Award Number 42
Docket Number TD–38

NATIONAL RAILROAD ADJUSTMENT BOARD

Third Division

Honorable Paul Samuell, Referee

PARTIES TO DISPUTE:

AMERICAN TRAIN DISPATCHERS ASSOCIATION
THE CHESAPEAKE AND OHIO RAILWAY COMPANY

DISPUTE.—"Should the requests made by Chairman C. E. Duke upon the management of this carrier, under dates of September 22, 1933, August 14, 1934, and September 10, 1934, to restore certain train dispatcher positions in the Peru, Indiana, office have been and be now complied with?"

FINDINGS.—The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier and the employees involved in this dispute are respectively carrier and employees within the meaning of the Railway Labor Act as approved June 21, 1934.

An agreement exists between the parties bearing effective date of February 16, 1927.

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

The opinion of Honorable Paul Samuell, Referee, is attached hereto and made a part of this award. (See Appendix A.)

AWARD

Case dismissed for want of jurisdiction.

By Order of Third Division:

NATIONAL RAILROAD ADJUSTMENT BOARD.

Attest:

H. A. JOHNSON,
Secretary.

Dated at Chicago, Illinois, this 29th day of May 1935.

APPENDIX A

OPINION RE TD–38

Paul Samuell, Referee. May 27, A. D. 1935.

QUESTION INVOLVED

The statement of J. G. Luhrsen, President of the American Train Dispatchers Association, in a letter to H. A. Johnson, Secretary Third Division of the National Railroad Adjustment Board, dated December 22, 1934, succinctly states the controversy involved:

> "The question involved is a dispute which has arisen out of a grievance over the refusal of the representatives of this carrier to restore two train dispatcher positions in the Peru, Indiana, dispatching office which were discontinued, effective September 1, 1932, which action did then and does now require the remaining train dispatcher on each of the two shifts to assume and discharge the duties and responsibilities which heretofore had been, and now should be, shared by two train dispatchers on each of the shifts involved."

POSITION OF THE CARRIER

It is contended by the carrier representatives that the National Railroad Adjustment Board has no jurisdiction of the dispute for the reason that the dispute is not such a "grievance" as to fall within Section 3 (i) of the Railway Labor Act as amended June 21, 1934, in that said alleged grievance is not a violation, misinterpretation, or misapplication of the agreement between the

carrier and the employee involved; that under said Section the Adjustment Board has jurisdiction only of disputes arising out of violation, misinterpretation, or misapplication of agreements between the carrier and employee concerning the rates of pay, rules, or working conditions; that the disputed question or grievance before the Board does not grow out of the interpretation or application of the agreement concerning the rates of pay, rules, or working conditions, and, therefore, the Adjustment Board is without jurisdiction; that the question should be submitted to the Mediation Board as provided by Section 5 (a) of said Act.

POSITION OF EMPLOYEE

It is contended by the representatives of the employee that the question involved is such a grievance as falls within Section 3 (i), and that this Adjustment Board should, therefore, entertain jurisdiction and decide the disputed matter on the question of fact as made by the record.

FEDERAL STATUTES INVOLVED

Two Sections of the Railway Labor Act of June 21, 1934, appear to be involved. Ssection 3 (i), which defines the jurisdiction of the Adjustment Board, provides as follows:

"(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the rules or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes."

Section 5 (a) (b) defines the jurisdiction of the Mediation Board as follows:

"(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

"(b) Any other dispute not referable to the National Adjustment Board and not adjusted in conference between the parties or where conferences are refused."

A careful reading of these Sections by one unfamiliar with the Railway Labor Act with its history and ramifications leaves one's mind in a quandary as to whether the jurisdiction of the two Boards is separate, distinct, concurrent, or overlapping. In the very able Briefs and exhaustive Arguments submitted in this case it is not contended by either side that the jurisdictions are concurrent or overlapping, and, therefore, we are constrained to give consideration to the theory that the Boards have separate and distinct jurisdictions, and the question must be decided as to which Board has jurisdiction of the question involved. Much reference has been made by both parties to testimony introduced at the hearings before the Committee on Interstate Commerce in the United States Senate and the House of Representatives as well as two annual reports of Walker D. Hines, Director General of Railroads, to the President of the United States in the years of 1919 and 1920. This has required much time and effort on the part of the Neutral Referee. It appears that the two chief proponents of the Bill before the Interstate Commerce Committee were the Honorable Joseph B. Eastman, Federal Coordinator of Transportation under the Emergency Transportation Act, and Honorable George M. Harrison, President of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees who spoke at length in support of the Bill.

