Award No. 997
Docket No. 923
2-AA-EW-'44

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee I. L. Sharfman when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 77, RAILWAY EMPLOYES' DEPARTMENT, A. F. OF L. (ELECTRICAL WORKERS)

THE ANN ARBOR RAILROAD COMPANY

Norman B. Pitcairn and Frank C. Nicodemus, Jr., Receivers

DISPUTE: CLAIM OF EMPLOYES: That under the controlling agreement and Award 784 (Docket 681) the carrier be ordered to pay the electrical workers' rate of pay, 84½¢ per hour and subsequent increases thereto, retroactive to March 23, 1941, to John F. Fennell and C. E. Adams.

EMPLOYES' STATEMENT OF FACTS: On October 28, 1941, this dispute was submitted to the National Railroad Adjustment Board, Second Division, hereinafter referred to as the "Board." This dispute was set down for hearing by the Board on February 12, 1942, and the interested parties were represented thereat.

The Board advised the parties under date of March 12, 1942, that the dispute was deadlocked; that same would be referred to a referee and that if the parties desired a hearing before the Board with the referee present, such request should be made upon the Board within fifteen (15) days from March 12, 1942.

On March 20, 1942, a hearing was requested before the Board with the referee present. This hearing was set down and held on April 15, 1942, before the Board with Referee Mitchell present, and both parties were represented thereat.

Under date of May 26, 1942, the Board issued Award No. 784, Docket No. 681, and therein Referee Mitchell concluded that—

1—"The contention of the carrier that the Second Division, National Railroad Adjustment Board, does not have jurisdiction over parties to this dispute is without foundation as the Second Division's jurisdiction includes electrical workers, and telegraph and telephone linemen are classified as electrical workers. This Division finds claimants are entitled to the rate of pay as prescribed in the current agreement from March 22, 1941. The case is referred back to the parties to ascertain the amount, if any, of additional pay claimants are entitled to from March 22, 1941."

2—Award—"Claim sustained as per findings from March 22, 1941."

The United States Supreme Court stated in the case of **Baldwin vs. Traveling Men's Assn.**, 283 U. S. 522, 525—526:

> "Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties. We see no reason why this doctrine should not apply in every case where one voluntarily appears, presents his case and is fully heard, and why he should not, in the absence of fraud, be thereafter concluded by the judgment of the tribunal to which he has submitted his cause."

In support of the position of the carrier in that connection attention is directed to the opinion of the Board as expressed in Award No. 1215 of the National Railroad Adjustment Board, Third Division.

Furthermore, when consideration is given to the fact that Messrs. Fennell and Adams have been paid at the established rates for telegraph linemen employed by The Ann Arbor Railroad since the date they entered the service of the carrier, it is obvious that the submission of this alleged dispute to the Board is without question an attempt on the part of the representatives of the employes to increase the established rates of telegraph linemen employed by The Ann Arbor Railroad in a manner contrary to the provisions of Section 6 of the Railway Labor Act.

When consideration is given to that fact, and the further fact that the National Railroad Adjustment Board is without authority under the law by which it was created to grant increases in established rates of pay, it is evident that the adjudication of the alleged dispute referred to herein does not fall within the province of the Board, and, therefore, the contention of the representatives of the employes should be dismissed and the request for an increase in the rates of pay of telegraph linemen denied.

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 waived right of appearance at hearing thereon.

This proceeding, Docket No. 923, was submitted for the purpose of effectuating Award No. 784 (dated May 26, 1942) and Interpretation No. 1 to said award (dated January 6, 1943), which were issued in the proceeding originally docketed as No. 681. When agreement could not be reached on the property as to the appropriate application of Award No. 784, an interpretation thereof was requested; and in this interpretation the case was referred back to the parties for application of the award as interpreted, "with the right to resubmit it if they cannot agree."

In these circumstances the Division deems itself bound by Award No. 784 and its interpretation, and declines, at the behest of the carrier or the employes, to reconsider the case from the standpoint of either jurisdiction or the merits. Its sole task, if the evidence of record is sufficient therefor, is to apply Award No. 784 as interpreted through its own determination and order; or, if the evidence is inadequate to support a determination and order, once more to remand the proceeding to the parties for settlement, without prejudice to the right to resubmit on the basis of evidence sufficient to support appropriate findings and an award pursuant thereto.

