Award No. 5702
Docket No. MW-5630

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Adolph E. Wenke, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

SOUTHERN PACIFIC COMPANY (PACIFIC LINES)

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood:

(1) That the Carrier violated the effective agreement on April 6, 1948 and on subsequent days thereto, when it failed to assign a Maintenance of Way Fuel Oil Pumper to perform the duties of pumping Diesel fuel oil at Taylor Roundhouse, Los Angeles, California;

(2) That the position of Diesel Fuel Oil Pumper, Taylor Roundhouse, Los Angeles, California, be rebulletined and assigned to a Maintenance of Way Pumper in the manner provided in Rule 18 of the effective agreement;

(3) That the Employe assigned to fill the position of Fuel Oil Pumper, referred to above, be compensated at the hourly rate of pay applicable to fuel oil pumpers, retroactive to April 6, 1948.

EMPLOYES' STATEMENT OF FACTS: On January 23, 1948, the Division Chairman of the Maintenance of Way Employes served notice on the Carrier that pending complete construction of diesel pumping and unloading facilities at Taylor Roundhouse, the position of Diesel Fuel Oil Pumper be bulletined on completion of that facility. On the completion of the diesel pumping and unloading facilities at Taylor Roundhouse on April 6, 1948, the Carrier assigned a Mechanical Department employe to the position of Pumper. The employe assigned to the position of Pumper at Taylor Roundhouse holds no seniority in the Maintenance of Way Department.

The facilities for the fuel oil pumping station were assembled, installed and tested by employes of the Maintenance of Way Water Service Gang No. 6, and on January 29, 1948, the employes of that Gang commenced pumping diesel oil into the storage tank. This arrangement continued intermittently, depending upon arrival of fuel cars, until February 14, 1948, when the storage tank was filled to its capacity. No further pumping was performed until 3:30 P. M., April 6, 1948, when Mechanical Department employes were assigned to perform the work of Fuel Oil Pumper at that point.

The duties of the Pumper on this position consist of:

(1) Pumping fuel oil from the tank cars into the storage tank through the use and operation of two 4 inch electric gear driven rotary type, Blackmere fuel oil pumps.

The carrier, having conclusively established that the work involved in this docket does not come within the scope of the Maintenance of Way Agreement, there is no basis under the Maintenance of Way Agreement, for the petitioner's request that a position of diesel pumper be bulletined in the manner set forth in Rule 18 of the said agreement, nor is there any basis for the petitioner's claim for compensation for which no service was performed retroactively to April 6, 1948. The claim is therefore without merit.

CONCLUSION

The carrier asserts that it has established that the claim in this docket is without basis or merit, and therefore, if not dismissed, it should be denied.

All data herein submitted have been presented to the duly authorized representative of the employes and are made a part of the particular question in dispute.

(Exhibits not reproduced.)

OPINION OF BOARD: This claim had its inception with the completion of additional facilities to handle diesel fuel oil at Taylor Roundhouse, Los Angeles, California. The work involved in general consists of unloading tank cars of fuel oil, pumping it into storage tanks and the usual keeping of records relating thereto and care of the equipment used for that purpose. The Brotherhood contends this work is covered by the scope of their agreement with the Carrier and asks that Carrier be required to assign it to them. The work is being done by fuel oil attendants of the Motive Power and Car Departments, a class of employes coming under Carrier's Agreement with the International Brotherhood of Firemen and Oilers, et al. It is Carrier's contention that the work is not exclusively that of employes covered by the Brotherhood of Maintenance of Way Employes and that its having a fuel oil attendant, an employe not covered thereby but covered by the Firemen and Oilers' agreement, was perfectly proper.

Carrier makes an alternative motion to the effect that we either suspend further proceedings herein until the Division has taken action to notify the Motive Power and Car Department employes covered by the Firemen and Oilers' Agreement and give them an opportunity to be heard or to dismiss the claim without considering it on its merits. This is on the theory that without these parties being notified and given a chance to be heard any award we may enter will be void and without force and effect.

