Award Number 65
Docket Number CL-63

NATIONAL RAILROAD ADJUSTMENT BOARD

Third Division

Paul Samuell, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES

GREAT NORTHERN RAILWAY COMPANY

DISPUTE.—" Claim of Mr. H. G. Best for position of Stenographer in Western Traffic Manager's Office, effective September 1, 1931, and compensation for monetary loss sustained as a result of being denied position."

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

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

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

Said cause having deadlocked, Paul Samuell was called in as Referee to sit with this Division.

An agreement bearing date of October 1, 1925, is in effect between the parties.

Effective August 31st, 1931, position of Clerk in Agricultural Development Agent's office, which is subdivision of Western Traffic Manager's Office, was abolished and employee filling the position, Mr. H. G. Best, seniority date November 19th, 1912, requested permission to displace Mrs. Ida Anderson, a junior employee, seniority date July 16th, 1931, occupying position of Stenographer in Western Traffic Manager's office. Mr. Best's request for this position was denied.

Claim is based on Rule 19 (a), reading:

> When forces are reduced or positions abolished, regularly assigned employes displaced, shall, within ten calendar days, designate in writing what junior employe they desire to displace, or at their option, file written request to be placed on an extra list. Employes failing to comply with this rule will be considered out of service.

It is contended by the carrier that assignments to positions shall be based on seniority, fitness, and ability, and that fitness and ability being sufficient, seniority shall prevail as provided by Rule 4; that the word "sufficient" being intended to more clearly establish the right of the senior employee to bid for the position where two or more employees have adequate fitness and ability. Evidence shows that Mr. Best was denied the position on which he sought to exercise his seniority rights upon the grounds that (quoting his supervising officer on September 8, 1931), "there was no other position available in the office in which he was employed."

The matter was then in dispute for about four months, the carrier contending that Mr. Best held no seniority rights in the office in which the position he was seeking was located. Afterward, on January 4, 1932, the supervising officer advised a representative of Mr. Best as follows: "It is our opinion, based on past experience, that Mr. Best is not competent to fill satisfactorily the position that he is seeking, and we are, therefore, unwilling to consider his application."

There is no question but that Mr. Best had seniority rights over Ida Anderson.

It is contended by Mr. Best that the carrier had no right to deny the application for the position on the grounds stated in the carrier's letter of September 8, 1931, and then four months later abandon that reason and raise the question of fitness and ability as shown in the carrier's letter of January 4, 1932; that even

though carrier might have such right to change reasons for denying the application, that Mr. Best was capable of handling the position which he sought.

The Schedule is silent as to the time the carrier may raise the question of fitness and ability. In any event, the Division is of the opinion that the carrier management did not act promptly in asserting the question of Mr. Best's fitness and ability. On the other hand, there is an open question as to whether Mr. Best has sufficient fitness and ability to fill the position sought by him. If Mr. Best had sufficient ability and fitness, the position should have been assigned to him within ten days after he had been displaced by reason of abolishing his former position as provided by the Schedule.

The Division is of the further opinion that Mr. Best should be given an opportunity to demonstrate his fitness and ability.

AWARD

It is, therefore, the award that Mr. Best shall be placed in the position as Stenographer in the Western Traffic Manager's office on September 1, 1935; that he shall be permitted to demonstrate his ability to hold and handle said position; that he shall be called upon to perform the usual and customary duties of that position; that the carrier management, between October 1 and December 31, 1935, shall report to this Division in writing, showing in what respect, if any, Mr. Best does not possess sufficient fitness and ability to handle the position, and shall at the same time furnish Mr. Best with a copy of such report.

In case of the failure of carrier to make such report before December 31, 1935, the position will then be awarded to Mr. Best permanently.

This Division shall be the final arbiter as to whether the carrier had exercised good faith in this dispute, as well as to the fitness and ability of Mr. Best to hold the position thus assigned.

This Division further reserves the right to make such investigation as it sees fit for the purpose of determining the question of fitness and ability of Mr. Best.

This Division further reserves jurisdiction of this case for the purpose of finally determining Mr. Best's fitness and ability, and also determining whether Mr. Best is entitled to compensation for monetary loss sustained as claimed by him.

By Order of Third Division:

NATIONAL RAILROAD ADJUSTMENT BOARD.

Attest:

H. A. JOHNSON,
Secretary.

Dated at Chicago, Illinois, this 15th day of July 1935.

