

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Jay S. Parker, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS
READING COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Reading Company that:

1. The carrier has violated and continues to violate the provisions of the Agreement between the parties when and because it declined and continues to decline, to assign to employees covered by said agreement the duties of operating teletype and other mechanical machines used for transmitting and/or receiving communications of record; and

2. The carrier shall be required to forthwith assign such operation to employees covered by the Telegraphers' Agreement.

EMPLOYEES' STATEMENT OF FACTS: An Agreement by and between the parties, referred to herein as the Telegraphers' Agreement, bearing effective date of April 1, 1946, is in evidence; copies thereof are on file with the National Railroad Adjustment Board.

Printing telegraph (teletype and/or printers) service is in operation on the Carrier's lines at:

Rutherford West Hump (HX Tower), operated 24 hours per day by employees under the Telegraphers' Agreement.

Rutherford "RU" Office, operated 24 hours per day by employees under the Telegraphers' Agreement.

Rutherford East Hump, operated 24 hours per day by employees outside of the Telegraphers' Agreement. This operation is in a room adjoining "RU" Office.

Reading "DC" Office, operated 24 hours per day by employees under the Telegraphers' Agreement.

Doylestown "D" Office, operated by employees under the Telegraphers' Agreement 16 hours per day.

New Hope, operated by employees under the Telegraphers' Agreement.

Willow Grove, operated by employees under the Telegraphers' Agreement.

The Carrier denies that it has violated or continues to violate the provisions of the effective Telegraphers' agreement and maintains the operation of teletype machines on the Carrier's system is not work which must be performed exclusively by employees under the Telegraphers' agreement.

The Carrier submits that under the provisions of agreement with the Brotherhood of Railway and Steamship Clerks, employees covered by that agreement are entitled to operate teletype machines which have been or may be installed for the purpose of transmitting and receiving reports and messages formerly handled by clerical employees by messenger, telephone or mail service. Under the provisions of the Telegraphers' agreement employees covered thereby are entitled to operate teletype machines which have been or may be installed for the purpose of transmitting and receiving reports and messages formerly handled by telegraphers. Teletype machines on this Carrier have been operated on this basis, which it will be noted is in accordance with the principle stated in letters of President Manion of The Order of Railroad Telegraphers and Grand President Harrison of the Brotherhood of Railway and Steamship Clerks quoted in Award No. 616 of the Third Division, National Railroad Adjustment Board.

It is the Carrier's position that this is a jurisdictional dispute and for the reasons stated hereinbefore maintains the Board should not assume jurisdiction but should dismiss the case. However, should the Board consider otherwise and assume jurisdiction the Carrier submits the class of employee assigned to operate the teletype machine as outlined herein has been in accordance and compliance with and not in violation of the provisions of either the Telegraphers' or Clerks' effective agreements.

To sustain the claim and require the Carrier to assign employees covered by the Telegraphers' agreement to the operation of all teletype machines, irrespective of location or whether the work prior to the introduction of such machines had been performed by clerks or telegraphers, would be in contravention of the provisions of the agreement with the Brotherhood of Railway and Steamship Clerks and involve the Carrier in a dispute with that organization.

Under the facts and circumstances and for the reasons set forth hereinbefore, the Carrier requests the Board not to assume jurisdiction in this dispute and to dismiss same. However, should the Board assume jurisdiction, it is the Carrier's position that the claim is unjustified and not supported by the evidence, practice or meaning and intent of the rules of the Telegraphers' agreement and respectfully requests that the Board so find and deny the claim in its entirety.

(Exhibits not reproduced.)

OPINION OF BOARD: This is a case where the Order of Railroad Telegraphers claims the Carrier is violating the agreement between the parties because it has declined and continues to decline to assign certain work covered by its terms to members of its craft. The right to the work is based on Article 1 (Scope Rule) of the Agreement, which provides such agreement will govern the employment and rates of pay of operators of teletype and other mechanical machines used for transmitting and receiving communications of record, and the relief sought is that the Carrier be required to forthwith assign all such operations to employees covered by the Telegraphers' Agreement.

