NATIONAL RAILROAD ADJUSTMENT BOARD
Third Division

Arthur M. Millard, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS
ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY

STATEMENT OF CLAIM.—

"Claim of the General Committee of The Order of Railroad Telegraphers on the Atchison, Topeka & Santa Fe Railway, that the rate for position of telegrapher-cashier at Blythe, California, shall be mutually fixed retroactively to May 1st, 1931, to conform with similar existing positions on the same seniority district (or in that territory), and that any employees filling this position since that time be so compensated."

STATEMENT OF FACTS.—

"Prior to April 21, 1931, there was in effect at Blythe, California, position classified as telegrapher-clerk and listed in Telegraphers' Schedule at 66¼¢ per hour. There was also in effect at this station a position classified as cashier (not represented by the Order of Railroad Telegraphers), carrying a rate of 85¢ per hour. Effective May 1, 1931, the position of cashier was abolished and the cashier work was assigned to telegrapher-clerk with change in the classification from telegrapher-clerk to telegrapher-cashier, with no change in rate of 66¼¢ per hour."

An agreement bearing effective date of February 5, 1924, as to rules, and January 1, 1928, as to rates of pay is in effect between the parties.

POSITION OF EMPLOYES.—

"The Committee contend that when the reclassification of the position was authorized by the Carrier, account duties of a higher rated and classified position being transferred to the position in question, a new position was created, so far as classification is concerned and that the rate of pay should have been fixed in conformity with that of existing positions of similar work and responsibility in the same seniority district. The Committee agree that it was not a newly created position so far as the operation of seniority is concerned; an agreement of long standing having been reached that a change in classification does not make applicable Article 20, Paragraph (c) of the Telegraphers' Schedule, which reads in part:

"'When vacancies occur, or new positions are created, they will be promptly advertised to all employes on that Division and accepted within seven (7) days thereafter.'

"The Committee does contend, however, that article 2, Paragraphs (a) and (b) are applicable and fully supports its contention. Article 2 reads:

"'(a) Where existing pay roll classification does not conform to the scope of this schedule, employees performing service in the classes specified therein shall be classified in accordance therewith.

"'(b) When new positions are created, compensation will be fixed in conformity with that of existing positions of similar work and responsibility in the same seniority district.'

"Paragraph (a) provides that the payroll classification must conform with the class of work being performed and Paragraph (b) provides that since certain class of work is performed and the payroll classification applied accordingly, compensation will be fixed in conformity with that of

"For the information of the Board, and not to be construed as a modification or change, so far as this particular docket is concerned, of the Carrier's position with respect to the application of Article V-(i) and its requirements, the right of the Carrier under the Telegraphers' Schedule of February 5, 1924 (the Schedule under which this claim has been filed by the Organization with the National Railroad Adjustment Board, Third Division) to place clerical duties of the character in question upon an existing position coming within the scope of the Telegraphers' Schedule and without any increase in the rate of pay of the latter position, was upheld by the United States Railroad Labor Board in its Decision 3789 of June 29, 1925, which decision, it is obvious, placed a binding interpretation upon the Telegraphers' Schedule which cannot be modified or abrogated except by the medium of negotiations and agreement between the parties, provision for which negotiations and agreement is contained in Article XXIII of the Telegraphers' Schedule and in the Railway Labor Act, amended, approved June 21, 1934; and the request of the Organization upon the Board as embodied in the 'Statement of Claim' is a request that the Board exceed its jurisdiction under the Railway Labor Act, amended, approved June 21, 1934, and enlarge upon the Schedule interpretation laid down by the United States Railroad Labor Board in its Decision No. 3789, herein referred to; and, furthermore, in the light of the provisions of Article V-(i) of the Telegraphers' Schedule, this is not a case that was pending and unadjusted on the date of approval of the Railway Labor Act; in view of which the Carrier respectfully submits that the dispute is really one not properly referable to the National Railroad Adjustment Board, Third Division."

