Award No. 1523
Docket No. 1423
2-B&O-FT-'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. 30, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. (Federated Trades)

THE BALTIMORE & OHIO RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES: 1. That the assignment of signalmen to perform the work of the electrical workers craft and the work of the machinists craft as covered in their respective work scope rules in connection with the maintaining and repairing of car retarders, is not authorized by the current agreement.

2. That accordingly the carrier be ordered to:

(a) Assign employes of the electrical craft to perform the aforesaid work covered in their work scope rules of the current agreement.

(b) Assign employes of the machinists craft to perform the aforesaid work covered in their work scope rules of the current agreement.

EMPLOYES' STATEMENT OF FACTS: The carrier installed and placed in operation about August 17, 1947, at Cumberland, Maryland, and at Willard, Ohio, about January 15, 1948, mechanical devices commonly called car retarders, to retard the movement of hump-switched freight cars on various classification tracks in these train yards. The speed of these cars descending the grade of tracks by force of gravity is controlled by retractable brake shoes attached to rails of yard tracks which apply to the side surface of freight car wheels.

The speed control of these cars stems from the electrical and mechanical equipment or devices installed in power houses, carrying 460 volt AC power, in towers adjacent to switching yard operations and in such yards attached to other tracks laying beyond and along the descending grade of tracks. The equipment consists of electric motors, motor generators, gas driven generators, machines or motors for operating such switches or retarders, wires and conduits, etc., required exclusively in connection with the operation and the control of these car retarders.

Forthwith placing these car retarders in operation, the carrier made the election to assign electrical workers' work, sheet metal workers' work

express some modified and less inclusive interpretation of those rules; the rules of the Board and the Act itself require that their position must be handled upon the property. At best the Division would have to remand for further handling in conference.

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.

In this case it appears from the face of the claim that employes of the electrical workers and machinists crafts are claiming the right to perform work on car retarders and the record discloses such work is now assigned to and is claimed by signalmen under the scope rule of their collective bargaining agreement with the same carrier.

At the outset the carrier relies on three propositions which must first be determined because if either is correct the claim cannot be disposed of on the merits.

We are not impressed with carrier's first contention the claim is so indefinite it must be dismissed. It is sufficiently comprehensive to advise all parties concerned of its nature and permit the rendition of a final and definite award after a full and complete hearing. So far as the claim itself is concerned that is all the Railway Labor Act contemplates or requires. We are cited to and know no decisions to the contrary. Those relied on to support the contention deal with the sufficiency of awards when rendered, not with the claim as filed, and hence are not controlling.

Nor do we believe there is merit in the second proposition the dispute is one over which the Division has no jurisdiction. This Board has held that in situations where the carrier has contracted with one or both parties to a dispute a matter of contract interpretation is presented for its decision and no jurisdictional question is involved. See Award 1359 of this Division and Awards 4471, 4951 and 5410 of the Third Division. Limited strictly to the particular subject under consideration we adhere to what is held in such awards.

In its third contention the carrier points out the signalmen have rights under their contract which will be affected by a decision on the merits and hence are interested and involved in the dispute. It then challenges our right to render a valid sustaining award on the ground the signalmen's organization has not been given notice of the claim filed with this Division and afforded an opportunity to appear and be heard throughout all stages of the proceeding. This presents not only a perplexing but a serious question which has long been a source of contention on this and other Divisions of the Board.

Section 3 First (j) of the Railway Labor Act, as amended, provides:

> "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 employees and the carrier or carriers involved in any dispute submitted by them."

It must be admitted that early in its history, and for that matter until quite recently (See Award 1359), this Division has rendered sustaining

awards in disputes of the character here involved, notwithstanding requirements of the section of the Act just quoted. Be that as it may, if the courts, who under express provisions of the Act (Section 3 First (p)) unquestionably have power to enforce or set aside awards made by the Board in actions brought to test their validity, have definitely determined that a sustaining award in the instant case would be void and unenforceable in the absence of notice to the signalmen's organization it is clear our duty is to comply with the requirements of Section 3 First (j), **supra,** as interpreted by them and see to it such notice is given. We therefore turn to that question.

