Award No. 4953
Docket No. 4698
2-B&O-EW-'66

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

THE BALTIMORE AND OHIO RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That under the current Agreement, the Baltimore and Ohio Railroad Co. unjustly removed Coal and Ore Pier Operator J. J. Hogarty from the service of the Carrier on September 23, 1963 as a result of investigation held at Curtis Bay, Baltimore, Maryland on August 29, 1963 and continuing through September 6, 1963.

2. That accordingly, the Baltimore and Ohio Railroad Company be ordered to restore the claimant, Mr. J. J. Hogarty to service with the Carrier and compensated for all time lost from September 23, 1963 until he is so restored and that the Carrier:

1. Make claimant whole for all vacation rights

2. Pay premiums for Hospital, Surgical and Medical benefits for all time held out of service

3. Pay the premium for group life insurance for all time lost and held out of service.

4. Re-establish his seniority rights unimpaired.

EMPLOYES' STATEMENT OF FACTS: Under date of August 19, 1963 the following notice was sent to Mr. J. J. Hogarty, electrical operator at the coal and ore piers:

"You are hereby notified in accordance with the rules of wage agreement under which you are working to report at Curtis Bay Coal Pier Office at 9:00 A. M. on August 23, 1963 for hearing on the following matter: Failure to properly operate mechanism controlling No. 4 Trimmer, resulting in cable breaking and Trimmer fall-

and privileges under an application of Rule 32 or the working agreement. There was no impropriety about the investigation procedure. There was no impropriety as to the conduct of the investigation. It is not now subject to challenge.

In a word, the carrier submits that the petitioner was given a fair and impartial hearing and that the discipline rule in the agreement was properly complied with in the petitioner's case.

CARRIER'S SUMMARY:

In the instant case, in assessing discipline, the carrier was confronted with direct evidence indicating that the petitioner was guilty of gross negligence in the performance of his duties. His responsibility was apparent and patent. His negligence resulted in a serious accident. The proper measure of discipline was assessed in this case.

The carrier petitions this division to hold this request and claim in its entirety as being without merit and to deny them accordingly.

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 first issue before the Division in this case is the question of jurisdiction.

This claim was filed concurrently in both the Second and Fourth Divisions, in view of some uncertainty concerning jurisdiction under the Railway Labor Act and the necessity of filing in the proper division within the time limit. The Fourth Division accepted jurisdiction and has already decided the claim on the merits, in its Award No. 1991. However that award is not binding on this Division, which is obligated to decide for itself whether it has jurisdiction, and, in the event of an affirmative decision, then to rule on the merits, without regard to the award of another division. Then, in the event of divergent awards, it will be for the federal courts to decide where the jurisdiction lay.

However, in determining the question for itself, it is reasonable to examine not only its own awards, but those of other divisions, including Fourth Division Award No. 1991, for whatever light and reason they may shed on the issue.

It is clear that jurisdiction can lie in only one division since the Congress, in Section 3, First of the Railway Labor Act established this Board with four divisions, specified the jurisdiction of each, and provided that disputes unresolved on the property might be referred "to the appropriate division of the Adjustment Board". Only "the appropriate division" can have jurisdiction over any dispute, and in the event of any ambiguity in the Act, it is first for

the division addressed, and finally for the courts, to decide the jurisdictional question.

The Claimant is clearly not among the groups of employes over whose disputes the First and Third Division are given jurisdiction by the Act. However, Section 3, First (h) specifies the respective jurisdictions of the Second and Fourth Divisions as follows:

> "Second Division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, **electrical workers,** car men, the helpers and apprentices of all the foregoing, coach cleaners, power-house employes, and railroad-shop laborers." (Emphasis ours.)

> "Fourth Division. To have 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 division.**" (Emphasis ours.)

Thus the question is whether, within the congressional intent, the Claimant is (1) an electrical worker, or (2) an employe directly or indirectly engaged in transportation of passengers or property by water, or (3) an employe, jurisdiction over whose disputes has not been given to a division other than the Fourth. But the third category is a catchall to cover only employes of classes not specifically mentioned as within the jurisdiction of another division.

The Claimant was a coal and ore pier operator at Curtis Bay, near Baltimore, and the claim relates to his discharge for alleged improper operation of machinery by which he was loading coal into the hold of a cargo shop. It seems too clear for argument that an employe who loads or unloads a ship is "directly or indirectly engaged in transportation of passengers or property by water", whether he does so as a stevedore or as a coal and ore pier operator. He therefore comes within the jurisdiction of the Fourth Division.

