Award No. 2785
Docket No. 2502
2-B&O-CM-'58

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee D. Emmett Ferguson when the award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 30, RAILWAY EMPLOYES' DEPARTMENT, AFL-CIO (Carmen)

BALTIMORE AND OHIO RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That under the current agreement, the Carrier improperly assigned other than employes of the Carmen's Craft to paint bins, cupboards, tables, racks, car and locomotive parts on February 8, 9, 15, 16, 21 and 23, 1955, March 8, 9, 10 and 11, 1955, April 27, and May 3, 23 and 24, 1955.

2. That the management be ordered to desist from assigning other than employes of the Carmen's Craft to perform the aforesaid painting in the Stores Department at Cumberland, Maryland.

3. That the management of the Baltimore and Ohio Railroad be ordered to additionally compensate Carman W. E. Bishop for four (4), eight (8) hour days and Carman C. E. Whitman for ten (10), eight (8) hour days at the applicable rate of pay.

EMPLOYES' STATEMENT OF FACTS: The Baltimore and Ohio Railroad Company, hereinafter referred to as the carrier, maintains and operates a Bolt and Forge Shop and Reclamation Plant at Cumberland, Maryland, wherein they manufacture car and locomotive parts, bins, racks, cupboards, tables, etc., and reclaim scrap material. The Bolt and Forge Shop, Reclamation Plant and Stores Department are all under one roof.

There are 83 journeymen carmen employed in the Bolt and Forge Shop and Reclamation Plant along with employes from the other shop crafts.

Carmen W. E. Bishop and C. E. Whitman, hereinafter referred to as the claimants, are journeymen carmen and are regularly employed in the Bolt and Forge Shop and Reclamation Plant as such, 7:00 A.M. to 3:30 P.M., Monday through Friday.

Starting in or about the year 1936 and up to the year 1955, painting in the Stores Department at the Cumberland Reclamation Plant, Cumberland, Maryland, was performed by car department employes when they were requested to do so by the management. (See Exhibit A)

This dispute has been handled with all carrier officials designated to handle such disputes up to and including the highest designated officer of the carrier, with the result that they have declined to make satisfactory settlement.

The agreement effective December, 1921, reprinted September 1, 1926, May 1, 1940 and November 1, 1952 is controlling.

POSITION OF EMPLOYES: It is submitted that the "Scope of Agreement" found on page 8 of the current agreement reading:

"Scope of Agreement.

The following rules and working conditions will apply to:

Machinist
Boilermakers
Blacksmiths
Sheet Metal Workers
Electrical Workers
Carmen

Their apprentices and helpers (including Coach Cleaners), in the

Maintenance of Equipment
Maintenance of Way
Signal Maintenance
Telephone and Telegraph Maintenance
Bolt and Forge Shop, Cumberland, Maryland, and all other departments, performing the work specified herein, superseding all other rules and agreements."
(Emphasis added.)

specifically and definitely secures the work contracted to the carmen in this agreement to the carmen.

Rule No. 138 carmen's "Classification of Work" rule reads in pertinent part:

> "Carmen's work shall consist of . . . painting with brushes, varnishing, surfacing, decorating, lettering, cutting of stencils and removing paint (not including use of sand blast machine or removing in vats); all other work generally recognized as painters work under the supervision of the locomotive and car departments . . ."

It is submitted that on the basis of the facts as stated hereinbefore in conjunction with the "Scope of Agreement" and that part of Rule 138 quoted above that the painting of bins, cupboards, tables, racks, car and locomotive parts in the Stores Department at the Cumberland, Maryland, Bolt and Forge Shop is work which this carrier has contracted to the carmen and that when the carrier assigned other than carmen they violated the agreement and damaged the employes who hold seniority as carmen at Cumberland, Maryland.

There is certainly no denial by the carmen's craft that the scope rule of the agreement, covering Group 3 employes, is more than adequate to cover the work performed in the Stores Department. This is an academic conclusion of the simplest degree. This has been the practice over a period of many, many years. Stores Department employes have been used to do the same kind of work now here protested.