In support of its position on this point the carrier relies on Award 5432 (Third Division) and the numerous federal court decisions therein referred to and discussed. We have examined those decisions and are in accord with the construction placed upon them in such award. Therefore, by reference, what is there said and held respecting them is made a part of these findings. In addition our research discloses other decisions and recent cases from other Divisions of the Board, not mentioned in that award, supporting the position that notice to signalmen is a prerequisite to the rendition of a valid sustaining award in the present case.

Dwellingham v. Thompson, 91 Fed. Supp. 787, decided in 1950, holds that where a claim is filed by one labor group contemplating the ousting of other employes, those who will be displaced from their jobs in event the demand of the claiming group is upheld by the Board are entitled to notice under the Fifth Amendment to the Constitution of the United States as well as the provisions of the Railway Labor Act.

The very recent case of **Hunter v. Atchison, T. & S. F. Ry. Co.,** 188 Fed. 2d. 294, decided in 1951, holds, that under provisions of the Railway Labor Act § 3, subdivision 1 (j): (1) Every person who may be adversely affected by an order of the Board has the right to notice and opportunity of participating in the hearing before the Board; (2) that an employe need not be named as a party to a proceeding before the Board to be "involved" in the controversy within the meaning of that term as used in the Act, and (3) that all train porters who claimed seniority rights in the work involved in the dispute, and who would be adversely affected by an award of the Board in proceedings by brakemen to oust porters from such duties, were entitled to notice of proceedings as persons "involved" in the controversy.

In the opinion of that case, after quoting at length from **Estes et al. v. Union Terminal Co.,** 89 Fed. 2d. 768, it is said:

> "We fully agree with the foregoing quotation from the opinion of the Court of Appeals for the Fifth Circuit. To say that the train porters are not involved in a dispute which may result in brakemen supplanting them in their jobs is so unrealistic as to be absurd. Surely the employee who has a certain job is as much interested in that job as another employee who is trying to take it away from him."

Of like import, although differently stated and involving other classes of employes, is **Missouri-Kansas-Tex. R. Co. v. Brotherhood of R. & S.** S. C. 188 Fed 2d. 302, also decided in 1951.

For recent awards of the Board recognizing and applying the Act as construed by the foregoing decisions see Awards 5599, 5600 and 5627 of the Third Division, also Awards 14837 and 14093 of the First Division.

On behalf of the claimant it is argued the signalmen are not "involved" within the meaning of that term as used in the Act. The answer to this argument appears in the foregoing authorities which definitely hold to the contrary.

Finally, it is contended the Supreme Court of the United States has never considered or indicated its approval of the interpretation given the

Act by Federal Courts of inferior jurisdiction. We do not agree. **Elgin, Joliet & Eastern R. Co. v. Burley,** 325 U.S. 711, later affirmed in 327 U. S. 661, holds an award made by the National Railroad Adjustment Board upon submission of a complaint concerning grievances is not effective against the aggrieved employe unless he is represented individually in the proceedings in accordance with the rights of notice and appearance or representation given to him by the Railway Labor Act. Moreover, in the opinion of that case, with direct reference to the import to be given the very section of the Act now under consideration, it is said:

> ". . . and § 3 First (j) not only requires the Board to give 'due notice of all hearings **to the employee** . . . involved in any dispute **submitted** . . .' but provides for 'parties' to be heard 'either **in person,** by counsel, or by other representatives, as they may respectively elect.' "
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> ". . . All of these provisions contemplate effective participation in the statutory procedures by the aggrieved employe." (pp. 734 & 736.)

After a careful examination of the federal cases to which reference has heretofore been made we are convinced the established law of the land now is that the provisions of Section 3 First (j), **supra,** require that notice be given to the signalmen under the confronting facts and circumstances of the case now under consideration. Therefore, based on such decisions and for the reasons set forth at length in Award 5432 of the Third Division, to which we subscribe, we hold that in the present state of the record we have no right to proceed to a determination of this dispute on the merits. We further conclude that under the existing circumstances the proper procedure to follow is to dismiss the claim without prejudice, thereby affording the claimant an opportunity to take whatever action it may deem advisable in the future.

AWARD

Claim dismissed without prejudice to future action in accord with the findings.

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. 1523

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 proceedings.

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 adjudica-

tion 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 injunctions. 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 employee"—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.

R. W. Blake
A. C. Bowen
T. E. Losey
Edward W. Wiesner
George Wright