If Claimant seems as clearly included within the statutory jurisdiction of this Division, it must attempt to determine the Congressional intent which obviously was not to establish conflicting jurisdictions, with the possibility of conflicting awards. The Act does not define "electrical worker" as any employe represented by the electrical workers' Organization, regardless of the nature of his work. He is clearly not engaged in electrical work and therefore is not an electrical worker within the usual meaning of the designation.

The Employes contend, however, that the Claimant was an electrical worker because the "Electrical Workers' Special Rules" in the current Agreement include Rule 128, established by the Labor Board, effective December 1, 1921, which reads as follows:

"CLASSIFICATION OF COAL PIER EMPLOYES.

> Coal pier elevator operators and coal pier electric hoist operators in connection with loading and unloading vessels."

This indicates that Claimant's classification brings him within the jurisdiction of the electrical workers' organization; but it does not say that he is actually an electrical worker. On the contrary, Rule 124, established by the same Board effective as of the same date, and appearing under the same heading of "Electrical Workers' Special Rules" specifically defines "electrical worker" as follows:

> "Any man who has served an apprenticeship or who has had four years' practical experience in electrical work and is competent to execute same to a successful conclusion within a reasonable time will be rated as an electrical worker."

First, he must have (a) served an apprenticeship or (b) have had four years' practical experience in electrical work.

Second, he must be competent to execute electrical work to a successful conclusion within a reasonable time.

Both requirements relate to actual electrical work, and make it clear that electrical workers are employes trained or with practical experience in electrical work, and able to perform it efficiently, which is in line with the normal understanding of the occupational designation.

Consequently, while these rules antedate the Railway Labor Act, this Board cannot assume that the Congress intended to define "electrical worker" as including coal and ore pier operators.

The Employes submit a portion of the Interstate Commerce Commission's "Rules Governing the Classification of Railroad Employes and Reports of their Service and Compensation", effective January 1, 1951, including a "List of occupations or positions" under the heading "Reporting division No.", in which appears the following:

"58 Electrical Workers (A)

Electrical worker
Electrical worker (autogenous welder)

"59 Electrical Workers (B)

Electric crane operator
Load dispatcher
Power station and sub-station operator
Chief load dispatcher
Chief power station operator
Assistant power director

"60 Electrical Workers (C)

Coal and ore elevator operator (electric)
Coal and ore hoist operator (electric)
Coal and ore pier car dumper (electric)
Coal and ore pier conveyor car operator (electric)
Grain elevator equipment operator (electric)"

This indicates that for the purpose of reporting data concerning service and compensation, coal and ore pier operators are grouped with electrical workers, presumably because they are represented by the same organization; but it does not define them as electrical workers, contrary to the normal understanding that electrical workers are employes who perform electrical work.

This Division's duty to resolve ambiguities in the Railway Labor Act does not involve a duty to establish an ambiguity by a strained construction of the Congressional enactment.

The question is suggested concerning this Division's duty if it should consider the Claimant as an "electrical worker" who is "directly or indirectly engaged in transportation of passengers or property by water", and thus within both jurisdictions. Obviously there cannot be dual jurisdiction if disputes are to be settled expeditiously and with the least possible resort to the courts, as intended by the Act.

Reference to Section 3, First (h) discloses that the jurisdiction of the first three divisions relates to classes of employes, while that of the Fourth Division relates to the specific work in which employes of any class are directly or indirectly engaged, namely the "transportation of passengers or property by water".

While most of the classes of employes named with reference to the first three Divisions would obviously not be concerned with the transportation of passengers or property by water, some of them can be. An actual electrical worker directly or indirectly engaged in the transportation of passengers or property by water would be an employe so engaged, and therefore apparently within the Fourth Division's jurisdictional specifications. He would be an electrical worker so engaged, which would seem to be a special situation controlling the general, thus giving jurisdiction to the Fourth Division rather than the Second. In view of our conclusion that Claimant was not an electrical worker, that point need not here be considered; but it must be resolved by the courts if they find coal and ore dock operators within the jurisdictional descriptions for both the Second and Fourth Division.

In view of this Division's lack of jurisdiction the claim must be dismissed without prejudice.

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, 1966.

Keenan Printing Co., Chicago, Ill. Printed in U.S.A.