

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Fred W. Messmore, Referee

PARTIES TO DISPUTE:

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

THE DENVER AND SALT LAKE RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that the Carrier has violated, and continues to violate, the Clerks' Agreement, effective March 1, 1942, when it published roster showing Mr. Cecil G. Murphy, Clerk, Craig, Colorado, with seniority date of August 27, 1935, instead of September 16, 1945.

OPINION OF BOARD: This case is before the Board on a joint submission by the Carrier and the Brotherhood; oral hearing waived by the parties. The right of the Board to hear and decide this dispute under the rules of the Board is not questioned.

It is contended, however, that before proceeding to determine this case on its merits: Cecil G. Murphy, clerk, whose seniority status is affected by the action taken by the System Committee of the Brotherhood, because the dispute involves depriving Murphy of his previously established and accumulated seniority rights, the case should be set for hearing and Mr. Murphy accorded an opportunity by proper notice to appear before the Board and present his views in respect to the merits of this dispute, which involves his seniority rights.

The Referee relies on Award 1193. In that case the Clerks' Organization was protesting the continuation of a formerly established seniority date of an individual whom the carrier had dismissed from its service, and had subsequently reinstated on a leniency basis some three years after his dismissal. The employees and carrier, parties to the dispute, had requested hearing thereon and the case was deadlocked on the issue of according an individual involved, and other employees whose seniority rights might be effected, an opportunity to be personally heard thereon. The Board said:

"* * * in order that there might be some semblance of finality to the award, we deem it proper at this time to hold that the employee or employees * * * be given notice of the hearing and an opportunity to be heard if he or they desire.

We hold, therefore, that the Adjustment Board shall give due notice of all hearings to the employee or employees involved in this dispute."

In arriving at the foregoing holding, the award quoted The Railway Labor Act, section 3 (j):

"Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employe or employes and the carrier or carriers involved in any disputes submitted to them."

The aforementioned statute states that notice shall be given to the employe or employes involved. The Division is without power to make a rule not in accord with the provisions of the law. The Courts have held that the rights of an individual cannot be affected unless he has been given notice and an opportunity to be heard.

The award in 1193 was based primarily on **Nord v. Griffin**, 86 F. 2d 431. The Court enjoined an award of the First Division of the Adjustment Board at the suit of an employe affected who was not given an opportunity to be heard in a case out of which the award had issued. The Court said, in part:

"The trial below and this appeal do not involve the merits of the controversy. They involve solely the question of whether the appellee is to be bound by an order of an administrative board in a proceeding to which he was not a party, entered at a hearing of which he had no notice. The mere statement of the Proposition is conclusive of its unsoundness. The rights of the plaintiff are protected by the Fifth Amendment."

Award 1193, likewise, relies on **Estes v. Union Terminal Co.**, 89 F. 2d 768. This case did not pass on the due process question, but the majority of the Court said that the Amended Railroad Labor Act, fairly construed, requires the Board to give notice to all affected employes.

Awards 371, 844, and 902, cases involving seniority rights, held in substance: In conformity with its rules the Board did not notify the third party of the hearing and over-ruled the objections of the carrier that the Board could not render a proper and lawful award without such notice. To the same effect are Awards 1137 and 1138.

In Award 1193, the Referee quoted from certain parts of the Referee's language in Awards 371, 844 and 902, to disclose the view of the Board and Referees, with reference to the seriousness in passing on the rights of a party who was not before the Division. We deem it unnecessary to repeat or detail what was said by the Board and Referees on this subject in Awards 371, 844 and 902, but make the observation that in Award 844, and the Referee's Memorandum attached to Award 902, the Referee's conclusion in Award 1193 with reference to notice, was well warranted.

The Brotherhood cites Award 2253. This Award involved a violation by the carrier of the Clerks' Agreement, by requiring and permitting employes who were not covered by the Clerks' Agreement to perform work that is covered by the Clerks' agreement, and made claim that the carrier be required to assign the work involved in such case to employes who held seniority rights under the Clerks' agreement. The Referee made reference to Award 1193, in the following manner: That the awards cited to the Board with reference to the requirement of notice were, with the exception of one case, cases that involved seniority rights. In speaking of seniority rights the Referee said a different question was involved. There the third person is, in a sense, also a party to the same agreement. His work is covered by the same agreement. The seniority he is claiming accrued under that agreement, and that some courts have held that seniority constitutes a property right which cannot be taken away by a court or an administrative board without complying with the requirements of due process. An award involving seniority necessarily affects all persons under that contract holding seniority dates later than the one changed by the award. Again speaking with reference to Award 1193, the Referee pointed out the Organization submitting the claim was protesting the establishment by the carrier of a seniority date which the Organization contended was some 13 years earlier than the man was entitled to under the agreement. An award favorable to the Organization would necessarily take 13 years off of the man's seniority. Therefore, it was held that notice and an opportunity to be heard were necessary in that case.

The Referee in Award 2253 pointed out that the Referee in 1193 did not consider the reasoning and language used therein applicable to claims of the nature under consideration before the Board in the case being considered. It is evident that the Referee in Award 1193 neither considered that third persons who might be indirectly affected by an award on a claim based on violation of a scope rule were "involved" employees within the meaning of the Railway Labor Act, nor that the requirements of due process made it necessary to give them notice and afford them a hearing. This is evidenced by Awards 1209 and 1210, written by the Referee who wrote Award 1193. Award 2253 did not hold adversely to Award 1193 with reference to requiring notice where seniority rights were involved.

Seniority, insofar as it is a property right, exists only by virtue of a group arrangement or agreement between employees and employers. The very nature of seniority rights in this sense precludes the assumption that they exist at the free will of the employer, or by virtue of individual agreement between an employer and employee. Seniority, if it is a right at all, is a vested interest in a certain specific permutation of individuals. It is a permutation which, barring disciplinary penalties, death, and voluntary withdrawals, can change only by promotions from the top, or by additions at the bottom. It is an interest in a specific orderly arrangement.

In the instant case the Brotherhood is contesting with the Carrier the seniority rights of an employee. The Carrier is nothing more or less than a nominal party to this dispute, and has nothing in particular to gain or lose by the final determination of the dispute. The Carrier is under no obligation to defend this employee's rights with reference to his seniority status. The employee whose seniority rights are disputed, and other employees affected by the result of this dispute, have a direct interest in the matter. We believe Award 1193 is decisive of the question here presented.

We hold for the reasons given herein: That notice should be given to Cecil G. Murphy, and all other employees involved, of the pendency of this matter; that the matter should be set for hearing on the merits of the controversy; and that Cecil G. Murphy, and all other employees involved, be given an opportunity to appear and be heard.

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 parties waived oral hearing thereon;

That the Carrier and the Employees involved in this dispute are respectively carrier and employees 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 notice shall be given in accordance with the Opinion.

AWARD

Notice shall be given Cecil G. Murphy, and all other employees involved, of the pendency of this matter; and the matter should be set for hearing on the merits of the controversy; and that Cecil G. Murphy, and all other employees involved, be given an opportunity to appear and be heard.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 16th day of December, 1946.