APPENDIX A

OPINION RE TD-55, TD-56, TD-57, CL-63

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

QUESTION INVOLVED

Has this Adjustment Board jurisdiction of disputes between employer and employee under the following general statement of facts?:

While the Railway Labor Act of 1926 was in effect, four disputes involving seniority, violation or other interpretation of rules or contracts arose between the employer and employee. These disputes were duly commenced in accordance with the practice and the law then in effect, that is to say, they were submitted in writing to or taken up in conference with the proper officers of the Division, and failing of agreement, were carried to the System Board of Adjustment, and after failing there, transferred to the Board of Mediation where conciliation was attempted, but again failed. Whereupon arbitration was offered by the Board of Mediation, but carrier declined to arbitrate. The Board of Mediation then advised parties that all practical remedies provided in the 1926 Railway Labor Act had been exhausted in an effort to adjust the "differences in mediation" without effecting a settlement, and, therefore, the mediation service of said Board had been terminated under the provisions of the Railway Labor Act.

All these proceedings took place prior to the approval of the amended Railway Labor Act on June 21, 1934. The employees, through their representatives,

claim that from time to time they insisted before carrier officials that these disputes be adjusted. However, nothing official or of record seems to have transpired after the Board of Mediation had written the letter to the parties as above indicated.

POSITION OF THE CARRIER

The carrier maintains that under such circumstances a dispute which arose under the Act of 1926, constituted a case under that law, was tried to a conclusion under the provisions of that law, exhausted all remedies and machinery provided by that law, and was ended under that law, and is not now within the jurisdiction of the National Board of Adjustment, or of any division thereof, under the new Railway Labor Act of 1934.

POSITION OF THE EMPLOYEE

The employees maintain that this Adjustment Board has jurisdiction by virtue of Section 3 (i) of the Railway Labor Act of 1934, and that this Board should take jurisdiction and dispose of the controversy in accordance with the facts contained in the record.

In support of its position the carrier contends that all legal remedies, as provided by the Act of 1926, have been exhausted; that the cases are at an end; that while the cases are "unadjusted", they are no longer pending.

Having reviewed the history of the Railway Labor Legislation in Case TD-38, it will be unnecessary to repeat. Suffice to say, the law has for its purpose, among other things, the avoidance of interrupted commerce and the prompt and orderly settlement of all disputes covering rates of pay, rules, and working conditions. While it is conceded that the purpose is laudable, the disputants are unable to agree as to the extent or limitation of the purposes expressed in the present Act.

Section 3 (i) of the present 1934 Act provides in part as follows:

> "The disputes between an employee * * * and a carrier * * * growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, *including cases pending and unadjusted on the date of the approval of this Act*, shall be handled in the usual manner", etc.

The carrier contends that the words "including cases pending and unadjusted" are clear and unambiguous. Standing alone, this might be true, but such words must be construed in keeping with the general purposes of the Act. Such technical construction should not be indulged as to do violence to the express general purpose of the Act. In the citation of the carrier in Docket TD-38, being the case of *Peck* v. *Genness*, 7 Howard 612-623, appears language which follows:

> "But it is among the elementary principles with regard to the construction of statutes that every section, provision, and clause of a statute shall be expounded by a reference to every other; and if possible, every clause and provision shall avail, and have the effect contemplated by the Legislature. One portion of the Statute should not be construed to annul or destroy what has been clearly granted by another. The most general and absolute terms of one section may be qualified and limited by conditions and exceptions contained in another, so that they all may stand together."

The reasoning contained in the opinion rendered in TD-38, with reference to the word "grievance", applies here as it does there.

The words "including cases pending and unadjusted" should be construed in connection with the intention of the Act. They have significant relationship to the words which follow: "on the date of the approval of this Act." These last quoted words undoubtedly refer to cases or disputes which arose under the Act of 1926. Therefore, it becomes timely to analyze briefly the Railway Labor Act of 1926. Some of the expressed purposes were "to settle all disputes" (Sec. 2—first); that all disputes "shall be considered, and, if possible, decided with all expedition in conference between representatives designated and authorized so to confer, respectively, by carriers and the employees thereof interested in the dispute" (Sec. 2—second); "that * * * it shall be the duty of the designated representative of such carrier and employees, within ten days after the receipt of a notice of a desire * * * to confer in respect to