OPINION OF BOARD.—This claim of the General Committee of the Order of Railroad Telegraphers on the A. T. & S. F. Ry. Co. is based upon a position at Blythe, Calif., classified prior to April 21, 1931, as telegrapher-clerk and, effective May 1, 1931, changed in classification from telegrapher-clerk to telegrapher-cashier with no change in the rate of pay.

The Committee contends that prior to the change in classification there were two positions at Blythe, one classified as telegrapher-clerk and listed in Telegraphers' Schedule at 66¼¢ per hour, and another position as cashier (not represented by the Order of Railroad Telegraphers) carrying a rate of 85¢ per hour. Effective May 1, 1931, the position of Cashier was abolished and the cashier's work was assigned to the newly classified telegrapher-cashier.

The Committee claims that the rate for position of telegrapher-cashier should conform with that of similar existing positions in the same seniority district, or in that territory, and asks that such rate be fixed retroactively to May 1, 1931, and that employes filling such position since that time be so compensated.

In its presentation of conditions concerning this dispute the carrier contends first that the amended Railway Labor Act, approved except as otherwise specified in the Act, on June 21, 1934, limited the retroactive effect of the Act to cases that were pending and unadjusted on the date of its approval.

Second, that "this claim should be denied because of non-compliance by the employes with the following provisions of the Agreement":

"Article 5-(h):

"The same line of procedure as that followed in the handling of discipline cases will be followed in handling other grievances arising in connection with the application of this schedule."

"Article 5-(i):

"Any grievances to be considered must be presented within thirty (30) days of date alleged to have occurred."

Third, that the carrier did not create any new position, as admitted by the *employes, insofar as operation of seniority is concerned, and therefore Section* "b" of Article 2 of the Agreement does not apply.

Considering the question of "cases that were pending and unadjusted" on the date of the approval of the amended Railway Labor Act, the Board submits that the Act did not imply nor apply any statute of limitation to cases pending and unadjusted, or, for that matter, to any other class of disputes or grievances growing out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions.

The Act meant and means exactly what is stated, or cases in dispute between the employes and the carrier; and in its application to the proper and reasonable interpretation of the rules or Agreement between the employes and the carrier

may be made retroactive to the time when those rules came into existence insofar as any prohibition in the Act is concerned.

In further connection with Paragraph (i), Section 3, of the amended Railway Labor Act, approved June 21, 1934, we cannot separate certain words or phrases in the paragraph to the exclusion of others without distorting the meaning and proper interpretation of the paragraph as a whole. When the paragraph is considered as a whole, both in its subject and its inclusions, it will be found that there will be no discrimination between cases "pending and unadjusted" or otherwise, but that "disputes between an employe or group of employes 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, including" (or taken in with and making a component part of such disputes) "cases pending and unadjusted on the date of approval of this Act shall be handled in the usual manner up to and including * * * the appropriate Division of the Adjustment Board."

Under this interpretation of Paragraph (i), Section 3, of the amended Railway Labor Act, approved June 21, 1934, the Board rules that this instant case is properly before this Third Division of the National Railroad Adjustment Board.

With respect to the application to this claim of Article 5, Paragraph (h) and Article 5 (i) of the Agreement between the carrier and the employes, and (Article 5 (h)), which defines the line of procedure in the handling of grievances arising in connection with the application of the schedule, and (Article 5 (i)) which places a limitation of thirty days on the presentation and consideration of such grievances, the Board calls attention to the fact that this claim does not represent a grievance in the sense in which the term is used in the Agreement, or a protest against what an individual or his representative or representatives may consider an unjust charge, a burden, an oppression, a hardship inflicted, or a trouble evidenced. This claim is made by the General Committee of the Order of Railroad Telegraphers, one of the two parties to the Agreement or schedule of rules and regulations between the employes and the carrier and is not a grievance presented by an individual of a character coming under the application of Article 5 (i) of the schedule. Further, this claim is a contention of one of the principals of the agreement with the other over the application or misapplication of a rate or rule whose proper application is a matter of mutual or joint responsibility.