Ordinarily we should give this contention no further attention than to say it has already been fully discussed and considered and correctly disposed of by this Division in its Award No. 2253 contrary to Carrier's contention. See also Awards 3999 and 4471 of this Division to the same effect. However, in view of this Division's recent Award 5432, and others that apparently follow it, the matter will be again fully considered.

It should be remembered that the class of employes covered by the Firemen and Oilers' Agreement are within those over which the Second Division of the Adjustment Board is given jurisdiction. See Section 3, First, (h). The question here presented is, does Section 3, First (j), under the situation here presented, require a notice of this hearing to be given to the Firemen and Oilers in order for this Division to render a valid award between Carrier and the Brotherhood on a dispute arising from an interpretation and application of the rules of their Agreement? We think not.

The National Railroad Adjustment Board, consisting of four Divisions, is the creature of and obtains its jurisdiction and authority from Congress through the Railway Labor Act and it is, therefore, to that act that we must look for the answer to our problem here and, to the extent of that authority, its jurisdiction is exclusive. As stated in Slocum vs. Delaware, Lackawanna

& Western Railroad Co., 339 U.S. 239, "We hold that the jurisdiction of the Board to adjustment grievance is exclusive." See also Conductors vs. Pitney 326 U.S. 561.

It should be remembered that the four Divisions of the Adjustment Board are administrative bodies performing quasi-judicial functions but each entirely independent of the other with each given jurisdiction over certain named classes of employes and authority to settle grievances by making interpretations and application of their agreements with the carrier. This is fully evidenced by the following provisions of the Railway Labor Act.

Section 3, First (h) provides: "The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, . . ."

Section 3, First (h) also sets forth what classes of employes each Division shall have jurisdiction of which, for this Division, is as follows:

> "Third division: To have jurisdiction over disputes involving station, tower, and telegraph employes, train dispatchers, maintenance-of-way men, clerical empolyes, freight handlers, express station, and store employes, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employes."

Section 3, First, (i) sets forth the extent of each division's authority as follows:

> "(i) The disputes between an employe or groups 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, * * * 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 disputes 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 will be observed that the last section above quoted relates to disputes between an employe or groups of employes and a carrier or carriers and not between the employes or groups of employes as such. This is further evidenced by Section 2, Sixth, which relates to the same on the property.

The difficulty seems to arise out of Section 3, First, (j), with reference to what it requires in the way of notice. This Section provides:

> "(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."

Necessarily "involved in any dispute submitted to them," as contained in the foregoing section, can only mean such employe or groups of employes and carrier or carriers whose rights can actually be adjudicated by the Division before which the dispute is brought. It does not and cannot broaden the jurisdiction and authority which that Division has, which is limited to the several classes of employes over which the Division is given jurisdiction and the disposition of their disputes arising from the interpretation and application of the rules of their agreements. Here this Division does not have jurisdiction of the classes of employes covered by the Firemen and Oilers' Agreement nor does it have authority to interpret and apply the rules of their agreement. To bring other groups of employes into a hearing over which this Division has neither jurisdiction nor authority and, as to which,

it could make no effective award, would only tend to lend confusion to the hearing and serve no useful purpose.

The question of depriving a person of his property without due process of law, as is provided for in the Fifth Amendment of the Federal Constitution, is often referred to as being involved when parties are not given notice under this provision. The Fifth Amendment provides: "No person shall . . . be deprived of . . . property without due process of law; . . ." This is commonly referred to as having "his day in court." But this right is not one of form but of substance and to have a "day in court" contemplates that when a person is notified and given a hearing before a tribunal that such tribunal will have authority to determine his rights and properly adjudicate them. Otherwise he has not had due notice process. This Division has no jurisdiction of the classes of employes coming under the Second Division. Neither does it have authority to interpret and apply the scope provisions of the agreement they have entered into with this Carrier through the organization representing them. Certainly it could not be said that the requirements of due process would be satisfied as to them by merely notifying them and permitting them to appear before this Division, as any award rendered attempting to adjudicate their rights would be void.