In Award No. 784 the Division found that the claimant telephone and telegraph linemen are electrical workers over whom this Division has jurisdiction; that these claimants are subject to the current agreement effective July 1, 1921; that they are entitled to the rate of pay operative under that agreement; and that they should be compensated at this rate of pay from March 22, 1941. In its interpretation of Award No. 784 the Division further specified that the claimants served in a dual capacity—performing electricians' work as well as linemen's work; and that they should be paid, under the agreement, for work performed as electricians at the electricians' rate of pay, and for work performed as linemen at the linemen's rate of pay.

The only factual basis of record for an order designed to effectuate Award No. 784 as thus interpreted is the claim of the employes in the present proceeding, Docket No. 923, that the electrical workers' rate of pay, as of March 23, 1941, was 84½ cents per hour, and the observation in the Division's interpretation of Award No. 784 that "the representatives of the employes conceded that a lineman received generally four cents per hour less than an electrician."

This evidence is not adequate to support a determination and order by the Division.

The 84½-cent rate, as of March 23, 1941, is alleged to be the rate of pay of electrical workers. Since electricians as well as linemen are classified as electrical workers, and since it is conceded that the linemen's rate of pay is not the same as the electricians' rate of pay, the 84½-cent rate, even if it is the proper rate for electricians, cannot be used as the single rate to effectuate Award No. 784 as interpreted by the Division.

Nor is it appropriate, assuming that the 84½-cent rate is the proper electricians' rate, that the linemen's rate be fixed by the Division at 4 cents less than this amount. The employes are claiming and have been awarded the linemen's rate under the agreement effective July 1, 1921. It is that precise rate, as fixed by the United States Railroad Labor Board in 1921 and subsequently modified by order or agreement, and not some generalization with respect thereto submitted ex parte in oral argument by the employe members of the Division, that must be applied.

Since, furthermore, the linemen's rate of pay is a monthly rate, it is essential, before it is converted to an hourly rate, that agreement be reached or evidence presented as to the proper number of hours per year upon which the monthly rate, as it is now paid or as it is sought to be modified, should appropriately be based. The employes assert their right to the hourly rate of pay operative under the controlling agreement for 3156 hours per year; but this claim appears to be inconsistent with the number of hours per year used in the very determination of the United States Railroad Labor Board which constitutes the starting-point for ascertaining the linemen's rate of pay under the agreement effective July 1, 1921.

Finally, no evidence whatever has been submitted as to the relative amounts of electricians' work and linemen's work performed by these claimants. Such evidence is essential to the application of Award No. 784 as interpreted by the Division. Such evidence is necessary both to fix the proper rate for the future, under the controlling agreement, and to determine the amount of back pay, under the same agreement, to which the claimants are entitled since March 22, 1941.

The obstacles encountered by the Division to the issuance of an order finally disposing of this case have not only sprung, as already indicated, from the failure of the employes to submit evidence essential to the application of Award No. 784 as interpreted by the Division, but also from the carrier's misconstruction of the meaning and effect of that award. While the carrier has insisted vigorously that Award No. 784 is final and binding and must not be modified, it has devoted itself primarily, in Docket No. 923, to rearguing

the questions of jurisdiction and merit already disposed of adversely to it, instead of presenting evidence relevant to the application of that award. It erroneously construed Award No. 784 as interpreted by the Division as constituting a denial, in toto, of the employes' claim, despite the fact that the claim was expressly sustained, as per the Division's findings, from March 22, 1941.

In view of the rather complicated situation involved in this proceeding, embracing not only rates of pay evolved over a long period of years but also a necessarily changing distribution of assignments as between linemen's work and electricians' work, it is the opinion of the Division that it is peculiarly appropriate that Award No. 784 as interpreted by the Division be put into effect by agreement of the parties. It is the opinion of the Division, furthermore, that it is perfectly feasible to reach agreement in this connection, provided each party adheres in good faith to Award No. 784 as interpreted by the Division.

For this purpose the case is once more remanded to the parties. In the event of failure to reach a settlement, the proceeding should be resubmitted on a record, as indicated above, which is sufficient to enable the Division to make a sound and equitable determination under Award No. 784 as already interpreted.

AWARD

Case remanded to the parties in conformity with above findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: J. L. Mindling
Secretary

Dated at Chicago, Illinois, this 10th day of March, 1944.