such dispute" at a certain time and place (See Sec. 2, Par. 4); that Boards of Adjustment shall be created by agreement between the carrier and the employee and which agreement shall provide that disputes between any employee * * * and a carrier * * * growing out of grievances or out of the interpretation * * * of agreements * * * 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, that the disputes shall be referred to the designated Adjustment Board by the parties or by either party, with a full state of facts, etc.; that a decision of such Adjustment Board shall be final; (Sec. 3); that the functions of the Board of Mediation shall be invoked in case the Adjustment Board cannot agree, and in case of the inability of the Board of Mediation to bring about conciliation through mediation, then the Board shall attempt to induce the disputing parties to agree to arbitrate (See Sec. 5, a, b, and c); but the agreement to arbitrate is optional for either party and the failure or refusal to submit to arbitration shall constitute no violation of any legal obligation. Thus we find a most peculiar situation in the event that arbitration is rejected by either party. No decision being reached along any of the stages of adjustment, the dispute thus stood in "mid air", so to speak, and undecided. It was not only unadjusted, it was likewise stalled. It is true that the Act did not direct the dispute to travel elsewhere. It is equally true that under those circumstances no decision could be reached, although each disputant was entitled to a decision.

The Briefs in these cases indicate that there are a large number of cases stalled, undecided, or "pending", according to the employees' interpretation of that word. When the amendment of June 21, 1934, was written it was logical that Congress should attempt to correct this anomaly by creating legal machinery whereby this large number of accumulated and undecided cases might be promptly disposed of.

In the 1934 Act we find in Section 3 (i) that disputes between employer and employee growing out of agreements as to working conditions, rates of pay, etc., *including cases pending and unadjusted on the date of approval of the Act*, shall be handled according to the machinery therein set forth. It is self-evident, therefore, that the part of the Act above quoted contemplated that some disputes which had reached the dignity of a "case" should be disposed of by the Adjustment Board. The italicized words could not refer to a "case" before the Board of Mediation, for the reason that under Section 4 it is provided "all cases referred to the Board of Mediation and unsettled on the date of the approval of this Act shall be handled to a conclusion by the Mediation Board." The Mediation Board shall take over all cases referred to the Board of Mediation which remain unsettled, while the Adjustment Board shall take over and settle these cases pending and unadjusted on the date of the approval of the Act.

The important question, then, to be decided is, what do the words "cases" and "pending" mean? In my opinion, "cases" are those disputes which have ripened into cases by passing through the various legal steps in an attempt to reach an adjustment as provided by law under the 1926 Act. The carrier interprets the word "pending" to mean "hanging on" or "to be suspended." There are other interpretations of this word. I find from my College Standard Dictionary that it also has the meaning of "to be awaited, adjusted, or settled", or "undetermined"; "incomplete", "remaining unfinished or undecided." The cases at bar were originally disputes which were first presented in conference to the properly authorized and designated officials of the Railroad System, and, failing there to obtain an adjustment, they were then referred to the System Adjustment Board, which deadlocked, and from there to the Board of Mediation, and there unable to obtain a decision. It is true that the cases at bar had passed through all the processes provided by the 1926 Act, but it is equally true that these cases remain unadjusted and undecided; and if the words "undecided" and "pending" are synonymous, then these cases remain "pending and unadjusted." It is self-evident that the Bill does not shine with clarity of language. We must again resort to what we conceive to be the meaning and intention of the Legislature. One of the principal purposes of law is to promptly and expeditiously settle disputes and cases. A dispute and/or case is not adjusted by permitting it to remain unadjusted. To hold that the disputes in the cases at bar have been settled by permitting them to remain undecided or pending is incongruous, inconsistent, and irrational.

It is to be noted that in the Committee hearings on the Bill the carrier presented an amendment as follows: "Provided that no Board created under the

provisions of this Section shall consider a grievance of any character the cause of which arose more than two years prior to the effective date of this Act." By striking the proposed amendment, Congress apparently intended that there should be no statute of limitations as respects those disputes which have ripened into cases and which cases remain pending and unadjusted.

To hold that the cases at bar should not be considered by this Board on the theory that they have had their day in Court, although they remain undecided and unadjusted, renders vacuous the words "pending and unadjusted", or at least places upon them an unreasonable or irrational construction. In my opinion, the carrier's contention that this Board is without jurisdiction is untenable, and I therefore hold that these cases should be taken by this Adjustment Board and decided upon their respective records.

(Signed) PAUL SAMUELL, *Referee.*