It is indeed interesting as well as enlightening to follow the history of social legislation as it concerns Railroad employment beginning with the Erdman Act in 1898, later superseded by the Newlands Act in 1913, which was followed by the Federal Control of Railways beginning in December of 1917, which created an Adjustment Board in the Division of Labor in 1918, and the return of Railroads to private control, the adoption of the Esch-Cummings Act in 1920, creating the Railroad Labor Act of 1926, which was amended on June 21, 1934.

Gradually but persistently has Congress advanced toward the goal of uninterrupted commerce, and the right of collective bargaining, and the prompt and orderly settlement of disputes between the carrier and employee concerning rates of pay, rules, working conditions, grievances or disputes growing out of the

interpretation or application of agreements covering rates of pay, rules, or working conditions betwee nthe carrier and employee (Section 2).

While it is not within the province of this opinion to comment upon the policy, the merits or demerits of the enactments of Congress, yet I cannot refrain from observing the apparent lack of interest displayed by members of the Committee in both the House and Senate in the consideration of the Bill. Apparently it was assumed that the bill would be reported favorably and pass, with the result that the criticisms were few, and many refinements were omitted. The authors of the Bill would doubtless have been aided greatly had the Bill been criticised severely during Committee hearing. Be that as it may, Bill H. R. 7650 became the law of the Federal Government, and we must deal with it in its present forms and as written upon the Statute books.

To my mind there is ambiguity in Sections 3 (i) and 5 (a) and (b). If the word "grievances" in Section 3 (i) is to be interpreted in its widest scope, then the words which follow, "or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions" are superfluous. A "grievance" in its widest interpretation embraces a ground of complaint, a cause of annoyance which may be just or imaginary. Any person may claim to be aggrieved even though without foundation. An example—assume that the dispatchers in the Mississippi Valley would claim the weather in July and August to be unbearable, and demand double pay for last year and a shorter future schedule. Obviously it is a grievance, as well as a dispute, which involves the change in working conditions. Section 5 (a) requires that such dispute shall be referred to the Mediation Board, yet because one of the disputants has arbitrarily called the dispute a "grievance", should the matter be referred to the Adjustment Board? I am of the firm conviction that it should not. Several reasons impel such a conclusion. In the first place, Section 5 (a) definitely provides that the services of the Mediation Board shall be invoked in a dispute concerning changes in working conditions when not adjusted by the parties in conference. Secondly, paragraph (b) of the same Section provides that the Mediation Board's services shall be invoked in any other dispute which is not referable to the Adjustment Board.

Every dispute must be considered as a grievance by one side or the other when the word "grievance" is interpreted in its widest sense. Therefore, I am led to the conclusion that there are disputes or grievances which Congress intended should not be "referred" to the Adjustment Board because of the language used in Section 5 (b). There must be some limitation placed upon the word "grievance" by Congress. It may be asked what is that limitation, and to me it seems that the language in Section 3 (i) admits of only one construction, and that is that grievances which flow from agreements concerning * * * working conditions shall be referred to the Adjustment Board. It must be admitted that the language used in the Act is not identical with this interpretation, yet Congress has seen fit to provide that there are disputes or grievances over which the Adjustment Board shall not take jurisdiction, and somewhere in the indefinite language used in Section 3 (i) a line of demarcation must be drawn. After much study of the above Sections, and realizing the awkwardness of the language, I read with much interest the comment made by the sponsors of the Bill before the Committee. I quote the language of the Honorable Joseph B. Eastman before the House of Representatives, at page 47:

> "It provides for the creation of a national adjustment board to which unadjusted 'disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions' may be referred. *Please note that disputes concerning changes in rates of pay, rules, or working conditions may not be so referred, but are to be handled, when unadjusted, through the process of mediation.* The national adjustment board is to handle only the minor cases growing out of grievances or out of the interpretation or application of agreements. Provision is also made so that deadlocks will be impossible. When the regular members, who will be equally divided between the two sides, disagree, they must call in a neutral member appointed by the mediation board to decide the case."

and again at page 48 he stated:

> "I also have the feeling that the national board will have a very distinct advantage, because it can establish certain precedents of general application which should furnish a guide for deciding cases locally."

and again the colloquy:

"Mr. Cooper. That is what I mean.