However, their rights are fully protected in this respect by the Railway Labor Act which provides a tribunal, the Second Division of the Adjustment Board, before which they can bring their claim. If this Division should decide the work here involved belongs to the Maintenance of Way employes under their agreement with this Carrier, proper procedures are available to the Motive Power and Car Department employes. They can take the matter to the Second Division for disposition under their agreement with the Carrier. If, in the meantime, the award of this Division is attempted to be put in effect either by Carrier within the time limit as ordered or through action in court under Section 3, First (p), the courts provide proper remedy to keep the matter in status quo until the rights of both parties have been determined by the proper Division of the Adjustment Board. As stated in Order of Conductors vs. Pitney, 326 U.S. 561, "The dismissal of the cause should therefore be stayed by the District Court so as to give an opportunity for application to the Adjustment Board for an interpretation of the agreement. Any rights clearly revealed by such an interpretation might then, if the situation warrants, be protected in this proceeding." See also Dwellingham vs. Thompson, 91 F. Supp. 787.

If, on its being properly presented to the Second Division, that Division should decide the work belongs to the Motive Power and Car Department employes under the Firemen and Oilers agreement with the Carrier, then the courts, under their general powers, could properly determine which of the two groups had the prior right thereto. However, such determination by the court would not relieve the Carrier from its responsibility of having contracted the work to both groups. Such relief lies through the processes provided by the Railway Labor Act. See Section 6 thereof. In the meantime, Carrier would be liable under its contracts with both Organizations.

This is comparable to a person who sells his home to two people. Clearly he cannot specifically perform as to both and the contract right prior in point of time would be entitled to specific performance. But that would not relieve the seller from his legal responsibility under his contract with the other party when determined by the proper tribunal.

All of this is set forth in Order of Railroad Telegraphers et al vs. New Orleans, Texas and Mexico Railway Co. 156 Fed (2) 1 on appeal from 61 F. Supp. 869, certiorari denied 329 U.S. 758. Therein the court stated:

> "The act authorized the Board to interpret and to apply the collective bargaining contracts of the crafts in controversies between the crafts and the carriers involving the contracts; but it is given no authority to pass on disputes between crafts. The act leaves the

settlement of inter-craft disputes to conference or to the Mediation or Emergency Boards."

* * * * *

"Even though the O.R.T. were not permitted to intervene in the proceeding brought by the B.R.C involving its contract with the carriers, it still has a right under the Act to commence a proceeding against the carriers and to obtain an order of the Adjustment Board interpreting and applying its own contract with them. Until that step is taken the court can not determine whether a wrong has been done calling for the intervention of a court of equity to protect the rights of individuals or of the public."

What is said by the district court in the foregoing case by quoting from the concurring opinion of Judge Hutchison in Bates vs. Union Terminal Co. 89 Fed (2) 768, is here applicable. Therein the court quoted: ". . . it (The Adjustment Board) does not concern itself with disputes between employes as such . . . it deals entirely with disputes between carriers on the one hand and their employes on the other."

The district court also said, which is here pertinent: "Had plaintiff union been permitted to intervene in the case before the Adjustment Board filed by defendant union, . . . and had (the Division) decided where and to what extent the jurisdiction overlapped on the jurisdiction of defendant union, or vice versa, and given an award in accord with such finding and that the collective bargaining contracts of the unions were void to the extent they included work beyond the jurisdiction of the contracting party, it is our opinion that such awards would have been beyond the powers of the Adjustment Board and a nullity."

Not only is the Carrier fully protected before this Division, where it may produce evidence as to usage, practice, custom, etc., as referred to in Order of Conductors vs. Pitney, 326 U.S. 561, but likewise in court, if the award is therein sought to be enforced under Section 3, First (p), as the order of any division of the Adjustment Board is only prima facie evidence of the facts therein stated. See Section 3, First (i) and Rules of Procedure of the Adjustment Board issued October 10, 1934.

In view of the foregoing we find that groups or classes of employes or the organization which represents them, of which a division of the Adjustment Board is not given jurisdiction, are neither necessary nor proper parties to a dispute properly before it arising out of an interpretation and application of an agreement between a class of employes and a carrier of which the division does have jurisdiction. Consequently, the requirements of Section 3, First (j), that: ". . . 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." does not apply to them.