The basis of the claim asserted here is that the carrier should have used carmen to perform this work. At the time the work was accomplished, it was accomplished by employes of the Stores Department doing work that fell wholly within the jurisdiction of the Stores Department. In fact and in effect the nature of the work being accomplished at that time was work falling wholly within the scope of the agreement governing stores laborers and helpers on this property.

It is the position of the carrier in this case that the claim made here at all its parts is without merit. The carrier respectfully requests this Division to so find and to hold that the claim in its entirety is without merit.

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

In this docket the carmen claim a violation of their agreement on an occasion when stores department employes painted bins, cupboards, tables, racks, car and locomotive parts.

At the senate hearings in 1934 preceding the amendment of the Railway Labor Act, Samuel E. Winslow, then chairman of the United States Board of Mediation, testified:

> "Mr. Winslow: * * * I do think that the whole situation will be relieved if a way could be found to define crafts. There are several references to crafts in this new bill, and yet, as I have been looking it over, I have not been able to find what is in one craft and what is in another, and no way of establishing them. * * *
>
> I am referring to these jurisdictional disputes. They are sticky things any way you go at them. Anyone that has anything to do with those jurisdictional disputes ought to wear gloves, I think, whether they are in the dispute or outside of it. * * *
>
> Now, whether or not it is the job of the Government to undertake to do something to straighten out this jurisdictional matter I don't know, * * *."
>
> "The Chairman. Have you any suggestion as to how it can be done?"
>
> "Mr. Winslow. No, sir; it is too complicated for me to tackle right off the reel. * * *

I haven't any objection at all to staying here * * * to help these fellows get together on this thing and see if you can't work that out. I think they can work it out. * * *

"The Chairman. Your idea then would be to allow them to work this out without any compulsory decision on the part of a third party?"

"Mr. Winslow. I would not feel that, for my part, I had enough wisdom or insight * * * to make a suggestion * * * for a law.

This business of crafts, to my mind, ought not to become a subject for congressional action unless in a great extreme. I think it is a family affair that can be worked out, * * *."

As its first defense to the claim, the carrier raises the now familiar third party notice question, asserting that this Division, under the statute which created it, is without authority or jurisdiction to proceed for the reason there has been no proper joinder of interested parties. From the language of the Act it appears that congress was fully informed of the dangers of jurisdictional disputes and following the comments of Mr. Winslow purposely refrained from establishing the National Railroad Adjustment Board as a forum for the settlement of jurisdictional claims between opposing unions. It might even be inferred that in fixing the jurisdiction of the respective Divisions of the National Railroad Adjustment Board, congress was in fact leaving it to the various unions and employers to handle their own affairs as hoped by Mr. Winslow. The present claim is one more instance of proof that the hope has not been realized.

Actually, the language of Sec. 3, First (h) which establishes the four divisions of the Board and fixes their jurisdiction over disputes involving specific crafts, creates a dilemma when read in cunjunction with Sec. 3, First (j), which requires the several divisions to give due notice to employes and carriers involved in any disputes submitted to them.

In a dispute such as the present one where it is claimed that others than employes of the carmen's craft were assigned, the possibility immediately arises that those other employes are members of a craft whose disputes are under the jurisdiction of another division.

If notice is given in such cases, the involved party notified, would in effect be requested to appear in a dispute in which he was involved, before a division other than the one designated by the Act as having jurisdiction over his craft.

Even in the face of this dilemma, there has been a growing body of awards and decisions by U. S. Circuit Courts of Appeal holding that notice should be given to those involved. In keeping with the duty imposed by the Act and as decreed by the courts we hold that this Division "of the adjustment board shall give due notice of all hearings to the employe or employees * * * involved."