"*Now, it does not mean that all disputes that might arise between a carrier and the employees is going to go to this National Board of Adjustment, does it?*

"Commissioner Eastman. *No, sir.*"

at page 58:

"Commissioner Eastman. Yes; *and it is my understanding that the employees in the case of these minor grievances—and that is all that can be dealt with by the adjustment board* * * *.

at page 64:

"Commissioner Eastman. *Mr. Cooper, do not make any mistake about this:* You have referred to wages. *The whole matter of working rules and conditions is not within the jurisdiction of this adjustment board. They have no right to determine what the working rules shall be. It is only the interpretation of whatever rules are agreed upon. It is a question of interpreting them.* It is minor matters of that kind, and not the questions either of wages or of working rules. *The basic matters are left for the processes of mediation.*"

I also quote several observations made by Mr. George Harrison, who likewise supported the Bill as adopted. The following testimony is taken from the Hearing of the Committee of the House of Representatives on H. R.-7650, at page 80, and in the discussion of the various features he says:

"*The next general question covered by the Act is that of establishing machinery to settle controversies that grow up between management and employees over the meaning or the allocation of the contracts that have previously been made.* Now, as a brief explanation of the character of those disputes, they might very well concern a man's seniority, whether or no his date is the proper date; might very well concern whether or no he has been paid the proper amount of compensation for a particular class of work performed, as the contract provides shall be paid. It may very well concern the separation of an employee from the service, whether or no he has been unjustly dismissed. It very well may concern the promotion of a man, whether he should have been accorded promotion, in accordance with his ability and his seniority in keeping with the rules of the contract; whether or no he was laid off in his seniority order; if he had not been taken back in his seniority order."

At page 81, Mr. Harrison further states:

"So, out of all of that experience and recognizing the character of the services given to the people of this country by our industry and how essential it is to the welfare of the country, these organizations have come to the conclusion that in respect to these *minor-grievance cases that grow out of the interpretation and/or application of the contracts already made* that they can very well permit those disputes to be decided, if they desire to progress them, to be decided, by an adjustment board. Should this act supply that machinery, it provides for a national board consisting of 18 labor representatives and 18 management representatives, a total of 36. Those representatives are to be compensated by the parties that they are to represent."

And again, before the Senate Committee, we find Mr. Eastman commenting upon the Adjustment Board as follows (page 158):

"The Board would not handle major issues relative to wages, rules, and working conditions. All that it would handle would be minor issues relating to the interpretation of such rules as exist and to grievances of employees under the established rules."

If I correctly read and interpret the testimony of the sponsors (and perhaps authors) of the present Railway Labor Act, it was their opinion that the language supports the theory that the Adjustment Board has no jurisdiction of working rules and conditions, nor shall it determine what the working rules shall be, but that it shall have only the right of interpretation of whatever rules are agreed upon, and that *basic matters are left for the processes of mediation.* It is indeed unfortunate that the law as written does not express the meaning and intentions as clearly as the oral statements of these eminent gentlemen, and while their statements are by no means conclusive, they are, nevertheless, persuasive in view of the ambiguity contained in the Railway Labor Act.

Mr. Luhrsen's statement as quoted on the first page of this opinion, together with Chairman Duke's statement in this record: "We are well aware of the fact that there is no violation of an agreement in your disinclination to restore any of these positions", and a study of the Schedule of Wages and General Regulations for Train Dispatchers as exists between the Train Dispatchers and the Chesapeake & Ohio Railway Company convinces me that no interpretation of rules or agreement concerning working conditions is involved in this dispute or grievance, although I do find that the Schedule or agreement contains many provisions as to working conditions, nothing sufficiently related, however, to the question involved in this case to permit an interpretation of rules.

It is my opinion that the interpretation of the contracts or rules between the employer and employee heretofore or hereafter entered into is the jurisdictional foundation of the Adjustment Board. These questions are minor as compared with the making of working rules, establishing working conditions, or agreeing upon wages, all of which are basic matters and left to the processes of the Mediation Board.

The question of restoring two train-dispatcher positions on a given Division, in the absence of an agreement or rule relating to an agreement or rule relating to the matter, is a question over which the Adjustment Board has no jurisdiction. While it is true that the dispute or grievance concerns only two positions, and which may be considered minor, yet the principle involved establishes a precedent which is basic and far-reaching. To recognize this dispute from a jurisdictional standpoint would, in my humble judgment, open the door to future disputes which, under the cloak of a grievance, are in truth and fact working-condition problems which are not governed by rules or contracts, and thus permit the Adjustment Board to supersede the functions and duties of the Mediation Board.

I, therefore, hold that this Board is without jurisdiction to consider the question and dispute raised in Case No. TD–38.

(Signed) PAUL SAMUELL,
Referee.