Award No. 2970
Docket No. 2358
2-BRCofC-MA-'58

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Harry Abrahams when the award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 130, RAILWAY EMPLOYES' DEPARTMENT, AFL (Machinists)

BELT RAILWAY COMPANY OF CHICAGO

DISPUTE: CLAIM OF EMPLOYES:

1. That under Rule 31 and 19 of the current agreement other than machinists were improperly used to make repairs to gasoline engines, pneumatic tools, and other machinery used in the Maintenance of Way Department and other departments on January 13, 27, 28, 31, February 1, 3 and 8, and this practice is continuing still.

2. That accordingly the carrier assign machinists to the aforesaid work, and properly compensate machinists who have been denied this work. The immediate claims are for Machinists G. Wolstenhome, R. Morlock, Leon Smolek, Richard J. Dowas, Robert Sindelar and Lloyd Marvin. The amounts, nature and dates of their claims is shown on the enclosed copies of time claims (form 318) which were originally presented to Mr. H. D. Koch, roadmaster.

3. That the carrier pay other claims which will be subsequently determined until the aforementioned work is properly assigned under the controlling agreement.

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 was raised by the claim of employes that other than machinists were used to make repairs to gasoline engines, pneumatic tools, and other machinery used in the Maintenance of Way Department and other departments.

The carrier set forth, among other things, that at all times the repairs to the said equipment had been made by the Maintenance of Way Department, and that therefore proper and due notice should be given to the Brotherhood of Maintenance of Way Employes before an award is made in order to allow them to present their position.

No notice was given to the Maintenance of Way employes or to the Brotherhood of Maintenance of Way Employes of this dispute by the Second Division of Adjustment Board, and they were not represented at the hearings herein.

Section 3, First (j) of the Railway Labor Act reads as follows:

> "(j) 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."

The question presented under the above section of the Act is whether the Maintenance of Way employes are "involved" in the said dispute. The carrier stated that the Maintenance of Way employes have been given the said work herein for many years. An award giving the said work to the machinists would certainly "involve" the Maintenance of Way employes.

In the case of Missouri-Kansas-Texas Railroad Co. vs. Brotherhood of Railway and Steamship Clerks, 188 F (2d) 302, the Court said at Page 305, "We think of no employe having a more vital interest in a dispute than one whose job is sought by another employe or group of employes." The Court further said at Page 305 of said case, "* * * those other employes sought to be ousted have a vital interest in the proceeding and, under Section 3, First (j) of the Act, a right to notice and opportunity to participate in the hearing before the Board."

Since the Maintenance of Way employes could be adversely affected by an award in this matter, they are entitled to notice under the Railway Labor Act and a right to be heard if they so desire. In the case of Hunter vs. Atchison, Topeka and Santa Fe Railway Company, 188 F (2d) 294 at Page 300, the Court said, "* * * in justice and fairness every person who may be adversely affected by an order entered by the Board should be given reasonable notice of the hearing. * * * No man should be deprived of his means of livelihood without a fair opportunity to defend himself. Plainly, that is the intent of the law." See also Nord v. Griffin, 86 F (2d) 48.

Today, the Maintenance of Way employes are entitled to notice and a right to be heard, tomorrow, the machinists may be entitled to notice and a right to be heard under similar circumstances.

The great majority of the Court decisions hereafter cited hold that a failure to give the notice as required under the Railway Labor Act and an opportunity to be heard could result in a void and illegal award. Kirby, et al v. Pennsylvania Railroad Company, 188 F 2d 793, Hunter v. Atchison, Topeka

& Santa Fe Railroad, 171 F 2d 594; 188 F 2d 294; and 78 F Supp. 984; Estes vs. the Union Terminal Company, 89 F 2d 768; Nord vs. Griffin, 86 F 2d 481; and 13 F Supp. 722; Templeton vs. Atchison, Topeka & Santa Fe Railroad, 84 F Supp. 162; Missouri-Kansas-Texas Railroad Company, et al vs. Brotherhood of Railway and Steamship Clerks, et al, 188 F 302; Allain vs. Tummon, et al, 212 F 2d 32; Whitehouse vs. Illinois Central Railroad, 212 F 2d 22; Elgin, Joliet & Eastern Railroad Company vs. Burley 325 US 711—affirmed in 327 US 661.

Failure to give a due and proper notice, as required under The Railway Labor Act, could result in taking the property rights of an employe or employes away without due process of law as set forth under the Fifth Amendment of the Constitution of the United States. Hunter v. Atchison, Topeka & Santa Fe Railway Company, 78 F Supp. 984—affirmed 171 F (2d) 594.

The decision rendered by the Supreme Court of the United States in the case of Whitehouse vs. Illinois Central Railroad, 349 US 366; 75 Sup. Ct. Reptr. 845, did not change the above decisions. It was confined to deciding only what was necessary to the disposition of the immediate case involving action of said railroad for a temporary and permanent injunction. In the said case, relief was sought by the said railroad prior to any decision on the merits by the Board. The Court said, "Railroad's resort to the Courts has preceded any award, and one may be rendered which could occasion no possible injury to it." The Court then held that the potential injuries which might result to the railroad from an adverse decision by the Railroad Adjustment Board was too speculative to warrant the use of the extraordinary remedy of injunction.

In a most recent decision in the case of the Order of Railroad Telegraphers vs. New Orleans, Texas and Mexico Railway Company, which was decided on January 10, 1956 after the Whitehouse decision, the United States Court of Appeals for the Eighth Circuit, 229 F 2nd 59 held, that a party that may be involved in a dispute under the Railway Labor Act should be given notice under Section 3, First (j) of the Railway Labor Act. On appeal to the Supreme Court of the United States, Certiorari was denied.

In accordance with the decisions of the Federal Court, this Board must hold that the Maintenance of Way employes are involved in this dispute, and that they should be given due notice by this Division as contemplated by Section 3 First (j) of The Railway Labor Act.

For some of the Awards of the Board recognizing and applying The Railway Labor Act as construed by the foregoing decisions, see Awards: 1523, 1524, 1525, 1526 and 1729 of the Second Division; Awards: 5432, 7975, 8105, 8106, 8107 and Award 8022 covering Docket CL-8086 of the Third Division.

AWARD

Consideration of and decision on the merits herein is deferred pending due notice by this Division to the Brotherhood of Maintenance of Way Employes to appear and be represented in this dispute in accordance with Section 3 First (j) of The Railway Labor Act.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 13th day of October, 1958.

LABOR MEMBERS' DISSENT TO AWARDS 2970

The majority's refusal to decide these cases on the merits renders the Division vulnerable to the stalemating of any case simply on the suggestion of a carrier that a third party is involved. The erroneousness of the majority's holding that consideration and decision on the merits should be deferred pending due notice by the Division to the Brotherhood of Maintenance of Way Employes is readily apparent since the statutory jurisdiction of the Second Division does not include such employes nor does the governing agreement include said employes.

The majority should have adherred to the rulings of Second Division Awards 340, 1359, 1628, 2315, 2316, 2359 and 2372 and awards of other Divisions, such as Award 8079 of the Third Division, that notice to third parties is not required where the employes' rights, if any, are not controlled by the agreement of the claimant organization or where the employes are members of a craft whose disputes are referrable to other Divisions of the Board and over which the Second Division would have no jurisdiction.

/s/ R. W. Blake

/s/ C. E. Goodlin

/s/ T. E. Losey

/s/ Edward W. Wiesner

/s/ J. B. Zink