Under these conditions the Board submits there are no limitations that can be applied to discussions regarding the adjustment or application of the rules contained in the schedule, or to the rates or conditions which they involve; these are subjects to be determined in joint discussions and negotiations, or, failing in this, to be interpreted in the manner provided and the Board rules that, in this instant case, Article 5 (i) of the agreement does not apply.

In connection with the claim of the General Committee that the rate for the position in dispute be fixed to conform with similar existing positions in the same seniority district, or in that territory, it is reasonable to assume that, if the position of telegrapher-clerk was paid at an established rate of 66¼¢ per hour prior to additional duties being added, there is justification for an increased compensation with a change of title and the added duties and responsibilities which were involved in the change. In the opinion of the Board the compensation should have been fixed in accordance with the rates of existing positions of similar duties and responsibilities in the same seniority district, or, in the absence of similar positions in the same district, with the rates paid in adjoining districts, with such differentials, if any, as would be properly applicable to the station in question. This, based on the rates for telegrapher-cashier positions in the adjoining, or Valley District, would establish a rate of 71¢ per hour plus such established and agreed upon differential, if any, as would be properly applicable for the position at the station involved.

In determining the claim for back pay for the employes involved, the Board submits its opinion that the employes must recognize that the obligation in not previously applying the proper rate, or at least making a claim therefor, is a mutual responsibility in which they are equally interested with the carrier. In view of this, it is the opinion of the Board that an equitable basis of settlement would be a retroactive application of the rate determined upon, from a period fixed midway between the point of the presentation of the claim and the date when the appointment of telegrapher-cashier became effective, and the Board so rules.

FINDINGS.—The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon and upon the whole record and all the evidence, finds and holds:

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;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the facts of record sustain the claim of the General Committee.

AWARD

Claim sustained to the extent indicated in the "Opinion of the Board."

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 18th day of May, 1937.

DISSENT ON DOCKET TE-438

The Board was without jurisdiction to handle dispute in this Docket.

The Referee's opinion in respect to "pending and unadjusted cases" as comprehended in the Railway Labor Act and the applicable rules of the contract between the parties involved cannot be justified under any course of reason or logic, and is nothing short of a distortion of both the letter and spirit of the law, and the rules of the contract involved.

In using the phrase, "pending and unadjusted on the date of the approval of this Act," in Section 3 (i) of the Railway Labor Act as amended, Congress certainly did not intend to confer jurisdiction on the Board over all cases regardless of their antiquity. If such had been the intention, the law would have so provided in definite terms, and then there would have been no necessity of including in the Act the descriptive phrase "pending and unadjusted" with reference to the cases coming within the Board's jurisdiction. It is significant that the statute does not refer to cases which are "pending or unadjusted," but by using the conjunctive phrase "pending and unadjusted," instead of the disjunctive phrase "pending or unadjusted," Congress thereby evidenced a clear intent that a case must meet the requirement of being both "pending and unadjusted" as of the date of the approval of the Act in order to come within the Board's jurisdiction. It cannot be logically argued that the words "pending" and "unadjusted" are used synonymously in the Act. To do so is to indict Congress of having done a useless and confusing thing by using two different descriptive words having different meanings when only one meaning was intended. It is a cardinal rule of statutory construction that full force and effect must be given to all the language used, and it will not be presumed that any of the language was considered as mere surplusage.

The Referee employs unique reasoning when he construes the law as being retroactive to any period prior to its enactment because it does not contain a specific statute of limitation. Upon such a theory, all laws, all contracts, would be retroactive unless they specifically provided that they would not be retroactive. No law, no contract, or other instrument defining the rights of persons are considered as retroactive unless such instruments contain specific declarations of their retroactive features. The only retroactive provisions of the law are those found in Section 3 (i), reading:

> "* * * including cases pending and unadjusted on the date of the approval of this Act."

Congress acted advisedly in this matter, and in the light of a construction placed upon the Transportation Act of 1920 involving the Labor Board's jurisdiction in cases arising out of occurrences prior to March 1, 1920, the effective date of said Act. The construction placed upon the Transportation Act in respect to its retroactive or retrospective effect is shown by Decision No. 83, Docket 123-C of the United States Railroad Labor Board.

