Award No. 3170
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.

In Award No. 2970, the Division held:

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 the 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 employe or employes 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

Thereafter, notice was given the Brotherhood of Maintenance of Way Employes and upon receipt of the following information from that Organization the case was considered on its merits.

Please be advised that the contractual rights accruing to the class or craft represented by the Brotherhood of Maintenance of Way Employes on this property are predicated solely upon the provisions of an agreement between the carrier and our organization dated April 15, 1940, together with such amendments as are pertinent thereto, and that the specific dispute as identified by the above-listed docket number is not one arising out of the application of these contractual provisions. Furthermore, this dispute has never been considered in conference by representatives of the carrier and this Brotherhood as provided in Section 2, Second, of the Railway Labor Act, and accordingly, it would be impossible for us to submit supporting or documentary evidence as required by the Rules of Procedure of the Adjustment Board, issued October 10, 1934, in attempting to substantiate any position we might deem it advisable to take.

In the event the application of the Maintenance of Way agreement was a subject of controversy between our Brotherhood and the carrier, it is our understanding that the procedural provisions of Section 3, First, (h) of the Railway Labor Act, would require that the dispute be referred to the Third Division of your Board.

EMPLOYES' STATEMENT OF FACTS: Under date of January 3, 1955, the Belt Railway Company of Chicago, hereinafter referred to as the "Carrier," assigned Mr. E. Beckett, a furloughed machinist helper, as a track welder in the Maintenance of Way Department of the carrier.

Since the transfer of Mr. Beckett to the position of track welder, he has been used on numerous occasions to make repairs to and to maintain various tools and machinery used in the Maintenance of Way Department. Such tools and machinery include gasoline engines, pneumatic tools, a diesel operated derrick, and other machinery.

Messrs. G. Wolstenholme, R. Morlock, Leon Smolek, Richard J. Dowas, Robert Sindelar and Lloyd Marvin, hereinafter referred to as the "Claimants," are employed as machinists by the carrier, in accordance with the provisions of the controlling agreement effective September 8, 1950.

This dispute has been handled on up to and with the highest officer of the carrier so designated to handle same, with the result that he has declined to adjust it. The agreement, effective September 8, 1950, as it has been subsequently amended, is controlling.

POSITION OF EMPLOYES: The employes submit that the agreement between this carrier and its employes, represented by System Federation No. 130, Railway Employes' Department, A. F. of L.-C. I. O., is applicable and controlling on the work specified in that agreement wherever performed on the property of this carrier.

In support of the employes' position, submitted herewith and identified as Exhibits A-1 and A-2 are copies of statements made by employes of the carrier in the machinists craft which show that machinists, covered by the applicable and controlling agreement, have prior to the assignment of Mr. Beckett as a track welder in the Maintenance of Way Department repaired and maintained coal chutes, roundhouse turntable, retarders on the hump, powerhouse air compressor, stationary engines, Derrick No. 240 and performed all the machinists welding.

Rule 31 of the controlling agreement reads as follows:

"CLASSIFICATION OF WORK:

> Machinists' work shall consist of laying out, fitting, adjusting, shaping, boring, slotting, milling and grinding of metals used in stripping, assembling, maintaining, building and installing locomotives and engines (operated by steam or other power), pumps, cranes, hoists, elevators, pneumatic and hydraulic tools and machinery, scale building, shafting and other shop machinery; tool and die making, tool grinding and machine grinding, axle truing, axle, wheel and tire turning and boring, engine inspecting, air equipment, lubricator and injector work; fire door work, removing, replacing, grinding, bolting and breaking of all joints on

superheaters; oxy-acetylene, thermit and electric welding on work generally recognized as machinists' work."

In accordance with the above-quoted rule, it has been the practice on this property as per the submitted exhibits to perform all of the necessary maintenance, repair and general repair on all of the equipment operated by steam, air and other power wherever used on the property by the machinists and employes of other crafts covered by the controlling agreement effective September 8, 1950, which includes Rule 31 quoted above.

It is the employes' position that the use of other than machinists to perform machinists' work in accordance with Rule 31 is prohibited by the following pertinent language of Rule 19:

"None but mechanics or apprentices regularly employed as such shall do mechanics' work as per special rules of each craft."

In accordance with the foregoing, your honorable Board is fully justified in sustaining in its entirety the claim of the employes in the instant dispute.

CARRIER'S STATEMENT OF FACTS: The employes have presented a claim because work of making repairs to certain equipment in the Maintenance of Way Department is performed by an employe of that department under the jurisdiction of the Brotherhood of Maintenance of Way employes, who also have an agreement with this carrier.