We come therefore to a consideration of the claim on its merits. Since the scope rule here involved relates to the work which is encompassed by reference to positions it is well to state the rule applicable thereto.

"Scope rules generally fall within two classifications, those which are very general in character and purport to include all work traditionally performed by the contracting craft and those which specifically spell out the work included." Award 3999 of the Third Division.

As stated in Award 4889 of this Division: "The scope rule of the Maintenance of Way agreement describes positions and not the work to be performed. The work falling within the scope of the agreement is that which is historically and customarily performed by the occupants of the positions named." See also Award 5120 of this Division.

Also the evidentiary rule laid down in Award 4889 of this Division as to operating rules: "We realize that operating rules are unilateral in character and not contractual in their nature. They may, however, constitute evidence to be considered in determining conflicting questions of facts. They constitute competent evidence of the duties assigned positions named in the scope rule."

From the record we find that prior to the consideration of this claim on the property fuel oil had been used and handled on the property of this carrier for more than thirty years, although in the beginning its use was limited. As equipment using fuel oil increased, the quantity handled increased until, with the advent of diesels, it included both black oil and diesel fuel oil. The facilities for handling diesel fuel oil at the Taylor Roundhouse, which gives rise to this dispute, were installed in the early part of 1948 although black oil used in steam engines had been handled there since about 1930. Admittedly Carrier has used employes of the Motive Power and Car Departments classified as fuel oil attendants to do this work. In fact, Carrier has always used either employes classified as fuel oil pumpers or as fuel oil attendants to do this type of work, depending upon where it was being done on the property.

During the period from December 16, 1921 to April 6, 1925, the United Brotherhood of Maintenance of Way Employes and Railway Shop Laborers represented both Maintenance of Way employes and unskilled employes in the Motive Power Department and the scope rule then in effect covered both oil pumpers and fuel oil attendants. As of April 6, 1925, this organization relinquished its representation of Shop Laborers, which included fuel oil attendants. Between April 6, 1925 and September 1, 1926, the name of United Brotherhood of Maintenance of Way Employes and Railway Shop Laborers was changed to Brotherhood of Maintenance of Way Employes and the latter entered into a new agreement with Carrier, effective as of September 1, 1926, covering employes in the Maintenance of Way Department. It is under the Scope Rule of this Agreement that the claim is made. It is significant that this Scope Rule does not contain Railway Shop Laborers nor employes covered by (i) in the former agreement which included fuel oil attendants. It does include fuel oil pumpers.

Subsequent to the United Brotherhood of Maintenance of Way Employes and Railway Shop Laborers' organization relinquishing Railway Shop Laborers as of April 6, 1925, they were represented by the Shop Crafts Association until December 27, 1934. As of December 27, 1934, the National Mediation Board certified the Railway Employes Department, A. F. of L., as the representatives of Roundhouse and Car Department Laborers, including fuel oil attendants. Subsequent thereto, effective October 16, 1937, the representation passed to The International Brotherhood of Firemen and Oilers where it is presently lodged.

Based on this historical background of practice and agreements, we do not think the position of fuel oil pumper under the Maintenance of Way Employes' agreement ever had the exclusive right to perform the work of unloading and pumping fuel oil into storage but that whether it was done by fuel oil pumpers or fuel oil attendants depended largely upon where it was being done. In view thereof we think it was proper for Carrier to have it done at the Taylor Roundhouse by Fuel Oil Attendants.

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 Carrier has not violated the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Acting Secretary

Dated at Chicago, Illinois, this 4th day of April, 1952.

