Award No. 4777
Docket No. 4676
2-CRRofNJ-EW-'65

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. 72, RAILWAY EMPLOYES' DEPARTMENT, AFL-CIO (Electrical Workers)

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY

DISPUTE: CLAIM OF EMPLOYES:

1. On October 24, 1962, the Carrier improperly dismisesd Barney Operator Ralph Perfetto in violation of the provisions of the controlling agreement.

2. That accordingly, Carrier be ordered to restore Mr. Perfetto to service with all rights unimpaired and be compensated for all wage loss sustained during the period he was restrained from working.

EMPLOYES' STATEMENT OF FACTS: Mr. Ralph Perfetto, hereinafter referred to as the claimant, was employed by the Central Railroad Company of New Jersey, hereinafter referred to as the carrier, as a Barney Operator at Pier No. 18, Jersey City, New Jersey.

On October 20, 1962, the clamant received a notice to appear at Room 7, Jersey City Terminal at 8:30 A. M. (D. S. T.) on October 23, 1962, to answer charges.

This charge contained the typewritten signature of C. Malanowski, Maintenance Foreman and the signature of C. A. Roth hand written in ink.

The hearing was held on October 23, 1962.

The claimant was dismissed from service on October 24, 1962, and that action was appealed on November 19, 1962, as shown by a copy of the local chairman's appeal letter.

The appeal was declined under date of November 29, 1962.

The claim was then handled with Superintendent Wilms who declined it, and on April 19, 1963, appeal was made to Mr. J. Craddock, General Manager, who also declined to adjust it.

All data submitted have been presented to the duly authorized representatives of the employes.

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.

Parties to said dispute waived right of appearance at hearing thereon.

The Claimant was the operator of a steam driven barney, a coal dumping facility at Pier 18, Jersey City.

In its submission the Carrier questions this Division's jurisdiction of the claim under Section 3, First (h) of the Railway Labor Act, for the reason that the Claimant, although represented by the International Brotherhood of Electrical Workers, is not in fact an electrical worker nor a member of any other class of employe over whch the Act gives it jurisdiction.

The Organization notes that this is a new issue not handled on the property; but it could not have been handled there, for the question of this Division's jurisdiction could not have been raised until it was invoked here by the filing of a claim. Furthermore, questions of jurisdiction can be raised at any time, since jurisdiction cannot be conferred by consent or waiver, and no board, commission or court has power over controversies not within the jurisdiction legally conferred upon it.

The Organization further contends that a barney operator is a coal pier car dumper within the meaning of Rule 83 (e), and is therefore an electrical worker within the meaning of the Agreement and of the Railway Labor Act. It also contends that coal pier car dumpers and coal pier conveyor-car operators were included within the classification of Linemen within the railroad industry by Rule 141 of the Electrical Workers' Special Rules, established by the U. S. Railroad Labor Board in their Addendum No. 6 to Decision 222, effective December 1, 1921. (Decisions of the U. S. Railroad Labor Board, Vol. II, 1921, pages 571-596.)

But the jurisdiction of this Division under Section 3, First (h) of the Railway Labor Act includes "electrical workers," and not "all employes represented by electrical workers' organizations" nor "electrical workers as defined by the Rules of the U. S. Railroad Labor Board."

Certainly Claimant's work of operating a barney does not make him in fact an electrical worker within the meaning of the Railway Labor Act.

In Award No. 925 this Division in 1943 dismissed a claim for lack of jurisdiction, stating its reason as follows:

> "The Second Division of the National Railroad Adjustment Board has jurisdiction of disputes between an employe or group of employes and a carrier only to the extent that such jurisdiction is conferred upon the Second Division by the terms of the Railway Labor Act, as amended. Section 3 (h) of the Act provides for the jurisdiction of

the different Divisions of the Board, and confers upon the Second Division 'jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, carmen, the helpers and apprentices of all the foregoing, coach cleaners, power house employes, and railroad-shop laborers.' The dispute involved in this docket concerns moulder helpers and is not within the prescribed jurisdiction of the Second Division. The fact that these moulder helpers are represented by the sheet metal workers' organization does not confer jurisdiction upon this Division."

Again in Award No. 4419 this Division said:

"While ordinarily, disputes, concerning members of the Firemen and Oilers Brotherhood come to this Division, and in fact a representative of that Brotherhood sits as a Member of this Division, nevertheless, Section 3, First (h) (supra), determines jurisdiction not by Organization, but by class or craft. The only classification under which Claimant could possibly come would be that of a 'railroad shop laborer,' a class to which he does not belong, as is apparent from this record.

Accordingly, we can come to no other conclusion (than) that we lack jurisdiction, and without prejudice to the merits of the controversy, we must dismiss the claim."

Other awards to the same effect are this Division's Award No. 4497; First Division Awards Nos. 15704, 17093, 17150, 17598, 18640 and 20277; Third Division Awards Nos. 1697, 7822 and 13118; and Fourth Division Awards Nos. 529, 748, 830 and 1991.

Such awards have long made it clear that the jurisdictions of the respective divisions depend solely upon classes of employes specified by the Congress in Section 3, First (h) of the Railway Labor Act, and not upon the organizations representing them. Thus the Brotherhood of Railroad Trainmen regularly presents Yardmaster's claims to the Fourth Division, to which that section of the Act confers jurisdiction "over disputes involving employes of Carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employes of carriers over which jurisdiction is not given to the first, second, and third divisions."