In conformity with long established practice in this carrier's Maintenance of Way Department and in compliance with the organization's agreement holding the contract of employes in this department, repairs and maintenance work on tools and equipment used by Maintenance of Way employes have been performed by them. The employes contend that repairs made in the Maintenance of Way Department on January 13, 27, 28, 31; February 1, 3 and 8 to gasoline engines, pneumatic tires and other machinery, not specifically named was in violation of Rule 19 and 31 of the current agreement covering machinists of System Federation No. 130.

POSITION OF CARRIER: The carrier takes the position first, that the machinists classification of work Rule 31 of the current agreement, on file with your Board, does not cover the work here being claimed. Nowhere in this rule does it state that machinists have exclusive rights to all maintenance work in connection with equipment of other departments.

They also cite Rule 19 of the current agreement which is entitled **"Temporarily Assigned to Foreman's Position".** This rule quite obviously has no application in the present dispute since its function is to prohibit the use of helpers and/or laborers from doing work recognized as mechanics work. It does not establish exclusive rights for mechanics to do this work.

The carrier has, for many years, had work performed in its Maintenance of Way Department that would parallel work performed in our locomotive department shops but neither has been treated as invading the others field. Of course, if the employes are relying upon the wording in their classification of work rule reading, "On work generally recognized as machinists' work" that language could be all inclusive. The employes have not heretofore classified work they are here claiming as machinists' work.

Secondly, the carrier takes the position that the work here being claimed, specifically repairs to a speed swing; a track bolt tightener, a track drill and a pneumatic spike driver have always in the past been performed by the employes of the Maintenance of Way Department. In fact, the carrier can cite many purchases of equipment for the past fifteen to twenty years that have been repaired and maintained by the Maintenance of Way Department. Below are cited some from the year 1937:

Year 1937—1—Air Compressor I.R. No. 105

1—Ballast Tamper I.R.

Year 1938—1—Track Power Wrench

Year 1939—1—Centrifugal Pump

1—Rail Drill

Year 1941—1—Rail Grinder

Year 1942—2—Tie Tampers

Year 1945—

1—Power Wrench

Year 1946—1—Centrifugal Pump

Year 1947—1—Track Drill

Year 1948—1—Rail Saw Portable Gas Driven Racine Tool

Year 1949—1—Tractor

1—Track Drill Budo Power

Year 1951—1—Power Plant Gas Engine

1—Tractor Compressor

Year 1952—1—Track Drill

Year 1953—1—Power Vise

Year 1954—2—Ingersoll Rand Spike Drivers

Year 1955—1—Skil Chain Saw

It is evident from the foregoing that the carrier has always had Maintenance of Way Equipment performed by employes of that department.

Third, the carrier questions the right of the Second Division to handle this dispute, involving a question of division of work between two organizations, without proper notice to the third party involved, namely, the Brotherhood of Maintenance of Way employes. See Awards 1423 and 1524.

Fourth, your Board has held in a number of instances where similar situations arose that the carrier had not violated the agreement. In award 1808, your Board said, "We find nothing in the agreement with the ma-

chinists which gives them exclusive rights to maintenance work in connection with the vehicular equipment of other departments." * * * See also Awards 1110 and 1556. Further, from the same award 1808, "Mechanical forces have the exclusive right only to the work embraced in their scope rule **and other work exclusively performed by them under an established practice.**" (*Emphasis ours.*)

For the above and foregoing reasons the employes' claim is without merit and should be denied by your Honorable Board.

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.

Parties to said dispute were given due notice of hearing thereon.

The dispute was raised by the claim of the 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 in other departments.

The repairs in dispute were made to the following machines: a speed swing, track bolt tightener, track drill, and pneumatic spike driver. The carrier stated that such repairs had always been made by Maintenance of Way employes and cited similar equipment that had for the past 15 years or more been repaired and maintained by Maintenance of Way Department employes.

The agreement involved does not have a specific scope rule. Rules 19 and 31 do not unequivocally cover the work involved as exclusively machinist work. Therefore, past practice can be shown as to the interpretation and application of the rules cited. By virtue of the past practice, as shown by the record, other than machinists were not improperly used to make said repairs.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 9th day of April, 1959.

DISSENT OF LABOR MEMBERS TO AWARD NO. 3170.

The majority choose to ignore the fact that the work performed by other than machinists violated Machinists' Classification of Work Rule No. 31 and Rule No. 19 of the current agreement.

The current agreement recognizes and preserves the rules, rates of pay and the working conditions of the claimants and stands as a protest against the erroneousness of Award No. 3170.

R. W. Blake

C. E. Goodlin

T. E. Losey

E. W. Wiesner

James B. Zink