Award No. 828
Docket No. TE-850

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

William H. Spencer, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

NORTHWESTERN PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: "Claim of the General Committee of the Northwestern Pacific Railroad Company that Telegrapher W. C. Van Heuit be compensated for net wage loss sustained by him by reason of the failure of the Carrier to place him on the position of supervisory agent at Ukiah on March 29th, 1932."

EMPLOYES' STATEMENT OF FACTS: "On March 29th, 1932, W. C. Van Heuit filed application to displace H. R. Pauli, supervisory agent at Ukiah, Calif. Carrier declined to permit the displacement. Dispute was handled under the provisions of the Amended Railway Labor Act and subsequently appealed to the National Railroad Adjustment Board, Third Division. Decision of this Board under Award 391, sustained the claim of the Organization and on or about March 22, 1937, Telegrapher W. C. Van Heuit was placed on the position by the Carrier."

An agreement bearing date of July 16, 1927, with changes as of May 1, 1936, is in effect between the parties.

POSITION OF EMPLOYES: "Exhibits 'A' to 'N' are attached hereto and made a part of this brief.

"Conferences on this dispute between the representative of the Carrier and representative of the Employes were held September 13th, 1937 and January 25th, 1938.

"This claim is filed under the provisions of Rules 9 and 15 of the agreement in effect between the parties to this dispute:

'RULE 9

Guaranteed Minimum Assignment

Regularly assigned employes herein specified shall receive one (1) day's pay within each twenty-four (24) hours, according to position occupied or to which assigned, if ready and available for service (or if required on duty less than the required minimum number of hours constituting a day's work), except on Sundays and holidays.'

'RULE 15

Abolished Positions

(a) When necessary to reduce the number of employes, they shall be laid off according to the seniority list taken in the inverse order.

"Obviously, under this process of preconceived handling a Board or Referee, would have no understanding of just what it was upon which they were ruling, as they could not know the ultimate effect, having no knowledge of the subsequent claims that might be filed on the same subject. Nor could the Management know the extent of claim or contention that was being considered in the instant case if the Organization did not know the subsequent claim would be initiated by an individual.

"The Management respectfully submits this principle was very positively ruled upon by the First Division of this Board in its Award No. 1956 wherein the Organization based retroactive time claims upon the provisions of a previous Award (No. 52) the findings and decisions of the Board being, 'The controversy that formed a basis of this claim was disposed of by this Division Award No. 52—Claim Denied.'

"The Carrier submits that this case was definitely and finally disposed of by this Board in its Award No. 391 of March 1937 (which was promptly complied with) and respectfully requests that the Board so decide."

OPINION OF BOARD: The carrier's defense in this dispute is based upon **res judicata,** a well established and quite defensible doctrine of the common law. In explanation of this doctrine, it is sometimes said that a final judgment by a court of competent jurisdiction on a given cause of action bars a subsequent action on the same claim by the same party against the other. The same principle is implicit in the statement that a party is not permitted to split his cause of action.

In the opinion of the Division, the claimant had two separate claims: the claim to displacement rights, and the claim for wage loss. The former claim was considered and allowed in the Division's Award No. 391. The latter claim was not made in the former dispute, and the Division gave it no consideration in the rendition of that award. While the two claims might properly have been joined in the former submission, there is nothing in the Agreement between the parties nor in the rules of procedure of the Adjustment Board requiring that they be included in the same submission.

The carrier in its submission stated that if a claim for wage loss had been presented at the outset, the conclusion reached in Award No. 391 might have been different. This is mere speculation. Certainly the record contains no evidence tending to show that the carrier has been inconvenienced or has suffered loss by reason of the petitioner's failure to present this claim when it presented the other claim.

In reaching this conclusion, the Division does not necessarily sanction the procedure adopted in the presentation of these two claims as being the wisest procedure. Indeed, it expresses the opinion that petitioners, in cases similar to this, should ask for all relief to which, in their opinion, the claimant is entitled to, or, where this is not possible, should serve notice on the carrier and the Division of its intention to ask for other relief at some later time. This procedure will assist the Division in conserving its time and in dealing more intelligently with disputes presented to it. In addition, it will protect the carrier against the risk of being taken by surprise.

The Division finds that the claimant is entitled to be compensated under Rule 9 and Rule 15 of the current Agreement for the wage loss sustained.

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 employe involved in this dispute are respectively carrier and employe 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 claimant is entitled to be compensated under Rule 9 and Rule 15 of the current Agreement for the wage loss sustained.

AWARD

The claim is sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 16th day of March, 1939.

DISSENT IN AWARD NO. 828

In this award the Referee dealt with and came to a conclusion which we deem to be in error as to the divisibility or indivisibility of action for a single breach of contract from which this claim for compensation arose.

The contention of the petitioners and the award here affirmatively recognized that former Award No. 391, Docket TE-316 dealt with the identically charged violation of contract upon which this subsequent claim for compensation in Docket TE-850 was based. The opinion here in its second paragraph recognizes that exact fact and dealt thereupon declaring that "the claimant had two separate claims."

Certain it is that the law in its upholding of proper method of procedure has forcefully declared repeatedly to the effect that one action only is allowed for a single breach of contract. That dictum holds the expressed objective of restriction of suits to such number as is absolutely necessary for purposes of justice.

