every individual employe dissatisfied with a decision concurred in by their own representatives has the right, which this employe claims, to come directly to this Board, the very purpose of the statute would be subverted, and instead of a speedy settlement of disputes we would have a condition bordering on chaos in the relations between the carriers and their employes.

We, therefore, must hold that this Board has no jurisdiction over this case, since one of the conditions required by the statute has not occurred—namely, a failure of the parties to reach an adjustment.

We should consider certain contentions made in argument. It is claimed that Section 3 (j) gives to an employe the right to file a claim individually before this Board. This subsection reads as follows:

"(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employe or employes and the carrier or carriers involved in any disputes submitted to them."

This provision applies only to the proceedings before this Board, not to the preliminary steps which a party must take before coming here. Assuming that a party under its terms does have a right to present his claim individually here, he must still comply with the provisions of Section 3 (i) before doing so.

It is also suggested that an employe has a constitutional right to present his grievance in person. Assuming without deciding that he may not have such right under the Act here in question, there is, even so, no denial to him of any constitutional guarantee. He is not compelled to accept the benefits of the Act. If, however, he does so, he must proceed in strict accordance with its terms.

AWARD

This claim is dismissed on the ground that this Board has no jurisdiction over it.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: J. L. Mindling
Secretary

Dated at Chicago, Illinois, this 21st day of July, 1941.