Fourth Division Award No. 1991 involved the claim of coal and ore pier operator employed by the Baltimore and Ohio Railroad Company, for whom identical claims had been filed before the Second and Fourth Divisions by this same Organization, so as to be within time, whichever Division should conclude that it lacked jurisdiction. In oral argument there the carrier opposed the Fourth Division's jurisdiction and stated that it had not questioned the jurisdiction of the Second Division.

In that award the Fourth Division said:

"This Division of the Board alone is charged with the duty and responsibility of adjudicating jurisdictional questions raised in pending cases. It may not delegate that right to other Divisions of the Board even though an identical claim is pending before another Division.

Neither may this Division withhold a decision until another Division has ruled on the jurisdictional issue. To do this would be to defeat the most essential purpose of the Act, which is to resolve disputes expeditiously.

Section 3, First, (h) of the Railway Labor Act, as amended, and as hereinabove quoted, specifically confers jurisdiction to the Fourth Division 'over disputes involving employes directly or indirectly engaged in transportation of passengers or property by water . . .' Claimant was employed as a Coal and Ore Pier Operator at the Curtis Bay Coal Pier. He was charged with the responsibility of loading and unloading coal and ore barges which transported such property by water. Claimant was definitely an employe engaged in directly or indirectly transporting property by water. Disputes arising between such employes and their employers are properly before this Division of the Board. This Division of the Board has jurisdiction of the pending dispute.

The mere fact that Claimant had worked under the Shop Crafts' Agreement, and that Rule 128 of that Agreement defined Claimant's classification, is of no importance. No collective agreement can affect the jurisdiction of the Divisions of the Board. Such an agreement cannot contravene the specific provisions of the Act. This claim will be considered on the merits."

While the Fourth Division there based its jurisdiction upon the fact that the claimant was an employe directly or indirectly engaged in transportation of passengers or property by water, that Division could equally well have based it upon the fact that the claimant was an employe over which jurisdiction was not given to any of the other divisions.

As in Awards Nos. 925, 4419 and 4497, we can only conclude that this Division lacks jurisdiction, and without prejudice to the claim upon its merits we must dismiss the claim.

AWARD

Claim dismissed, without prejudice, for lack of jurisdiction.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 30th day of September, 1965.

DISSENT OF LABOR MEMBERS TO AWARD NO. 4777

By its decision in this case, the majority of the Division has usurped the authority, and repudiated decisions, of the National Mediation Board. It has decided that "coal-pier dumpers and coal-pier conveyor operators" are not "electrical workers" and thus are not subject to the jurisdiction of the Second

Division. It reaches this conclusion despite the findings of the National Mediation Board that these employes are electrical workers and the Agreement between the parties to this dispute which lists these employes under the Special Rules for Electrical Workers. It necessarily follows that this Division has jurisdiction over the claim involved in this case.

The decision of the majority in effect finds that these employes are not electrical workers. It thus purports to decide the scope of electrical workers, a function reserved exclusively to the National Mediation Board by the Railway Labor Act, and, furthermore, it overrules the decisions of the Mediation Board with respect to the craft or class status of these employes in the industry. The majority has exceeded its jurisdiction in so doing.

While it is true that the jurisdiction of the various Divisions of this Board is determined by the craft or class of which the employes are a part and not necessarily by the organization which represents them, (nor did the employes make such a claim) it is equally true that craft or class lines are not determined or changed by the position of a carrier. (Which was done by the Carrier in this dispute.) The majority states that Section 3 First (h) of the Railway Labor Act does not cover the claimant who was a "coal-pier operator," and, therefore, that it cannot be successfully argued that coal-pier operators come within the scope of this Division's authority. This Board knows, or should know, that numerous payroll classifications not enumerated in Section 3 First (h) of the Act exist in a number of crafts or classes, yet the Divisions of the Board having jurisdiction of the crafts or classes of which such employes are a part, clearly have, and have exercised, jurisdiction over the claims of such employes. For example, there is no payroll classification of "telegraph and telephone linemen" listed in the jurisdiction of this Division, but as was pointed out in Second Division Award 784, they are classified as electrical workers. The findings in this Award read in part as follows:

> "The contention of the carrier that the Second Division, National Railroad Adjustment Board, does not have jurisdiction over parties to this dispute is without foundation as the Second Division's jurisdiction includes electrical workers, and telegraph and telephone linemen are classified as electrical workers."

Just as here the coal-pier car dumpers and coal-pier conveyor operators, are classified as electrical workers, must be considered electrical workers and subject to the jurisdiction of this Division. It is absurd to say that this Division has no jurisdiction over any employe whose payroll classification is not specifically identified among those listed in the jurisdiction of the Second Division under Section 3 First (h) of the Act. To so hold would permit the carriers by the mere device of changing payroll classifications to defeat the entire purpose of the Act creating separate Divisions of the Adjustment Board.

Furthermore, the decision of the majority is contrary to the consistent administrative policy of this Board, without exception over a period of many years, to assume and exercise jurisdiction over employes engaged as coal-pier dumpers and coal-pier conveyor operators. The claimant was entitled to rely on the long established recognition by the Division of its jurisdiction over these electrical workers. To deny the claimant of his right to have his claim heard on the merits under these circumstances is improper and completely unfair

and inequitable. As the referee in his first proposed award found that the dismissal of the claimant constituted excessive discipline and that the claimant should be returned to service with seniority and other applicable rights unimpaired, but without pay for time lost. While the majority professed that its decision is "without prejudice to the merits of the case", it is obvious that because of the time limit rules, this claimant's rights have been effectively disposed of on the merits by the majority decision.

Both from a legal and equitable standpoint, this should have been determined on its merits.

E. J. McDermott
C. E. Bagwell
T. E. Losey
R. E. Stenzinger
J. B. Zink

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