No reasonable suggestion can be made that fundamental decisions to that effect applicable to situations analogous to that comprised in this dispute, of which the following are but representative, were not available to the Referee, shooled in Law, who rendered this award:

In the Snell case the United States Circuit Court of Appeals said:

"Whatever right of action the plaintiff had for breach of contract of employment, it was indivisible, and one determination of their rights or a recovery is a bar to any further action for damages. In **Harrison vs. Clarke,** 182 Fed. 765, 105 C. C. A. 197, it was said that:

> 'The rule is well settled that one having a claim against another, arising either on the breach of contract or for a tort, must recover in one suit for all damages he may suffer because thereof, but is not permitted to split his cause of action and recover in successive suits therefor.'

"See, also, **Nesbitt vs. Independent District,** 144 U. S. 610, 12 Sup. Ct. 746, 36 L. Ed. 562, **Cromwell vs. Sac County,** 96 U. S. 51, 24 L. Ed. 681, and **Srere vs. Gottesman** (C. C. A.) 270 Fed. 188.

"A former judgment is a finality as to the claim or demand in controversy, including parties and those in privity with them, **not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. Old Dominion Copper Mining, etc., Co. vs. Lewisohn,** 202 Fed. 178, 120 C. C. A. 392: **Pakas vs. Hollings head,** 184 N. Y. 211, 77 N. E. 40, 3 L. R. A. (N. S.) 1042, 112 Am. St. Rep. 601, 6 Ann. Cas. 60. * * * *."

Justice Brewer, prior to his appointment on the United States Supreme Court, wrote an opinion for the Supreme Court of Kansas in **Madden vs. Smith,** 28 Kans. 798, 800, wherein he said:

> "Whether the plaintiff recovered much or little, and whether he claimed all or less than all he was entitled to, is entirely immaterial. One contract gives one cause of action, and the plaintiff maintaining one is estopped from any future or further action. This rule of law is familiar, rests upon the soundest principles, and we think is controlling in the present case. In 2 Smith's Leading cases, page 671, the author says:
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> > 'As an entire cause of action cannot be divided, a judgment in favor of or against the plaintiff for part, will be as conclusive against the right to maintain an action for the residue as if it had embraced the whole.' "

and finally:

The United States Supreme Court stated in the case of Baldwin vs. Traveling Men's Assn., 283 U. S. 522, 525—526:

> "Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties. We see no reason why this doctrine should not apply in every case where one voluntarily appears, presents his case and is fully heard, and why he should not, in the absence of fraud, be thereafter concluded by the judgment of the tribunal to which he has submitted his cause."

In the fourth paragraph of the Opinion of Board the Referee declares his lack of sanction of the procedure in the presentation of these two claims and describes the very procedure representative of good morals and proper ethics which a denial award in this claim would have affirmatively and officially set as precedent. Here is suggested the "wisest procedure," contrary to the award, truly representative of good morals and proper ethics in the presentation to and the acceptance by a competent tribunal of a dispute of the distinctive character of a single charged violation of contract such as is involved in the two claims, Award No. 391, Docket TE-316 and the instant Award No. 828, Docket TE-850.

How can there be found any semblance of justice in this award which in its basic opinion decries as unwise the procedure it upholds? Wisdom, good morals, and ethics are inherent in the procedures recommended to the petitioners in the fourth paragraph of the Opinion for the expeditious and intelligent handling of disputes by the Division as well as for the fair treatment of respondents by eliminating the element of surprise; yet the final award proceeds to impose penalty upon this respondent for advocating and practicing the very elements and procedures which the opinion lauds?

Had the award upheld the principles proclaimed in the fourth paragraph of the opinion there would have been a decision not only consistent with the unvarying practice before this Division of submission and award, both upon the substance of the contract violation claimed and the damages involved where there was but single violation of contract, in the 800 or more cases preceding the instant one which this Division has handled. This award sets up the first suggestion to parties of inconsistent procedure in that respect.

Under these circumstances this award is a perversion of sound law which a legally trained mind could have and should have found applicable to the situation which this case presented to the Third Division of the National Railroad Adjustment Board. If ever wishful thinking for desired end was evident in a punitive award, containing in the opinion the expression of

wisdom, good morals, and ethics in respect to procedure which should have been interpreted into sound law, this confusing, inconsistent, and erratic award gives true representation of it.

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

STATEMENT OF REFEREE

Whatever may be the situation under common-law procedure or under modern codes of practice and procedure with respect to the splitting of claims or causes of action, the Adjustment Board is not bound by such procedures. An interesting case in this connection is **Vierling v. Spencer** Kellogg and Sons, 187 Minn. 252, 245 N. W. (Minn.) 150, 85 A. L. R. 165 (1932). Here an employe, the victim of an accident arising out of his employment, applied to the Wisconsin Industrial Commission for compensation. The Commission awarded him compensation for the accident including a sum for hospitalization and medical care. Later he applied for compensation for a retraining period. The Commission made an award for retraining. The employer objected upon the ground that the employe should have presented the claim for retraining when he presented the claim for compensation. Upon appeal by the employer, the Supreme Court of the state affirmed the action of the Commission. In the course of its opinion Chief Justice Wilson said in part:

> When such an incident happens in an action at law, it is very unfortunate. But the Commission is not bound by common-law or statutory rules of procedure. It aims to reach the substantive rights of the parties.

In the same connection the Chief Justice also made this statement:

> No court can approve or encourage the practice of a litigant trying his case piecemeal or having more than one fair trial. Yet, in the instant case the law placed a very definite duty upon the employer. He is no worse off, aside from annoyance and inconvenience, than if the employe had fully presented his case before the first referee.