The record makes it clear the Carrier has entered into another collective bargaining agreement with the Brotherhood of Railway and Steamship Clerks and that Rule 1 (Scope) thereof provides in substance the agreement covers clerks assigned as teletype operators, engaged in the performance of clerical work. It also discloses that under and by virtue of their agreement the Clerks are claiming the right to perform and are performing

at least a portion of the work which the Telegraphers contend is encompassed within the scope of their contract.

At the outset the Carrier advances two contentions which must be disposed of because if its position with respect to either is sustained the confronting claim is not now in shape to be heard upon the merits. First, the Carrier challenges the right of this Board to hear and determine the claim for the reason the record shows a jurisdictional dispute is pending between the Clerks and the Telegraphers with respect to the operation of teletype and other mechanical machines used for transmitting and/or receiving other communications of record. Secondly, it points out the Clerks have rights under their contract which may be affected by our decision, hence they are interested parties, and question our right to render a valid sustaining award because the Clerks' Organization was not given notice of the claim filed with this division of the Board and an opportunity to appear and be heard.

We are not impressed with the Carrier's claim respecting the existence of a jurisdictional dispute. Section 3, First (i) of the Railway Labor Act gives this Board jurisdiction over disputes of the kind here involved growing out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions. Moreover in Awards Nos. 4951 and 5410 we decided contrary to the Carrier's contention when we held:

"A jurisdictional dispute exists when the Carrier has not contracted with either of two or more crafts and a dispute arises as to which is entitled to perform the work. Where the Carrier has contracted with one or both parties to a dispute, no jurisdictional question is involved. It is then a matter of contract interpretation for this Board."

Limited strictly to the particular subject under consideration in the foregoing quotation we adhere to what was said in the two awards above cited.

The second claim advanced by the Carrier presents a far more serious and perplexing question. Section 3 First (j) of the Railway Labor Act, long in force and effect, provides:

"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 dispute submitted to them."

We are aware that notwithstanding the requirements of the section of the Railway Labor Act just quoted this division of the Board has rendered sustaining awards in disputes of the character here involved. That was true in Awards Nos. 4951 and 5410 heretofore cited, also in a number of earlier awards which do not require citation. Indeed we have gone further than that. In Award No. 4580, a Telegraphers' case, where the Clerks were not given notice in conformity with the requirements of Section 3 First (j), supra, we sustained the claim and said that even though the Carrier had contracted with two organizations for the performance of the same work it would be required to meet its obligations under both contracts until it secured a revision of the involved Telegraphers' agreement.

The records of the awards to which we have heretofore referred have been reexamined and we find that with respect to matters now under consideration those cases were decided on contentions similar to the first claim the Carrier advances here. In fact, the opinions of two of them expressly state the Carrier was contending a jurisdictional dispute existing between two crafts. Therefore, to that extent, they are distinguishable because, as has heretofore been stated, the Carrier's second position is that even if this Board has jurisdiction over the dispute, it lacks power and authority to render a valid sustaining award whereas here—the Clerks' Organization has not

been served with what is known in law as "process" and made a party to the pending proceeding.

In support of its position the Carrier relies on numerous decisions of the Federal courts, to which we shall presently refer. Before doing that, however, it seems proper to point out that although the courts have no jurisdiction to interpret agreements between Carriers and their employees or to settle disputes arising out of the construction of such agreements (see case of *Missouri-Kansas-Texas Railroad Company, et al. v. Brotherhood of Railway and Steamship Clerks, et al.*, and the *Order of Railroad Telegraphers*, decided by the United States Court of Appeals for the Seventh Circuit on March 26, 1951), they do have express power, under Section 3, First (p) of the Railway Labor Act, when actions are brought to test the validity of orders of the respective divisions of the National Railroad Adjustment Board, to enforce or set aside such orders. This decision will not be cited again but it should be noted it recognizes and is in substantial accord with the principles announced in those to which we shall presently refer.

Turning to other Federal decisions relied on by the Carrier as supporting its position we find:

Nord v. Griffin, 86 Fed. 2nd 481, *certiorari denied* 300 U. S. 673, holds that an award of the National Railroad Adjustment Board which deprived an employe of his seniority rights without notice was invalid.

Estes v. Union Terminal Company, 89 Fed. 2nd 768, holds that every person who may be adversely affected by an order or award of the National Railroad Adjustment Board should be given reasonable notice of hearing but that such notice may be given to officials of the organization representing such persons.

