Award No. 1718
Docket No. CL-1894

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Edward M. Sharpe, Referee

PARTIES TO DISPUTE:

FRANCIS H. RUDD

MINNEAPOLIS, SAINT PAUL & SAULT STE. MARIE RAILWAY COMPANY

(Joseph Chapman and George Webster, Trustees)

STATEMENT OF CLAIM: "Employe Francis H. Rudd claims that the carrier should be ordered to assign him to either job No. 1 or No. 2 train and engineman timekeeper, on the Minneapolis, St. Paul, and Sault Ste. Marie Railway Company, at Minneapolis, Minnesota, with seniority rights unimpaired from November 6, 1934, with compensation, less any sums earned, at the same rate as paid to the train and engineman timekeepers who were assigned to the mentioned positions on November 6, 1934, in violation of the seniority rights of Francis H. Rudd, and the employe further claims that he is entitled to an order directing the carrier to cease and desist its unfair practices toward him."

STATEMENT OF FACTS: Petitioner was first employed by the Carrier in September, 1911. He left the Carrier in April, 1912 but returned in December of that year as a clerk. Thereafter he held the following positions:

(1) Invoice, Labor and Material Distribution and Oil Record Clerk, December 11, 1912 to July, 1913.

(2) Material Distribution Clerk from July, 1913 to September, 1915.

(3) Engineering and Shop Order Clerk from September, 1915 to August, 1916.

(4) Bill and Voucher Clerk from August, 1916 to November, 1917.

(5) Ass't Chief Timekeeper from November, 1917 to July, 1919.

(6) Chief Timekeeper from July, 1919 to January, 1921.

(7) Ass't Paymaster from January 16, 1921 to October, 1922.

(8) Paymaster from October, 1922 until position was abolished June 1, 1933.

(9) Chief Clerk, Treasury Department from June 1, 1933 to August 1, 1934 when position was abolished.

(10) From August 1, 1934 until November 27, 1934, price clerk, until demoted to clerk, on latter date.

On July 25, 1934 Petitioner was informed that the position he then held (Chief Clerk) would be abolished beginning August 1, 1934. At this time the Carrier was in the process of arranging for a centralized Accounting

Department to reduce personnel. By reason of his seniority Petitioner was able to work in August, September, and October, 1934 as a Price Clerk. He remained on this position until November, 1934. On October 25, 1934 the Carrier posted a bulletin abolishing jobs and on the following day the Carrier posted another bulletin for 32 positions to be filled by 48 clerks. Petitioner placed a bid for Train and Engine Timekeeper. They were Positions Nos. 1 and 2 on the bulletin, and claims that since he was a senior clerk he was entitled to an assignment of one of the positions. Carrier failed to give either of the positions to Petitioner.

Petitioner first presented his claim in 1936 and seeks reinstatement to the position he claims he is entitled to. In May, 1936 the Petitioner received the following letter:

"BROTHERHOOD OF RAILWAY & STEAMSHIP CLERKS
FREIGHT HANDLERS, EXPRESS & STATION EMPLOYES

System Board of Adjustment
Minneapolis, St. Paul & Sault Ste. Marie Railway

Minneapolis, Minn.
May 22, 1936

Mr. F. H. Rudd
C/o Soo Line

Dear Sir & Brother:

Referring to your grievance dated May 14, 1936, regarding your position in the Accounting section of the Auditor of Disbursement's office.

This matter was duly presented to the General Office Protective Committee and after careful consideration, it was our opinion that your grievance could not be handled, as our Grand Lodge Constitution prohibits us in paragraph (c) of Section 9 to handle same, and which reads as follows:

'No grievance originating prior to the time the aggrieved became a member of the Brotherhood shall be considered.'

Furthermore, your grievance could not be handled at this late date as the seven day period has long expired as provided in rule No. 29, Article 4 of the Agreement with the Railroad Company and this Organization.

Fraternally yours,

E. H. Engstrand, Div. Chairman."

Petitioner did not make any protest to his employing officer because of being denied Job Nos. 1 and 2 in November, 1934 until April 9, 1936. In November, 1934 upon request of Petitioner, the General Chairman of the Brotherhood mailed Petitioner an application blank for membership in the Brotherhood, advising Petitioner as to the initiation fees, but told him that the Brotherhood laws did not permit the Brotherhood to handle his grievances.

It is admitted that the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes is the representative of the craft or class of employe here involved.

