Award No. 4034
Docket No. 3547
2-SP-MA-'62

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Howard A. Johnson when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 114, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. — C. I. O. (Machinists)

SOUTHERN PACIFIC COMPANY (Pacific Lines)

DISPUTE: CLAIM OF EMPLOYES:

1. That under the current agreement the assignment of Maintenance of Way Employes to the work of dismantling, repairing and assembling water pumps and fuel pumps used in shop yards and outlying points is improper.

2. That accordingly the Carrier be ordered to assign the aforesaid work to machinists.

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 waived right of appearance at hearing thereon.

This claim is a resubmission of the claim heretofore submitted as Docket No. 1412 and disposed of by Award 1525, in which this Division found the Board without jurisdiction to consider the claim on its merits for want of third party notice, and therefore dismissed it without prejudice.

Award 1740 (Wenke) of this Division likewise was of dismissal without prejudice. Thereafter the Organization requested an interpretation of Award 1740, to answer this question:

"Are the words in Award 1740 reading: 'Claim dismissed without prejudice to be interpreted to mean that if the organization can prove by evidence that the claim set forth in the above award was handled in accordance with the terms of the agreement and the Railway Labor Act they are permitted to file the identical claim as contained in Award No. 1740 with the National Railroad Adjustment Board, Second Division, and have it decided on its merits."

This Division answered that question in its Interpretation No. 1 to Award No. 1740 (Wenke) as follows:

"As phrased, the answer to the question is 'No'. The dismissal of the appeal had the effect of affirming the carrier's denial of the claim made on the property. However, since the award did not determine the issue presented on its merits the words 'without prejudice' were added to preclude any contention on the part of the carrier that an adjudication had been made on the merits of the issues in case the situation complained of continued after the carrier's denial thereof was made or if a similar situation developed at any time in the future, and, in either case, a claim was made based thereon. It was not intended by the use of the words 'without prejudice' to thereby permit the identical claim, that is, a claim for the identical period of time as was denied on the property, to be again made."

In other words, the denial was affirmed by the award of dismissal of the appeal and could not again be attacked; for under Section 3 First (m) of the Railway Labor Act "the awards shall be final and binding upon both parties to the dispute, except in so far as they shall contain a money award."

If the award had been merely to suspend action or defer consideration until the third party notice had been given it also would have been binding upon the parties so far as it went, but would not have disposed of the appeal so as to affirm the decision appealed from.

Prior to that time Award No. 1523 had dismissed Docket No. 1423 without prejudice, for want of third party notice. In case No. 2370, the Organization gave thirty day notice of intention to file an identical claim, and in Award No. 1640, without considering the final effect of dismissal by Award No. 1523, this Division outlined the procedure for docketing and third party notice. It became Docket No. 1630, which was decided on the merits in denial Award No. 1835, again without reference to the effect of dismissal Award No. 1523. While Award No. 1835 was made eleven days after Interpretation No. 1 to Award No. 1740, it made no reference to the latter or to the jurisdictional issue there determined, and neither overruled it nor decided the issue to the contrary. The question was not raised in either Case No. 2370 or Docket No. 1630 nor mentioned in either Award No. 1640 or Award No. 1835.

Reference is made to this Division's Award No. 1281 in Docket No. 1098, sustaining a claim on the merits, after having rendered Award No. 1194 in the same docket, in which it held:

"Case remanded in accordance with the above findings."

But the remand to the property of a grievance which has been appealed is not a dismissal or termination. Like any other award of this Board, it is

binding upon the parties so far as it goes, but is not a final disposal of the matter. Thus in Award No. 1281 this Board said:

> "The dispute not having been disposed of by the parties after it was remanded is now before the Division for a decision or award. It is as unsettled today as it was in May, 1947."

In any event Award 1281 did not consider or rule upon the jurisdictional question confronting us here.

The precedent of this Division's Interpretation No. 1 to Award 1740 has been followed by Third Division Awards 8419 (Lynch), 8760 (Daugherty), 9025 (McMahon), 9254 and 9255 (Weston), 9376 and 9377 (Stone), 9397 (Rose), 9435 (Begley), 9451 (Grady), and 10516 (Miller). No awards or decisions to the contrary have been found.

It is necessary to conclude that under Section 3 First (m) of the Railway Labor Act, the award of dismissal, whether right or wrong, is a final disposition of the claim, and that if the same claim is refiled the Board's only authority is to dismiss it. Being jurisdictional the matter cannot be waived when it comes to the attention of the Board.

AWARD

Claim dismissed in accordance with Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 13th day of July, 1962.

DISSENT OF LABOR MEMBERS TO AWARD NO. 4034

This claim is a resubmission of the claim heretofore submitted in Docket No. 1412 which was "Dismissed Without Prejudice" in Award No. 1525 because third party notice had not been given pursuant to Section 3 First (j) of the Railway Labor Act. In Award No. 4034, the majority concludes that the dismissal in Award No. 1525 affirmed the denial of the claim by the carrier, was final and binding upon both parties and barred a subsequent resubmission of the same claim.

