Award No. 1628

Docket No. 1503

2-CofG-MA-'52

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Edward F. Carter when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 26, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. (Machinists)

CENTRAL OF GEORGIA RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYES: 1. That under the current agreement, Mr. Julian Crossley, Macon machinist, was improperly transferred to Albany, Georgia, to temporarily fill the position of Assistant General Foreman, from noon June 7, 1951, through June 28, 1951, inclusive.

2. That, accordingly, the carrier be ordered to compensate W. D. Turner, Albany machinist, the difference between compensation already received as machinist and that amount of daily compensation paid Machinist Crossley for service rendered at Albany, Georgia, during the aforesaid period.

EMPLOYES' STATEMENT OF FACTS: Mr. E. T. Harrison, assistant general foreman, at Albany, Georgia, was released from duty June 3, 1951, to enter a hospital at Savannah. June 3 and 4 fell on Saturday and Sunday, the regularly assigned rest days of Mr. Harrison, and his position was filled on those days by Mr. J. H. Fitzgerald, foreman, car department, in keeping with an understanding had between the parties in September, 1950.

W. D. Turner, machinist, employed in seven-day service, first shift, 8:00 A. M. to 4:30 P. M., was assigned to fill the place of Mr. Harrison beginning June 5. He was displaced June 7, at noon, upon arrival of Mr. Julian Crossley from Macon, Georgia, in company with Master Mechanic H. M. McKay. Mr. Crossley remained at Albany to fill the place of Mr. Harrison until the latter returned on duty June 29.

Machinist Turner had been used over a period of many years to temporarily fill the position in question at Albany, Georgia. Continued use of an hourly rated mechanic to fill same was ordered by the superintendent motive power as recently as April, 1951, in maintenance of long established policy.

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 dispute grows out of the following factual situation: Mr. E. T. Harrison, Assistant General Foreman at Albany, Georgia, was released from duty on June 3, 1951. The foreman of the car department worked the position on June 3 and 4, the regularly assigned rest days of the position. No complaint is made as to this assignment. On June 5, W. D. Turner, machinist, was used in the position. On June 7, he was displaced by Mr. Julian Crossley, a machinist at Macon, Georgia, who had exercised his seniority as such after his supervisory position at Macon was discontinued. The claim is that Turner was entitled to the work and that he should be additionally compensated for the difference in rates during the time Crossley worked the Assistant General Foreman's position at Albany.

The dispute is governed by Rule 32, current agreement, which provides:

> "Should an employe be assigned temporarily to fill the place of a foreman, he will be paid his own rate—straight time for straight time hours and overtime rate for overtime hours—if greater than the foreman's rate; if it is not, he will get the foreman's rate. Said positions shall be filled only by mechanics of the respective craft in their departments."

The foregoing rule means, we think, that if the carrier saw fit to fill the position of Assistant General Foreman that it would compensate the employe filling it at the rate of his regularly assigned position or that of Assistant General Foreman, whichever was the higher. But the position is one which the carrier could blank and not fill at all. This accounts for the use of the word "should" at the beginning of the rule. If the carrier filled it, the higher rate as hereinbefore described would be paid. The second sentence contains the positive "shall" and clearly means that said positions shall be filed only by mechanics of the respective craft in their department. It is separate and distinct from the first sentence of the rule and unequivocally says that such positions shall be filled only by mechanics of the respective crafts in their departments. The rule appears plain until we examine the rules of another craft incidentally involved in this dispute. Rule 32 standing alone awards the work to the Claimant Turner. Consequently, we feel that Claimant is entitled to the benefit of the agreement to which he is a party and that a sustaining award is in order.

It is argued that Rule 32 is a pay rule and that it should not be otherwise considered. The first sentence of the rule clearly involves pay rates. The second sentence does not. If the latter was to be construed as a pay rule only, it could have no effect at all as the first sentence completely disposes of the question of pay. If it is to be given any meaning, therefore, it requires foremen's positions to be filled temporarily with mechanics of the respective craft in their departments. Under the rules of contract construction, every part of a rule should be given meaning where it is possible to do so. The mandatory language used demonstrates quite conclusively that it was something more than a pay rule. It contracted the work in question to mechanics of the respective craft in their departments.

