Award Number 119
Docket Number CL–135

NATIONAL RAILROAD ADJUSTMENT BOARD

Third Division

Paul Samuell, Referee

PARTIES TO DISPUTE:

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

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY (FRANK O. LOWDEN, JAMES E. GORMAN, JOSEPH B. FLEMING, TRUSTEES)

DISPUTE.—"Shall Miss Geraldine Burns and Miss Kathryn McAley be permitted to exercise their seniority on positions of Claim Checkers, rate $81.00 per month, office of Auditor Freight Traffic, Chicago, Illinois, and shall they be compensated for monetary loss sustained account not being permitted to so exercise their seniority on July 3, 1933?"

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

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

An Agreement exists between the parties bearing effective date of January 1, 1931.

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

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

AWARD

Case or dispute dismissed for want of jurisdiction.

By Order of Third Division.

NATIONAL RAILROAD ADJUSTMENT BOARD.

Attest:

H. A. JOHNSON.
Secretary.

Dated at Chicago, Illinois, this 5th day of November 1935.

APPENDIX A

OPINION RE: CL–135

Paul Samuell, Referee. November 5, A. D. 1935.

QUESTION INVOLVED

Jurisdictional Question:

By agreement of the Members of this Division this dispute is submitted to the Referee on the question of jurisdiction originally raised by the Carrier.

The case grows out of a disagreement as to application of a seniority rule in an agreement between the Carrier and the Brotherhood of Railway and Steamship Clerks.

Prior to June 21, 1934, this dispute had been presented to the Local Board of Adjustment, and upon being deadlocked was referred and carried to the Board of Mediation. That Board had not yet completed its efforts to settle the dispute through mediation when the 1934 Railway Labor Act was enacted. The Board of Mediation was abolished on June 21, 1934, and was replaced by the new Mediation Board. On June 21, 1934 the new Mediation Board requested Petitioner to withdraw this case and submit to the National Railroad Adjustment Board when that body should be formed. The Petitioner acquiesced, and, on August 20, 1934, the Secretary of the new Mediation Board advised Carrier

that employees' representatives had requested withdrawal of this case from the jurisdiction of that Board and that the request had been granted. Because of the action of the Petitioner, the Carrier now contends the Petitioner is without right to pursue this case before this Board, basing its argument on the first paragraph of Section 4 of the Amended Railway Labor Act of 1934, which provides as follows:

> "All cases referred to the Board of Mediation and unsettled on the date of the approval of this Act shall be handled to conclusion by the Mediation Board."

and that since this case was in the hands of the new Mediation Board on the date of the approval of the Act, the subsequent withdrawal of the case from that Board now precludes the Petitioner in further pursuing its remedy.

The Petitioner contends that this Board has jurisdiction for the following reasons, very briefly stated:

(1) That this Board, in rendering its Awards in TD–55, TD–56, TD–57, and CL–63, and which Awards attempted to set forth the distinction as to jurisdiction between this Board and the Mediation Board, used the following language: "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 those cases pending and unadjusted on the date of the approval of the Act", and that the use of the word "shall" was not intended in a "compulsory" sense but merely as "directory."

(2) That it was not the intention of Congress to require that *all* cases pending before the old Board of Mediation on June 21, 1934, regardless of their nature, be handled by the new Mediation Board and by it only, for the reason that in case either disputant refused to acquiesce in the recommendation of the Mediation Board, the case would not come to a final conclusion. Moreover, that the old Board of Mediation could only function as a Mediator between employer and employees as to broad general policies, and was not authorized to decide individual cases such as the one involved herein; that under the 1934 Act the new Mediation Board was to have jurisdiction over the *making* of agreements while the *interpretation* and *application* of them was delegated to this Board.

(3) That Section 4, paragraph first of the 1934 Act was intended by Congress to be for administrative purposes, to prevent a lapse in the handling of cases between the old and new Mediation Board, and of necessity, the jurisdiction of this Board and the new Mediation Board could very properly be concurrent insofar as it pertained to interpretation or application of agreements, and, therefore, no rights were prejudiced by withdrawing a pending case before the Mediation Board and submitting the same to the National Railroad Adjustment Board.

I have given earnest consideration to the position of the Petitioner in this case, realizing that to reject its argument would result in a denial of the right of the employes to be heard at this time as to their alleged rights under a contract, but the law and the circumstances which flow therefrom admit to no other conclusions.

I held in the cases above referred to, that the "Mediation Board should take over all cases referred to the Board of Mediation which remain unsettled, while the Adjustment Board shall take over and settle those cases which are pending and unadjusted on the date of the approval of the Act." The word "shall" was used advisedly and in the compulsory sense. To hold that this Board and the Mediation Board have concurrent jurisdiction in this case would open the door to perplexities and confusion which could not be unravelled. With all due deference to the recommendations or suggestions of the Mediation Board, I am of the firm conviction that the recommendation of withdrawal of the case from its jurisdiction was inadvisable. In order to enforce its rights the Petitioner should have insisted that the Mediation Board proceed, and in the event of advice from that Board that all practical remedies had been exhausted in an effort to adjust the difference without effecting a settlement, then, in my opinion, this Board could have assumed jurisdiction, supporting its authority on the hypothesis that the acse was still pending and unadjusted. It follows, therefore, that this case or dispute should be dismissed for want of jurisdiction.

(Signed) PAUL SAMUELL,
Referee.

Dated at Chicago, Illinois, this 5th day of November 1935.