Without the specific provisions in Section 3 (i) covering pending and unadjusted cases, the National Railroad Adjustment Board could not legally take

jurisdiction of any question arising out of an occurrence prior to the effective date of the Act (June 21, 1934). In thus giving the Act a retroactive effect, Congress specifically limited such retroactive effect to cases that were pending and unadjusted on the date of its approval, and clearly intended that a case to come within the jurisdiction of the Board, which grew out of an occurrence prior to the enactment of the law, must have the essential characteristics of being both pending and unadjusted.

The opinion by Referee Samuell, identical in Awards 53, 54, and 65, of this Division was an inclusive interpretation of pending and unadjusted cases. In respect to disputes arising from occurrences prior to the date of the Railway Labor Act, amended, as did the occurrence in the instant case, Judge Samuell's opinion may not be read to dignify such as a dispute or case until it had thus been accredited under the provisions of the Railway Labor Act of 1926, at the time in effect. No grievance was then presented; no dispute was then considered; no case, pending and unadjusted or otherwise, then existed.

It is clear, from Judge Samuell's opinion, that a case involving an occurrence prior to June 21, 1934, could not be considered as a pending and unadjusted case unless it had ripened into a dispute and had progressed through the various channels provided by the Act of 1926.

The instant case, involving an occurrence more than 3 years prior to the Amended Railway Labor Act becoming law, and which was not presented to the carrier until after the Amended Railway Labor Act became law, cannot by any course of reason or logic be considered a "pending and unadjusted" case.

In the Opinion, in respect to the application of Article 5 (i) of the agreement between the carrier and the employees involved in this case, the Referee states:

> "* * * the Board calls attention to the fact that this claim does not represent a grievance in the sense in which the term is used in the agreement or the protest of an individual, or his representative or representatives, against what he may consider an unjust charge, a burden, an oppression, a hardship inflicted, or a trouble evidenced. * * * and is not a grievance presented by an individual in the sense in which the term is used in Article 5 (i) of the schedule."

Another referee, in Award 417, involving the same carrier, same organization, same contract, and the same rule, on April 22, 1937, stated his opinion to be:

> "Article 5 (i) cannot be held to cut off the claim of the employee for the grievance here involved was a continuing and recurring one * * *.
>
> "The employee's claim for back pay, however, cannot under this rule logically extend for more than thirty days prior to the date on which complaint was first made, February 21, 1934. Obviously, if the grievance is held to be recurring and a continuing one on the basis that there is a separate violation on each day, any and all violations committed before thirty days prior from the time the complaint is first made are outlawed under Article 5 (i)."

Thus it is seen that one referee holds that such a case as the instant one is not a grievance within the meaning of Rule 5 (i), while the other holds that it is a grievance within the meaning of Rule 5 (i) and that said rule has application.

We are in agreement with the opinion stated in Award 417 to the extent that the question involved a grievance coming under and subject to the terms of Paragraph 5 (i). We disagree with the application of the rule as made to that case, as evidenced by the dissent which accompanied Award 417. We find no fault with the principle of one referee disagreeing with another. This dissent goes to the unwarranted and wholly unjustified construction placed upon the terms "pending and unadjusted," as these terms appear in the Railway Labor Act and upon the terms and provisions of the rule of the agreement between the parties involved in the instant case.

Even if this Board had jurisdiction under the Amended Railway Labor Act this claim should have been denied because of non-compliance by the employees with the following provisions of the agreement.

> Article 5-(h):
>
> "The same line of procedure as that followed in the handling of discipline cases will be followed in handling other grievances arising in connection with the application of this schedule."
>
> Article 5-(i):

"Any grievances to be considered must be presented within thirty (30) days of date alleged to have occurred."

It is undisputed in the record that the change in the position of telegrapher-clerk to telegrapher-cashier took place on May 1, 1931, and that no claim was presented until December 3, 1934. The rules above quoted clearly established estoppel against the presentation of claim after the expiration of 30 days from the time the change took place on May 1, 1931. The written rules are merely an expression of the agreement reached between the parties, and such agreements must be construed and interpreted so as to give effect to the intention of the parties to the agreements.