The carrier contends however that Crossley, although working as a machinist, is a furloughed supervisor and that it was in such capacity that

he was assigned the questioned work in Albany. It is true that carrier's agreement with the supervisors provides that they should have system seniority and that senior furloughed supervisors will be first to be recalled. While no rule in the supervisor's agreement has been pointed out to us which says that the foregoing applies to the filling of temporary vacancies, we will concede for the purposes of this case that it does.

We can understand that a carrier in dealing with many crafts in the negotiation of agreements with each could, as was evidently the case before us, contract some particular work to more than one craft. This creates no unsurmountable obstacle as inequitable as it might seem. The carrier can cancel the offending language from one or both of the craft agreements by proceeding under Section 6 of the Railway Labor Act. Likewise, where work is claimed by two or more crafts and is not covered by the agreement with any of them, the Railway Labor Act provides adequate remedies for their solution. These statements are, of course, a prelude to another question posed by the carrier which we shall now discuss.

Carrier contends that any sustaining award by this Board in the case before us would be null and void for the reason that no notice was given to Foreman Crossley or the supervisor's organization and that this constitutes a violation of the Fifth Amendment to the Constitution of the United States. In this respect, we point out that each of the four divisions of this Board has jurisdiction over agreements between carriers and certain named crafts. The machinists' agreement is within the jurisdiction of the Second Division while that of the Supervisors is within the jurisdiction of the Fourth Division. There is nothing about this which in any manner is antagonistic to the rights of the parties because every dispute is controlled by the agreement between the carrier and the particular craft involved.

It is asserted by the carrier, however, that notice to involved third parties is essential to a valid award. The validity of this statement necessarily rests on the meaning of the word "involved". Certainly a casual or incidental interest is not sufficient to require notice. It must be such an interest as the assertion of a right or the prevention of a wrong.

In the case before us the Second Division has no jurisdiction to construe carrier's agreement with the supervisors, the jurisdiction over such agreement being lodged with the Fourth Division. Consequently, any rights Crossley may have as a supervisor can be protected by appropriate proceedings before that Division of the Board and anything the Second Division may do in determining the dispute presently before this Division cannot add to or detract from any rights Crossley may have by virtue of the Supervisor's Agreement. Certainly, one who can neither gain or lose, sustain profit or suffer damage, is not a necessary party to a proceeding. The giving of notice could accomplish no useful purpose and would tend only to create technical procedures and confusing processes that were intended to be avoided by the creation of the Board. Where it appears that a third party has no justifiable interest in a dispute, and he can suffer no advantage or injury whether or not he appears, notice to him is not essential to its disposition and no basis exists for a claim that the due process clause of the Fifth Amendment to the Constitution of the United States has been offended.

The contention also centers around the meaning of Section 3, First (j) of the Railway Labor Act which 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 employee or employees and the carrier or carriers involved in any disputes submitted to them."

It is readily apparent that the meaning of the words "involved in any disputes submitted to them" is of first importance. It must be borne in mind that the various divisions of the Board were given jurisdiction over collective

agreements between carriers and certain specified crafts. It was clearly the intention of the Act that the Second Division only should have jurisdiction over collective agreements between carriers and machinists. The Second Division and it alone was to determine the meaning of these agreements. Any award made was to be based on the agreement as made by the parties. If a violation of the Agreement was established, the Second Division is required to enter an award so holding. No person or organization not a party to the agreement could have any interest therein. His rights were dependent upon his own contractual rights with the carrier. Irrespective of an award of the Second Division, a party to some other agreement can properly insist upon the enforcement of his own contractual rights before the proper division. His rights are dependent upon the interpretation of his own agreement unaffected by any award made under some other contract. As we have hereinbefore stated, a carrier may in some instances contract the same work to two or more crafts. Until such time as it sees fit to eliminate the duplication under the processes provided by Section 6, it may find itself subjected to two or more liabilities, the same as any person may do by contracting with more than one person concerning the identical subject matter. It seems clear to us, therefore, that notice is not required to be given any party whose rights rest solely upon a different contract and that the words, "involved in any disputes submitted to them" do not and were never intended to include such persons.