OPINION OF BOARD: The issue involved in this case deals with the jurisdiction of the Board to entertain the petition of Petitioner. In disposing of this question we have in mind that the merits of Petitioner's claim are not to be considered; that there is no disagreement between the Carrier and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express

and Station Employes of Mountineer Lodge 838; that the Brotherhood could not handle the claim because it arose prior to Petitioner's membership in the Lodge, and that orderly administrative procedure demands that presentation of grievances to the Board should be through a Brotherhood.

It is the position of the Brotherhood that under the provisions of the Railway Labor Act, there being no dispute between the Brotherhood and the Carrier, the Board is denied the right to hear the protest of an individual employe, and the Petitioner failed to comply with Rule 29, Article IV, which requires that grievances must be presented within seven days after their occurrence.

It is the position of the Carrier members of the Third Division and the Petitioner that under the provisions of the Railway Labor Act an aggrieved employe has the right to have his grievance disposed of by the Board without being represented by the Brotherhood.

In Award No. 514, Second Division, it was said:

"The general purposes of the Railway Labor Act are stated as follows:

> '(1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employes or any denial, as a condition of employment or otherwise, of the right of employes to join a labor organization; (3) to provide for the complete independence of carriers and of employes in the matter of self-organization; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.'

"It is further stated in the statute that:

> 'It shall be the duty of all carriers, their officers, agents and employes to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employes thereof.'

"It is further provided by the statute that:

> 'All disputes between a carrier or carriers and its or their employes shall be considered, and, if possible, decided, with all expedition, in conference **between representatives designated and authorized so to confer, respectively, by the carriers and by the employes thereof interested in the dispute.**
>
> 'Representatives, for the purposes of this Act, shall be designated by the respective parties without interference, influence or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employes for the purpose of this Act need not be persons in the employ of the carrier, and no carrier shall, by interference influence or coercion seek in any manner to prevent the designation by its employes as their representative of those who or which are not employes of the carrier.'

"One of the primary purposes of the Act appears to be to provide for collective bargaining, in the following language:

> 'Employes shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employes shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act.'

"It is further provided:

> 'In case of a dispute between a carrier or carriers and its or their employes, arising out of grievances or out of the interpretation or application of agreements concerning * * * rules, or working conditions, it shall be the duty of the designated representative or representatives of the carrier * * * and of such employes * * * to confer in respect to such dispute.' "

In the above award the manner of handling disputes was discussed and it was there said:

"A consideration of the foregoing clearly shows that it was the legislative intention to provide, not only for collective bargaining but also, as far as possible, to provide for the adjustment of disputes by representatives designated by the carriers and by the employes. The provision that such disputes 'shall be handled in the usual manner up to and including the chief operating officer of the carrier' assumes that there is a recognized manner of handling such disputes. Rule 35 of the Schedule of Rules between the Union Pacific System and the union, which is one of the principal provisions with which this dispute is concerned, in this case justifies and makes clear this assumption when it provides that grievances shall first be taken to the foreman, general foreman, or shop superintendent **'by the duly authorized local committee of the employes or their representative,'** and thereafter to the highest designated railway official. In this case it can, therefore, be said that the usual manner of handling such a dispute, as provided by statute, is that set forth in Rule 35 of the Schedule of Rules, that the employe shall be represented, in grievance claims, by the duly authorized local committee or their representative. * * *

"Obviously, the determination of different cases will depend upon the varying provisions of agreement between carriers and employes. If, according to such agreement, it were provided that an employe should present his claim individually against the carrier, such a manner of presentation would be 'in the usual manner,' as provided by the statute. There might well be cases in which there was no provision in a contract relating to disputes; and in such a case the inquiry would necessarily be determined, upon review before this Board, on proof of what the usual manner of handling such disputes actually was; and the same would apply where there was no contract between the carrier and employes. But the only way in which disputes may be referred by petition to this Board is upon showing that they were handled with the carrier in the manner provided for by contract, or in the usual manner adopted by the carrier and its employes.

"* * * In our opinion the section of the statute quoted by the court does not provide for such individual negotiations and presentation of a petition before this Board, but merely provides that, upon a hearing before the Board, the individual petitioner may be present and heard, or that any representative designated by him may be so heard. In reaching such a conclusion, we recognize a distinction between procedure for review, and what may be permitted when review is actually had before an appellate tribunal.

"In order that this Board may assume jurisdiction of a dispute on petition, it must appear that the dispute has been handled in the usual manner in negotiations with the carrier as provided by the statute; and that it is only in case there has been a failure to reach an adjustment in the manner so provided that this Board will review such proceedings. In the instant case, there was no compliance with the statute on the part of the petitioner. The usual manner of negotiating with the carrier was not complied with. There was no failure to reach an adjustment **in the usual manner.** Petitioner, having failed to pursue the required method of presenting his grievance, which in this case was that provided by the agreement between the carrier and the employes, this Board is without jurisdiction to pass upon petitioner's claim."

