**Award Number 323**
**Docket Number CL-311**

# NATIONAL RAILROAD ADJUSTMENT BOARD
## Third Division

Robert G. Corwin, Referee

PARTIES TO DISPUTE:

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

CHICAGO GREAT WESTERN RAILROAD COMPANY

DISPUTE.—

"Claim of the employes that the Carrier violated its agreement with its employes by removing the clerical and station employes employed at its Kansas City, Missouri, freighthouse from their positions on July 31, 1933, and by turning over and transferring the work of such positions to employes of the Kansas City Southern Railway. Claim is made for reinstatement of all employes affected to their former positions and for all wage loss sustained by employes affected by such transfer of work."

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 employes within the meaning of the Railway Labor Act, as approved June 21, 1934.

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

As a result of a deadlock, Robert G. Corwin was appointed as Referee to sit with the Division as a member thereof.

This case comes before the Division on a joint submission of the parties. The carrier raises the preliminary question of the Board's jurisdiction. The same dispute was involved in a case pending before the Mediation Board at the time the Amended Railway Labor Act went into effect. That Act provides that cases pending before the former Board of Mediation shall be handled to a conclusion by the present Mediation Board. This division has held in awards 53 and 54 that if the Mediation Board has handled a case to a conclusion but it still remains unadjusted, the appropriate division of the National Railroad Adjustment Board shall have jurisdiction. Subsequent to the effective date of the Act the Mediation Board dismissed this case for want of jurisdiction. Whether such dismissal constitutes a conclusion under a proper construction of the law might be open to question, but in the carrier's position in this case it is conceded that the Mediation Board did handle the case to a conclusion.

Where jurisdiction depends upon a certain fact and that fact has been admitted by the party challenging jurisdiction, it is bound by its admission even though incorrect, the principles of estoppel apply, and jurisdiction may be assumed.

The carrier here also joined the claimants in submitting the dispute to this division. By doing so we think its action must be construed as a further admission that the grievance was pending and unadjusted and that this is the appropriate division to determine it. It could have refused to join and it should have done so if it wished to raise the question. What we have said in Docket 261, Award 322, in general as to jurisdiction is referred to. Under all the circumstances we feel that this case also may be heard on its merits.

On the merits of the controversy the facts are as follows:

As of August 1, 1933, the Chicago & Great Western Railroad Company entered into a contract with the Kansas City Southern Railway Company. This contract recites the facts that the Southern owned and operated a freight depot and maintained a freight agent and station force about a block away from a depot previously operated by the Great Western which the latter wished to discontinue; that the Great Western wished to have the use of certain facilities of the Southern and employ the latter to render and perform certain services for it, including

the receipt and delivery of less than carload shipments through the freight house of the Southern.

The contract then proceeds to provide that the Great Western shall have the use of the freight house and the tracks leading thereto and therefrom and that the Southern through its freight house employees exclusively will handle all the less than carload freight of the Great Western. The agent of the Southern was to become the agent of the Great Western and the former was to perform for the latter all the services usually and necessarily performed at a local freight station. It was to execute bills of lading, collect freight, do all the recording and accounting, etc. While the Great Western might place its signs on the freight house and was to furnish its stationery, forms, and books, pay its proportion of fidelity insurance and other expenses, the effect of the contract is to lease an undivided part of the Southern freight house and a joint use of its tracks, for which rentals were specified, and for the Great Western to employ the Southern as its agent to perform the services for it which had theretofore been the work of the Great Western freight house employees.

On the 29th of July 1933 the latter were notified that their offices and warehouse would be discontinued and that the entire force would be taken off, to exercise their seniority wherever they pleased. The situation is exactly the same in principle as that under consideration of this Division in its award No. 180. The carrier attempts to distinguish the instant case from that award and others cited by showing that the work contracted out or turned over to an agent in the earlier cases cited was performed on its own premises. Such was not wholly true, we think, in a recent award of Division One, 1237. The reasoning of the various awards cited by the employees does not admit of any such distinction. It affirms the principle that any work necessary in performing the functions of a common carrier belongs to such classes of employees as are protected by its collective agreements with them. If the carrier could farm out any part of the labor necessary to its operations it could arrange with others to do a large part or all of it, impairing the rights of its employees to handle the jobs which the entire spirit and intent of the agreement assures them. The difference would only be one of degree. So long as the work exists in the prosecution of its business, it is theirs under the schedules, and such is the meaning and effect of seniority. But if any distinction could be drawn, it remains to be said that the services of the Southern employees were performed on property leased to the Great Western, and which it had as much right to use as though it owned the title to the buildings in fee simple. It had a property right in them under the contract.

Under the facts disclosed in the submission we are obliged to find that the carrier disregarded the rules of the Clerks' agreement, particularly the first and the last. The desirability of the consolidation of facilities in many cases cannot be questioned, but such consolidation can only be effected with due regard to the contractual rights of the employees. Nor must we let the word consolidation confuse us. We should examine the processes involved and discover just what happened. Here the carrier arranged with another to represent it as its agent in doing the work of its own men on premises which it had rented for that purpose. We have been unable to find any recent authority not in accord with these views.

## AWARD

Claims allowed to the extent that the petitioners would have enjoyed work had they not been deprived of it under the contract considered in the findings and subject to any income which they may have otherwise earned.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: H. A. JOHNSON
*Secretary*

Dated at Chicago, Illinois, this Twentieth day of October, 1936.

## DISSENT

The Referee who wrote the findings and award in this case finds that "under the facts disclosed in the submission we are obliged to find that the Carrier disregarded the rules of the Clerks' Agreement, particularly the first and last."

The first rule reads:

"RULE 1. These rules shall govern the hours of service and working conditions of the following *employees* * * *." (Italics ours.)

The record in this case shows the C. G. W. abandoned their freight house at Kansas City July 31, 1933. This is even agreed to by the parties in the joint statement of facts reading in part—

"Effective with the close of business July 31, 1933, the Kansas City Freight including office and warehouse was closed * * *."

Rule 1 covers only employees of the C. G. W. Company. It must be plain to anyone that the agreement between the parties covers only employees, and there are no employees of the C. G. W. at Kansas City Freight House, because the Freight House has been abandoned.

The only reasonable and manifest intention of the agreement between the parties is to embrace all positions, established and maintained by the Carrier, covered by said agreement.

There is no prohibition in this rule or any other rule of the agreement against consolidation of the Carrier's facilities with the facilities of other railroads, nor the abolition of positions as a result thereof.

The last rule reads:

"RULE 90. This agreement shall be effective as of February 1, 1922, and shall continue in effect until it is changed as provided herein or under the provisions of the Transportation Act, 1920.

"Should either of the parties of this agreement desire to revise or modify these rules, 30 days' written advance notice, containing the proposed changes, shall be given and conferences shall be held immediately on the expiration of said notice unless another date is mutually agreed upon."

The carrier made on change, revision, or modification in any rules in the agreement; therefore, no notice was necessary under this rule or any other rule of the agreement, the Transportation Act of 1920, or the Railway Labor Act of 1926, in effect at the time this consolidation was made.

The findings do not show what other provisions, if any, of the clerks' agreement were disregarded.

No findings are made which afford any reasonable basis for the conclusion that the Carrier disregarded the rules of the clerks' agreement.

The Award is ambiguous, as well as arbitrary.

(Signed) L. O. MURDOCK.

Concurred in by:
GEO. H. DUGAN.
C. C. COOK.
A. H. JONES.
R. H. ALLISON.