What then does the questioned language mean? We think it means that when the rights of one person under a collective agreement are before a Division of the Board for determination, any employe or employes having rights under the same agreement which may be damaged or destroyed is "involved" in the dispute within the meaning of Section 3, First (j) and is entitled to notice. For instance, an award under the Machinist's Agreement which grants one employe a seniority dating to the injury of another, within the same craft, furnishes a case when notice is required under Section 3, First (j) and under the due process clause as well. A careful reading of the judicial decisions on the subject will reveal that this distinction is made, although it must be conceded that they cannot be completely harmonized. We have carefully examined the awards of this and other Divisions on the subject including Awards 1523, 1525, 1526, Second Division; Awards 2253, 3999, 4471, 5432, 5433, 5599, 5600, 5702, Third Division; Awards 14673, 14837, 14903, First Division. In most of these Awards, the differentiation pointed out in the present case was not made or the application of the rule distinguished on the facts. The legal situation has been developed pro and con by Awards 5432 and 5702 of the Third Division. While conceding the integrity, learning and high standing of the author of Award 5432, it is our considered opinion that Award 5702, Third Division, when considered in the light of the findings herein made, states the correct rule in this type of case. We are convinced that in the interpretation of agreements and the settlement of disputes, this Board need not take cognizance of disputes between crafts. The Railway Labor Act provides adequate methods for disposing of intercraft difficulties and they are not for this Board. This being so, notice to other crafts or members thereof, having agreements of their own with the carrier, is not within the purview of Section 3, First (j) of the Railway Labor Act, nor does a failure to give notice to such employes offend against the Fifth Amendment to the Constitution of the United States. Such a notice, if given, would be a vain thing on the part of the Division and illusory to the recipient thereof. Under such circumstances the failure to give notice does not affect the validity of an award otherwise proper.

It is further argued that even if the foregoing be true that notice is required by Circular B, a rule of procedure adopted by the Second Division. An examination of Circular B shows that it was intended to cover situations where the "seniority standing of persons is affected, as a result of deciding a specific seniority dispute, who may or may not be mentioned in the dispute." It seems to us that its very purpose is to protect the rights of those whom we have heretofore pointed out as having an interest in the result of the action of the Board. There is nothing in it that requires notice to Organizations or members thereof whose rights grow out of their own agreement with

the carrier. Circular B cannot, as we see it, play any part in the dispute before us. Its proper use is consistent with the views in these findings.

The American Railway Supervisors Association and Julian Crossley as a member thereof are not indispensable, necessary or proper parties to the dispute. It necessarily follows that neither of them is entitled to notice as a condition precedent to a valid award. This Board is one of limited powers, expressly defined by the Railway Labor Act. It does not have the general and all inclusive powers of a court of equity. We find no merit in the application of the carrier for a dismissal without prejudice or a stay of the proceedings until notice can be served on the American Railway Supervisors Association and Julian Crossley, the supervisor alleged to be involved.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 12th day of January, 1953.

DISSENT OF CARRIER MEMBERS TO AWARD NO. 1628, DOCKET NO. 1503

Carrier Members are impelled to dissent on the findings and award in this case on both the question of jurisdiction and the question of merits for the reasons advanced in the following:

JURISDICTION

It is an elementary rule, applicable alike to judicial or administrative tribunals, that where it appears complete justice cannot be done by the tribunal in the proceeding before it, jurisdiction of the matter should be declined. And this rule is particularly where the decision of the tribunal will not in all respects conclude the matter. Equally elementary is the rule that notice of a proceeding before a judicial or administrative tribunal is a requirement which must be a strictly adherred to and failure to give such notice to all affected by, or having an interest therein, invalidates the proceeding. We are now told these rules no longer apply to our proceedings; that we should, knowing that our decision cannot do complete justice, assume jurisdiction of, and make an award in a dispute without notice to employes under the jurisdiction of another Division adversely affected thereby; that an employe under the jurisdiction of another Division of this Board adversely affected by a decision of one Division is "fully protected" by his right to obtain a contrary decision from another Division of this Board. This statement is made in spite of the fact that a valid award, in the absence of proper notice to all employes involved in the dispute, could not be made in either proceeding by either Division under the uniform holdings of the Courts since Nord v. Griffith, (1936) 86 F. (2d) 481, certiorari denied 300 U. S. 673, where First Division Award No. 68 was held void because of the failure to notify an adversely affected employe, down through M-K-T RR Co. v. Clerks, (1951) 188 F. (2d) 302, where Third Division Awards Nos. 3932, 3933 and 3934 were similarly found to be void. See also, Brand v. Pennsylvania RR Co., 2 L.C. 18,489; Estes v. Union Terminal Co., 89 F. (2d) 768; Railroad Yardmasters of America, v. I. H. B. RR Co. 70 F. Supp. 914, 166 F. (2d)