We conclude however from the facts in this docket that the identity of "the employe or employees * * * involved" has not been disclosed, nor whether as a matter of actual fact they are involved. This absence of facts leaves the division unable to proceed. Accordingly, the matter is remanded to the parties for further progression on the property and the giving of notice is deferred until the existence and identity of all involved parties is established.

AWARD

Case remanded for further progression on the property in harmony with above findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 27th day of February, 1958.

DISSENT OF LABOR MEMBERS TO AWARD NO. 2785

As a jurisdictional defense, the carrier has raised, and the majority has sustained, the objection that this Division may not proceed to a disposition of the claim on its merits for the reason that there has been no proper joinder of other interested parties. We dissent from the Award both because of disagreement with the basic principles asserted by the carrier on this "now familiar third party notice question," and also because of the manner in which they have been applied in this dispute.

As to the latter point, irrespective of any question of the necessity for third-party notice in cases of this sort, we cannot agree with the refusal to entertain jurisdiction where the existence of interested, or "involved," third parties has not even been established. Though conceding that the present record not only fails to identify any other involved employes, but even fails to show "whether as a matter of actual fact they are involved," the majority has remanded the case for "further progression on the property," presumably placing a duty on the parties here to search out and identify other employes who might be involved, if any can indeed be found. Adoption of such a procedure by the Division renders it vulnerable to the stalemating of any case simply on the suggestion of a carrier, without any showing that such is the fact, that there might be other parties involved. We submit that jurisdiction should not thus be abandoned on mere speculation, without any showing that the statutory requirements of notice, whatever their scope, have not been complied with.

As to the correctness of the carrier's basic proposition on the question of the notice required by the statute, the findings of the majority do not agree with the carrier's contentions, but bow to them on the basis of a growing body of awards and decisions by United States Circuit Courts of Appeal." Indeed, the majority confesses inability to reconcile the decisions which it feels compelled to follow with the clear statutory limitations upon the jurisdiction of the Board and its several Divisions.

The awards of the Divisions of the Board and decisions of the courts on the third-party notice question have indeed been conflicting, but we adhere to the rulings of Second Division Awards 1628, 2285, 2315, 2316, 2359, and 2372, and other awards of this and other Divisions, that notice to third parties is not required where their rights, if any, are not controlled by the agreement of the claimant organization, or where they are members of a craft whose disputes are referrable to other Divisions of the Board and over which we would have no jurisdiction. Our reasons for this position were stated at some length in dissents of the Labor Members to Second Division Awards 1523 and 1835. The soundness of our previous position, and the error of the court decisions relied upon by the majority here and in the previous awards to which we dissented, is supported by the decision of the Supreme Court of

the United States in **Whitehouse v. Illinois Central Railroad Company**, 349 U.S. 366 (May 27, 1955), where the court said, in a situation analagous to the present case:

> "One thing is unquestioned. Were notice given to Clerks they could be indifferent to it; they would be within their legal rights to refuse to participate in the present proceeding. . . . Apart from some lower court's dicta, there is no reason for holding, in the abstract, that any possible award would be rendered void by failure to give notice to an outside even if related interest that cannot be compulsorily joined as a part to the proceeding. The Board has jurisdiction over the only necessary parties to the proceeding and over the subject matter."

While the Supreme Court did not undertake, in the **Whitehouse** case, to rule on this whole third-party notice question, the opinion clearly indicates the error of the majority here in considering this a closed question because of the body of lower court decisions referred to. Thus, the court stated:

> "The wording of the notice provision of Section 3 First (j) does not give a clear answer. In the context of other related provisions
>
> **it is certainly not obvious that in a situation like that now before us notice need be given beyond the parties to the submission."**

For these reasons, and for the reasons asserted in the dissents to Second Division Awards Nos. 1523 and 1835, we dissent from the Award herein, and state as our opinion that the Division should have accepted jurisdiction and proceeded to a decision on the merits of the dispute.

R. W. Blake

Charles E. Goodlin

T. E. Losey

E. W. Wiesner

James B. Zink