Award No. 3126
Docket No. 2502
2-B&O-CM-'59

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, A. F. of L.-C. I. O. (Carmen)

BALTIMORE AND OHIO RAILROAD COMPANY, THE

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, 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.

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 original jurisdiction over the dispute between the above captioned parties involved herein.

This Division of the Adjustment Board has no jurisdiction over clerks or maintenance of way employes disputes which is established by the Railway Labor Act in Division III of the National Railroad Adjustment Board.

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

Carrier has raised the issue of lack of jurisdiction of the Division for non-joinder of interested parties who are or may be involved herein. It asserts that the carmen who now claim this work are not entitled to it; that the work has always been done by stores department employes (clerks) and that if the work should be decided to be improper for the clerks under their agreement that the bridge and building department employes (MofW) are entitled thereto in advance of the claimant carmen.

The consensus of thought on this third party notice question is to the effect that giving notice to a craft whose disputes are under the jurisdiction of another division, is likely to be ignored because our division cannot interpret their agreement. Regardless of this likelihood, U. S. Circuit courts of appeal have held that notice should be sent.

For rulings requiring notice, see:

1.	MKTRR vs. Clerks	188 Fed(2nd) 302
2.	Kirby vs. Pennsylvania	188 Fed(2nd) 793
3.	Hunter vs. ATSF	188 Fed(2nd) 294
	Also as	171 Fed(2nd) 594
4.	Estes vs. Union Terminal	89 Fed(2nd) 768
5.	Nord vs. Griffin	86 Fed(2nd) 481
6.	Allain vs. Tummon	212 Fed(2nd) 32
7.	EJ&E vs. Burley	325 U. S. 711
	also	327 U. S. 661
8.	ORC vs. Pitney	326 U. S. 561
9.	Whitehouse vs. Illinois Central on appeal	212 Fed(2nd) 22 349 U. S. 845
10.	Telegraphers vs. NOTM	229 Fed(2nd) 59

The Whitehouse case, supra, is the latest expression by the Supreme Court touching on this question. In that case a U. S. District Court granted a temporary injunction to the petitioning railroad holding up further proceedings by the Third Division unless notice was given to the third party. This decision was taken up to the U. S. Circuit Court of Appeals where, with one justice dissenting, the decision was affirmed. Then the case was appealed to the U. S. Supreme Court which reversed the Circuit Court of Appeals and said in a divided opinion, in part as follows:

> "We have been urged to resolve the present dispute regarding the requirement of notice to persons not formal parties to a submission * * *. This remains a perplexing problem despite the substantial agreement among courts of appeal which have considered the question in holding that notice is required. * * * The wording of * * * (Sect) 3 First (j) does not give a clear answer, * * *, it is certainly not obvious that * * * notice need be given beyond the parties to the submission. * * * Were notice given to clerks * * * they would be within their legal rights to refuse to participate in the present proceeding * * *. There is no reason for holding, in the abstract, that any possible award would be rendered void by failure to give notice."

Then after all this discussion of the basic question the court concluded the appeal deciding there was, "inadequate basis for intervention (by the courts) whether by mandamus or injunction".

This Board can only observe that the court's intervention of remedial legal rights has operated to leave the basic question unanswered, and also leaves a question as to the opinions of the dissenters which were not expresed.

With full knowledge that the fundamentals of due process, notice and an opportunity to be heard, the paramount character of individual rights, and the sanctity of contracts, are all mingled in this issue, and that the Supreme Court has not definitely decided the question posed by the conflict built into the Railway Labor Act by its framers, we hold on this occasion that notice shall be sent to the third party involved, specified by the carrier.

AWARD

Consideration and decision herein are deferred until notice and an opportunity to be heard have been given to the Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express & Station Employes.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 16th day of March, 1959.

DISSENT OF LABOR MEMBERS TO AWARD NO. 3126 (Docket No. 2502)

Since 3 First (h) of the Railway Labor Act specifies the employes who are involved within the jurisdiction of the Second Division and clerks are not involved in such jurisdiction there is no justification under Sec. 3 First (j) of the Act for giving notice to them.

The claimants, being employes within the jurisdiction of the Second Division and their employment being governed by the agreement between the parties to this dispute, should have had their case decided on its merits.

James B. Zink

R. W. Blake

Charles E. Goodlin

T. E. Losey

E. W. Wiesner