Hunter v. A. T. and S. F. Railway Co., 78 Fed. Supp. 984, affirmed in 171 Fed. 2nd 594, holds that an award of the National Railroad Adjustment Board which removed the plaintiff employe from his position as a porter brakeman without notice deprived him of his property rights without due process of law and was void.

To the same effect is *Railroad Yardmasters of North America, et al. v. Indiana Harbor Belt Co., et al.*, 166 Fed. 2nd 326.

Brotherhood of Railroad Trainmen v. Templeton, et al., 84 Fed. Supp. 152, affirmed by the United States Court of Appeals (Eighth Circuit) on April 14, 1950, writ of *certiorari denied* by the Supreme Court of the United States on October 9, 1950, holds that members of a class of railroad employes are entitled to notice of a proceeding before the National Railroad Adjustment Board for interpretation of a collective bargaining agreement which affect their rights to employment and that in the absence of such notice an award made by the board in such a proceeding is illegal and void, and the compliance by a railroad with such illegal award is a deprivation of the members of that class of their property rights without the process of law and may be enjoined.

In connection with the foregoing decisions, it is interesting to note that enforcement of this Board's recent sustaining Award No. 5123, involving a class dispute between different crafts, was recently temporarily enjoined by the United States District Court for the Northern District of Illinois, Eastern Division, in Civil Action No. 51 C 238, which is still pending, on the ground that individuals bringing the action, whose rights were affected, had not been given notice in compliance with Section 3, First (j), *supra*.

Equally interesting is the fact that the First Division has recently commenced to recognize the force and effect of the foregoing decisions by re-

fusing a hearing on the merits in cases where the record reveals that parties whose rights may be affected have not been noticed in conformity with the rule last above mentioned. See First Division Awards Nos. 14475 and 14673.

From what has been heretofore related, it becomes apparent the established law of the land now is that the provisions of Section 3, First (j), supra, require that notice be given to the Clerks' Organization under the existing facts and circumstances of the case now before us. This Board is no greater than the source of its creation. When that source gave the courts power to set aside its orders and that authority is exercised in the manner above indicated we not only have the right but it becomes our duty to adopt and follow a practice which the courts definitely indicate will give validity to what are now held by them to be invalid awards. With the rule so well established to hold otherwise can only result in unnecessary waste of time and useless expenditure of funds on the part of the employees, the carriers and the Board. Therefore we bow to the inevitable and, notwithstanding what may be found to the contrary in any of our previous awards, hold that this case cannot now be heard on its merits because it appears from the records that the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, representing employees having rights that might be affected by our decision, were not served with notice of the filing of the claim and given an opportunity to be present and heard throughout all stages of the proceedings. In such a situation the proper procedure in our opinion is to dismiss the claim without prejudice, thereby affording the claimant an opportunity to take whatever action it may deem advisable in the future.

In deference to former well-considered decisions, most of which were handed down before the courts firmly established the principle heretofore discussed, it should perhaps be stated that except from a procedural standpoint, in cases where it appears there is a class dispute over who has the right to perform work under existing agreements, the rule heretofore announced will result in nothing materially new or startling. This Board will retain all the authority it heretofore possessed under provisions of the Railway Labor Act, including the power to construe contracts and render awards respecting them just as it has in the past, the only difference being that, having conformed to what the courts have held is essential, its sustaining awards will be held valid and binding. This, we may add, in response to fears expressed by the employees if the rule should be adhered to, works no hardship to but, on the contrary, is to the advantage of each and every claimant in the position of the one here involved. Under the pre-existing rule, if challenged, a claimant would find his sustaining award was invalid under court decree whereas a denial award resulted in complete and final adjudication of the rights of employees covered by the involved contract. Compliance with the rule we have concluded should be followed means that if a claimant succeeds in establishing his claim before this Board, he has acquired rights under an award which will be upheld by the courts as valid and binding.

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 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

The claim should be dismissed without prejudice for the reasons and upon the ground set forth in the Opinion and Findings.

AWARD

Claim dismissed without prejudice and in accordance with the Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 6th day of September, 1951.

DISSENT TO AWARD No. 5432, DOCKET No. TE-5406

We dissent.

A. R. Ferris
Roger Sarchet
G. Orndorff
A. J. Cunningham
J. H. Sylvester