In Award No. 515, Second Division, there was a further discussion of the conditions precedent to the giving of the Board jurisdiction to entertain a petition. It was there said:

"There is an agreement in force between the Erie Railroad Company and the mechanical department employes of such carrier, which provides as follows with regard to grievances:

'(a) Should a dispute arise as to the relative standing of an employe, or any other controversy arise, growing out of this agreement or from other cause, that cannot be adjusted by the Erie Railroad Company and said employe, the matter in dispute shall be referred to one or both committees established and constituted as herein and hereinafter provided, for a decision by a majority vote thereof.

'(b) Local Shop conference committees representing all Shop Crafts will be elected from the employes from each shop point, as may be agreed on, who shall represent the employes on all matters involving any misunderstanding concerning discipline, wages, and working conditions. All such differences shall be adjusted, if possible, by the local conference committee at the meeting at which they are presented. If differences are not so adjusted they shall be referred to a District Adjustment Committee made up of the local Chairman and General Chairman of their respective crafts or their authorized representatives (2), representing the men; Shop Superintendent, District Master Mechanic or Assistant Superintendent of Motive Power; or their representatives (2) representing the Company. A majority vote of the District Committee to finally decide the controversy.'

"Petitioners have never complied with the foregoing rules. The dispute in question has not been referred to the local shop conference committee or the district adjustment committee. The Railway Labor Act provides that disputes between a group of employes and a carrier, growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, 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,** the dispute may be referred by petition of the parties, or by either party, to the appropriate division of the Adjustment Board. (45 U. S. C. A. Sec. 153 [1].) In the instant case the usual manner of handling such disputes as that in question, is according to the provisions of the contract. These requirements have not been complied with. Failure to follow the procedure required in the statute, and defined in the agreement, leaves this Board without jurisdiction to entertain the petition. See Gooch v. Ogden Union Railway and Depot Company."

In Award No. 643, Second Division, it was said:

"With respect to the second condition precedent, the story is entirely different. This Board has jurisdiction only in case the parties fail 'to reach an adjustment.' Here the parties did not fail to reach an adjustment. They decided that the claim was without merit. The statute does not say that the dispute must be settled in a manner satisfactory to the employe individually. Mr. Hildebrand designated the representatives of his union to act for him; they conferred with the proper representative of the carrier; they came to a decision with the carrier, and, so far as any further proceedings under this statute are concerned, that decision is final. This Board has no authority to review it. Its jurisdiction would attach only if the parties, acting through their duly designated representatives, have failed to settle the controversy themselves."

"We, therefore, must hold that this Board has no jurisdiction over this case, since one of the conditions required by the statute has not occurred—namely, a failure of the parties to reach an adjustment."

"It is also suggested that an employe has a constitutional right to present his grievance in person. Assuming without deciding that he may not have such right under the Act here in question, there is, even so, no denial to him of any constitutional guarantee. He is not compelled to accept the benefits of the Act. If, however, he does so, he must proceed in strict accordance with its terms."

It is a well settled rule that the Board only has jurisdiction in the event that the parties fail to reach an agreement and that the dispute has been handled in the usual manner in negotiating with the Carrier. It is admitted that the Brotherhood in this case is the representative of the class of employes here involved.

Section 3, First (i) of the Railway Labor Act reads:

"The 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 cases pending and unadjusted on the date of approval of this Act, 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, the dispute may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes."

It is admitted that this dispute was not handled by the representative of the employes authorized to represent them. It is also admitted that the dispute was not handled "in the usual manner." Employe Rudd states:

"Petitioner recognizes that orderly administrative procedure demands that ordinarily presentation of grievances to this Board should be through a Brotherhood."

It follows from the authority quoted and the facts in this case that an individual employe is not a party to the dispute and may not invoke the jurisdiction of the Board.

FINDINGS: The Third Division of the Adjustment Board finds and holds:

That this Division of the Adjustment Board has no jurisidiction over the dispute involved herein.

AWARD

Jurisdiction denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 20th day of February, 1942.

Dissent to Award 1718 (Docket CL-1894)

We are unable to agree with the conclusion that under the Railway Labor Act the Adjustment Board does not have jurisdiction of a dispute referred to it by petition of an individual employe.

(S) **A. H. Jones**
(S) **R. H. Allison**
(S) **C. C. Cook**
(S) **C. P. Dugan**
(S) **R. F. Ray**