It is clear, from the language of the above rules, that it was the intent of the parties to create an estoppel against the presentation of any claim which was not presented within 30 days of its first occurrence, and if not so presented, would not thereafter be subject to determination under the agreement.

The representatives of the employes and of the management drew the terms of this agreement with a common understanding of occurrences which created grievances. The change in position at Blythe, if objectionable to the employees, constituted such an occurrence, and gave cause for a grievance under the agreement on the date that the change took place. It was to such a grievance and such a date that Article 5–(i) of the agreement referred.

It is clear that no other interpretation can be properly placed upon these rules in view of their plain language, intent, and purpose.

Indicative of the importance attached by the Telegraphers' Organization to compliance with the requirements of the above quoted rules, the following is quoted from booklet, which was prepared and issued by Santa Fe System Division No. 61 of The Order of Railroad Telegraphers, entitled "Interpretations of Schedule, March 16th, 1922":

"SEC. '1.' *Grievance to be taken up within thirty days.*—This is a new rule and should not be overlooked in any way. Each employe should become conversant with his working contract and any irregularity alleged to have occurred, a formal protest should immediately be made. Special attention should be given to this section."

The above is complete confirmation of the purpose and intent of the parties as we have previously related. The filing of a claim approximately 3½ years after the change took place cannot by any sound reason or logic be construed as compliance with these rules.

The carrier has complied with all of the appropriate provisions of the Telegraphers' Schedule. Article 2, Sections (a) and (b), and Article 20, Section (c), cited by the Telegraphers have no application. By changing the payroll classification of this employee, the carrier did not create any new position as admitted by the employees in the record insofar as operation of seniority is concerned and, therefore, Section (b) of Article 2 of the Agreement does not apply. For the same reason Paragraph (c) of Article 20 does not apply because there were no vacancies or new positions involved. The same provisions of the Agreement relied upon by the Telegraphers in this dispute were in the Agreement when a similar dispute was considered by United States Railroad Labor Board and covered by its Decision No. 3789. In that dispute which is identical with the present case the employees acknowledge that there was no rule in their Agreement which directly covered a situation of this kind, but, as before stated, the two rules upon which they are relying in this dispute were in the Agreement at the time dispute was presented to the United States Railroad Board, but their statement was an admission in that case that the rules in question were not applicable.

The claim in this case is: "* * * that the rate * * * shall be mutually fixed retroactively to May 1, 1931, * * *," this being the date when the change to position of telegrapher-cashier became effective. The award is: "Claim sustained to the extent indicated in the 'Opinion of the Board.'"

The "Opinion of the Board" is:

"* * *. In the opinion of the Board the compensation should have been fixed in accordance with the rates of existing positions of similar duties and responsibilities in the same seniority district, or, in the absence of similar positions in the same district, with the rates paid in adjoining districts, with such differentials, if any, as would be properly applicable to the station in question. This, based on the rates for telegrapher-cashier

positions in the adjoining, or Valley District, would establish a rate of 71¢ per hour plus such established and agreed upon differential, if any, as would be properly applicable for the position at the station involved. * * *."

If this opinion is to be accepted as a definite basis for rate to be applied, the award exceeds the authority of the Board in two respects:

FIRST. The award exceeds the provisions of the agreement, particularly Article II (b), which limits the rate of compensation to be "in conformity with that of existing positions of similar work and responsibility in the same seniority district." There is no provision in the agreement which admits of establishment of a rate on the basis of rates of existing positions of similar character in another or adjoining district.

SECOND. The award goes beyond the claim to have the rate mutually fixed and usurps the rights of the parties under the agreement.

The "Opinion of the Board" further rules that back pay shall be retroactive "from a period fixed midway between the point of presentation of the claim and the date when the appointment * * * became effective." This action of the Board is not based upon any provision of the agreement and exceeds the authority of the Board which is restricted to the interpretation and application of agreements.

A. H. JONES.
J. G. TORIAN.
R. H. ALLISON.
GEO. H. DUGAN.
C. C. COOK.