326; Hunter, et al., v. AT&SF RR Co., et al., 78 F. Supp. 984, 171 F. (2d) 594, certiorari denied 337 U. S. 916; Templeton v. AT&SF RR Co., 84 F. Supp. 162, 181 F. (2d) 527, certiorari denied 330 U. S. 823; Hunter v. AT&SF RR Co., 188 F. (2d) 294; and Kirby v. Pennsylvania RR Co. 188 F. (2d) 793.

But by ignoring the above cases, the majority finds, through a devious course of reasoning, that the notice required by the Act to be given to an employe or employes "involved in any dispute" must be given only when all of the parties "involved in" the dispute are subject to the jurisdiction of the same Division. The fact that through lack of such notice, other employes may be deprived of their rights is dismissed with the cavalierly assertion that "their rights are fully protected" because "they can bring their claim" before another Division. The realities of such a situation, as shown by the history of Awards Nos. 6635 to 6639, inclusive, entered by the First Division on April 20, 1942, are completely ignored. There, as a result of awards entered without notice to them, 250 express messengers were deprived of their jobs by brakemen and such jobs are still being held by brakemen long after the awards were held to be "illegal and void" because entered without notice to the express-messengers. Templeton v. AT&SF RR Co., et al., 84 F. Supp. 162, 181 F. (2d) 527 certiorari denied 330 U. S. 823. Much of this delay might have been avoided if, when the claim of the brakemen to the express-messengers' work was brought before the First Division, notice had been given to the express-messengers. The express-messengers would then have been in position to protect their rights either by legal action to enjoin the proceedings before the "illegal and void" awards had been entered, or if no Division of the Board has jurisdiction over both parties, by "resort to the machinery provided by Section 6 for changing" such "overlapping agreements." M-K-T RR Co. v. Clarks supra.

The statement "that groups or classes of employes * * * of which a Division of the Adjustment Board is not given jurisdiction, are neither necessary or proper parties to" this dispute is hopelessly in error. They are "indispensable parties" because, as stated by Justice Wenke, in Cunningham v. Brewer, (Neb. 1944) 16 NW (2d) 533, "a final decree cannot be made without affecting their interest." That rule was applied also in Local B 843 of International Brotherhood of Electrical Workers v. Western Public Service Company, (Nebr. 1941) 299 NW 531, where a union sought to oust twelve of its members from their employment with the defendant. The union brought suit in equity to enjoin the defendant from retaining in its employ any union member in arrears in the payment of union dues. The twelve delinquent members were not made parties to the suit and had no notice thereof. Their names, however, were listed in the petition. The defendant demurred to the position on the ground that there was a "defect of parties defendant." The union refused to amend its petition to make the delinquent members parties-defendant and the District Court dismissed the action. The Nebraska Supreme Court, in an unanimous opinion, affirmed the action of the District Court, in saying, in part:

> "The rule in equity by which the trial court was guided in sustaining the demurrer for defect of parties defendant and in finding that the employes were indispensable parties was stated in a former case as follows:
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> > ' "Indispensable parties" to a suit are those who not only have an interest in the subject-matter of the controversy, but also have an interest of such nature that a final decree cannot be made without affecting their interest or leaving the controversy in such condition that its final determination may be wholly inconsistent with equity and good conscience. Jones v. Evans, 99 Neb. 666, 157 NW 620.'
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> "* * * The 12 employes who are members of the union have a vital interest in the subject-matter of the suit. A final decree can-