Award No. 1526
Docket No. 1426
2-D&H-BM-'52

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Jay S. Parker when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 35, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. (Boilermakers)

THE DELAWARE AND HUDSON RAILROAD CORPORATION

DISPUTE: CLAIM OF EMPLOYES: (1) That the carrier improperly assigned to employes other than those of the boilermakers' craft, the fabricating and assembling of material mentioned in the boilermakers' special rules 47, 48 and 49.

(2) That the agreement between the Delaware and Hudson Railroad Corporation and System Federation No. 35, Railway Employes' Department, American Federation of Labor, to which the boilermakers' craft is a party, grants to the boilermakers' craft the right to perform work of its craft in all departments where work covered by said agreement is performed.

(3) That the boilermakers' craft was damaged to the extent of hours other employes were used to perform work that should have been assigned to the boilermakers' craft.

(4) That the following employes in the boilermakers' craft be compensated as follows:

Boilermaker J. Fitzgerald, 48 hours @ $1.738, plus 20%—$100.11
Boilermaker Welder H. Whittaker, 48 hours @ $1.798 plus 20%—$103.56
Boilermaker Helper H. Mercier, 48 hours @ $1.45 plus 20%—$83.40

EMPLOYES' STATEMENT OF FACTS: On or about April 10, 1950, the carrier started the building of a body on a new Ford truck that was to be used to transport an electric welding machine and other equipment such as acetylene and oxygen bottles and equipment used in the performance of maintenance of way work.

The material used was channel iron, angle iron and sheet steel. The work included the laying out, cutting, drilling, shaping, fitting up and welding.

The fenders of the truck were made of ⅛" boiler plate, which was rolled, fitted up and welded. Deck plates and deck plate supports were applied, and on the back of the truck two large spools made of boiler plate and angle iron were applied. These spools were to be used for the welding cables.

to make the repairs in the instant case is employed in the maintenance of way department and is called upon to do such work in the ordinary performance of his every day duty.

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.

The parties to said dispute were given due notice of hearing thereon.

The involved claim, wherein employes of the boilermakers' craft are claiming the right to perform work which is being performed by maintenance of way employes, has been submitted to the Division on hearings and for final decision without notice to the last named employes. In Award 1523 (Docket 1423), this day adopted and to which we adhere, we held that under the provisions of Section 3 First (j) of the Railway Labor Act (1) similar employes were "involved" within the meaning of that term as used in such section, (2) that such employes were entitled to due notice of all hearings, and (3) that in the absence of such notice we could not proceed to a determination of the dispute on the merits. Therefore, on the authority of such award and for the reasons therein stated, we hold this claim must be dismissed without prejudice.

AWARD

Claim dismissed without prejudice.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 25th day of February, 1952.

DISSENT OF THE LABOR MEMBERS TO AWARD NO. 1526

The claimant organization contends that the scope rule of its agreement with the carrier requires certain work, currently being performed by employes in a different craft, to be assigned to and performed by employes in the craft represented by the claimant. The carrier contends, and the majority has held, that the dispute thus presented may not be heard and decided on its merits for the reason that the organization representing the employes currently performing the disputed work has not been given notice of the claim filed with this Division, and afforded an opportunity to appear and be heard throughout the proceeding.

The dispute presented by this claim relates only to the proper interpretation and application of the agreement between the claimant organization and the carrier. The determination of that question is in no sense an adjudication or determination of rights that may be claimed by other employes under agreements of other organizations. We have held in a number of cases, as have the courts, that this Board's function is limited to the interpretation and application of the agreements upon which claims are based, and that questions of the validity and enforcement of the agreements as so interpreted are for other tribunals. Nor can we revise or amend agreements so as to

resolve conflicting or overlapping coverage of agreements of different organizations in cases of this sort.

Under these circumstances, it is evident that employes whose legal rights do not stem from the agreement placed before us for interpretation cannot be "involved" in this dispute within the meaning of Section 3 First (j) of the Railway Labor Act; nor does our determination of the dispute involve an adjudication of their rights under other agreements which would entitle them to notice as a matter of due process of law.

Another claim disposed of today (Award 1527, Docket 1420) illustrates the futility of the notice which the majority requires here. In that case the claim was dismissed on the basis of a finding that it involved a maintenance of way man whose rights could be adjudicated only by the Third Division of the Board. Precisely the same situation exists with respect to the employes who the majority holds are entitled to notice and an opportunity to participate in this proceeding. Their claimed rights can be neither established nor lost in a proceeding before this Division, and it is certainly not our function to issue advisory opinions for the benefit of the Third Division.

The majority recognizes in its opinion here that its action in dismissing this claim for lack of the notice in question represents a complete reversal of previous rulings of this and other Divisions of the Board. Several Federal court decisions are cited, and we are referred to additional decisions cited in Award No. 5432 of the Third Division, all to the effect that such reversal of our previous rulings is now required by "the established law of the land." We are advised that the **Hunter** and **M.K.T.** cases, both heavily relied upon by the majority, are still in process of litigation, and that the opinions cited involved only questions of the propriety of preliminary injunction. Cases like the **Estes** and **Nord** cases are clearly not in point, because there the rights of the persons as to whom notice was required were necessarily being determined and adjudicated in the Board proceedings, because their rights and those of the claimants derived not from separate agreements, but depended upon the Board's interpretation of the same contract. And the only notice discussed by the Supreme Court in the case of **Elgin, Joliet & Eastern R. Co. v. Burley,** 325 U.S. 711, on rehearing 327 U.S. 661, was notice to "the aggrieved employe"—in other words, the claimant himself—and not notice to third parties who might claim inconsistent rights under different agreements (there being no such third parties involved in the **E. J. & E.** case).

On the other hand, in addition to well-reasoned opinions in previous Awards of the Board (see Third Division Awards Nos. 2253 and 4471, and this Division's Award No. 1359), the cases of **Washington Terminal Co. v. Boswell,** 124 F (2d) 235, affirmed 319 U.S. 732, and **Order of R.R. Tel. v. New Orleans, Texas & Mexico Ry. Co.,** 156 F. (2d) 1, cert. den. 329 U. S. 758, clearly indicate the absence of any such notice requirement as that imposed by the majority here. Under these circumstances, we think the majority's conclusion as to the established law of the land with respect to the notice requirement is not merely premature, but is in fact erroneous.

For these reasons we are compelled to dissent from the Award dismissing the claim herein, and to state that in our opinion the dispute herein should have been heard and determined on its merits.

/s/ R. W. Blake

/s/ A. C. Bowen

/s/ T. E. Losey

/s/ Edward W. Wiesner

/s/ George Wright.