The award is based essentially upon Interpretation No. 1 to Second Division Award No. 1740 and certain Third Division cases in which that Interpretation was erroneously applied. Award No. 1740 did not involve the question of third party notice nor the failure of the Board to perform its statutory duty. That denial award was based upon the failure of the claimants to present their claims to the Board within the contractual time limit rule, a fact which precluded the Board from then or thereafter considering the merits of the claim for the period of time involved therein. Thus, a denial award was required. Interpretation No. 1 explains the referee's reason for adding the words "without prejudice." They were added to make it clear that the Board was not passing on the merits of the issue (the alleged contract violation) so that in case the situation complained of developed at any time in

the future, the award would not be a precedent for a similar timely filed claim. Since the involved claim was never properly before the Board and because of the time limit rule never could be, it is clear that a resubmission of the same claim was barred by Award No. 1740.

In Docket No. 1412, however, the claim was clearly within the Board's jurisdiction, was properly before it and ripe for consideration and decision on its merits. The Board, not the parties, committed error in not serving a third party notice. The only logical interpretation of the "Dismissal Without Prejudice" in Award No. 1525 is its normal meaning, namely, the right to refile the same claim, have the notice served and have the claim heard on its merits. The majority, in erroneous reliance on Interpretation No. 1, in effect, find the award to be one of dismissal with prejudice and a bar to further consideration of the merits of the claim. In so doing, they attribute no meaning to the phrase "Without Prejudice" and treat it as mere surplusage. This is an unwarranted disregard of plain language and is unsupported by any fact or issue in this case which is even remotely comparable to those involved in Award No. 1740. Award No. 1525 should not be held to be final and binding in the sense that it barred the resubmission of the claim.

Even if Award No. 1525 had been "claim denied" and been with prejudice, the Board was required to hear the claim here involved on its merits. The majority relies on the proposition that under Section 3 First (m) of the Railway Labor Act, an Award of dismissal, whether right or wrong, is a final disposition of the claim. In so doing, they ignore completely and do not discuss the principal jurisdictional issue asserted in the case, namely, whether Award No. 1525 is void because of the Board's failure to perform its statutory duty and if void whether the Board is empowered or required to correct its error and rehear the same claim on its merits.

It is now well settled, which it was not when Award No. 1525 was rendered, that awards are void and not final and binding if rendered without giving the statutory third party notice. "The Board's authority is based upon the statute. Until the statutory requirements are met, it has no more standing to produce legally effective orders than any voluntary group of citizens." **Kirby v. P. R. Co.**, 188 F. (2d) 793.

That an award rendered without notice is null and void is clearly shown in **Seaboard Air Line Railroad Company v. W. H. Castle** 36 CCH Labor Cases, ¶ 65,295, wherein the court said:

> "In failing to give notice of all hearings, in Docket C.L. 6875 and an opportunity to be heard to plaintiff's incumbent employees and their unions at the five points in question, the National Railroad Adjustment Board has violated the due process requirements of Section 3 First (j) of the Railway Labor Act in contravention of the rights of said employees under the Railway Labor Act.
>
> "Award No. 7816 and the accompanying order are void because made without giving notice of any opportunity to be heard to the incumbent employees and their union which are involved in this dispute."

If the speculative rights of third parties are so carefully guarded from the failure of the Board to perform its statutory duty, it is inconceivable

that the rights of the principal parties would not be entitled to equal protection, both as a matter of law and equity.

In the very recent decision in **Brotherhood of R.R. and S.S. Clerks vs. Orndorff, et al,** decided May 3, 1962, (not yet reported) the court in ordering the Board to give third party notice and rehear the case on its merits found as follows:

> "It is not fitting or equitable that the Clerks and the clerical employees, whose grievances were submitted in Docket C.L. 6857, should be prejudiced in obtaining an adjudication of their grievance claims on account of **a prior error of the Third Division itself** in failing to serve notice of the submission upon the appropriate persons and the parties involved in the dispute." (Emphasis supplied.)

The effect, on the involved claim, of the failure to give third party notice is clearly set forth in Brotherhood of R.R. Trainmen vs. Swan, 214 Fed. (2d) 56, in which case the court said:

> "The statutory duty of the division became clear when the courts declared void the awards because of the absence of the express-messenger. The effect of the voiding of awards was to leave the five cases pending and undisposed of. Thereupon it became and still is the duty of the Division to hear and dispose of these cases entirely disregarding the findings and awards heretofore made."

The claim filed in Docket No. 1412 which resulted in Award No. 1525 was properly filed with the Board, complied with all the statutory requirements for the filing of such claims, and was clearly within the Board's jurisdiction. The claim was dismissed through no fault of the petitioner or of the employes on whose behalf the claim was filed and solely because of the error of the Board itself. The majority would now bar consideration of that claim on its merits, despite the fact that awards issued without third party notices are void and that the effect thereof is to leave the claims pending and undisposed of. It is the duty of the Board in this case to give third party notice and to hear and dispose of the claim on its merits. To do otherwise is to deprive the claimants of their statutory rights and constitutes a refusal of the Board to perform its statutory duty.

Therefore we dissent to the majority holding in Award No. 4034.

C. E. Bagwell

T. E. Losey

E. J. McDermott

Robert E. Stenzinger

James B. Zink