DISSENT TO AWARD NO. 5702, DOCKET MW-5630

It is an elementary rule, applicable alike to judicial or administrative tribunals, that where it appears complete justice cannot be done by the tribunal in the proceeding before it, jurisdiction of the matter should be declined. And this rule is particularly applicable where the decision of the tribunal will not in all respects conclude the matter. Equally elementary is the rule that notice of a proceeding before a judicial or administrative tribunal is a requirement which must be strictly adhered to and failure to give such notice to all affected by, or having an interest therein, invalidates the proceeding. We are now told these rules no longer apply to our proceedings; that we should, knowing that our decision cannot do complete justice, assume jurisdiction of, and make an award in, a dispute without notice to employes under the jurisdiction of another Division adversely affected thereby; that an employe under the jurisdiction of another Division of this Board adversely affected by a decision of one Division is "fully protected" by his right to obtain a contrary decision from another Division of this Board, and his right, through the Courts, "to keep the matter in **status quo** until the rights of both parties have been determined by the proper Division of the Adjustment Board." These statements are made in spite of the fact that a valid award, in the absence of proper notice to all employes involved in the dispute, could not be made in either proceeding by either Division under the uniform holdings of the Courts since **Nord v. Griffith,** (1936) 86 F. (2d) 481, **certiorari** denied 300 U.S. 673, where First Division Award No. 68 was held void because of the failure to notify an adversely affected employe, down through **M-K-T RR. Co. v. Clerks,** (1951) 188 F. (2d) 302, where Third Division Awards Nos. 3932, 3933 and 3934 were similarly found to be void. See, also, **Brand v. Pennsylvania RR. Co.,** 2 L.C. 18,489; **Estes v. Union Terminal Co.,** 89 F. (2d) 768; **Railroad Yardmasters of America v. I.H.B. RR. Co.,** 70 F. Supp. 914, 166 F. (2d) 326; **Hunter, et al., v. AT&SF RR. Co., et al.,** 78 F. Supp. 984, 171 F. (2d) 594, **certiorari** denied 337 U.S. 916; **Templeton v. AT&SF RR. Co.,** 84 F. Supp. 162, 181 F. (2d) 527, **certioari** denied 330 U.S. 823; **Hunter v. AT&SF RR. Co.,** 188 F. (2d) 294; and **Kirby v. Pennsylvania RR. Co.,** 188 F. (2d) 793.

But, by ignoring the above cases, the author of this award finds, through a devious course of reasoning, that the notice required by the Act to be given to an employe or employes "involved in any dispute" must be given only when all of the parties "involved in" the dispute are subject to the jurisdiction of the same Division. The fact that, through lack of such notice, other employes may be deprived of their rights is dismissed with the cavalierly assertion that "their rights are fully protected" because "they can bring their claim" before another Division. The realities of such a situation, as shown by the history of Awards Nos. 6635 to 6639, inclusive, entered by the First Division on April 20, 1942, are completely ignored. There, as result of awards entered without notice to them, 250 express messengers were deprived of their jobs by brakemen and such jobs are still being held by brakemen long after the awards were held to be "illegal and void" because entered without notice to the express-messengers. **Templeton v. AT&SF RR.**

Co., et al., 84 F. Supp. 162, 181 F. (2d) 527, **certiorari** denied 330 U.S. 823. Much of this delay might have been avoided if, when the claim of the brakemen to the express-messengers' work was brought before the First Division, notice had been given to the express-messengers. The express-messengers would then have been in position to protect their rights either by legal action to enjoin the proceedings before the "illegal and void" awards had been entered or, if no Division of the Board has jurisdiction over both parties, by "resort to the machinery provided by Section 6 for changing" such "overlapping agreements." **M-K-T RR. Co. v. Clarks,** supra.

The statement "that groups or classes of employes * * * of which a division of the Adjustment Board is not given jurisdiction, are neither necessary or proper parties to" this dispute is hopelessly in error. They are "indispensable parties" because, as stated by Justice Wenke, the author of this award, in **Cunningham v. Brewer,** (Neb. 1944) 16 NW (2d) 533, "a final decree cannot be made without affecting their interest." That rule was applied also in **Local B 843 of International Brotherhood of Electrical Workers v. Western Public Service Company,** (Neb. 1941) 299 NW 531, where a union sought to oust twelve of its members from their employment with the defendant. The union brought suit in equity to enjoin the defendant from retaining in its employ any union member in arrears in the payment of union dues. The twelve delinquent members were not made parties to the suit and had no notice thereof. Their names, however, were listed in the petition. The defendant demurred to the petition on the ground that there was "a defect of parties defendant." The union refused to amend its petition to make the delinquent members parties-defendant and the District Court dismissed the action. The Nebraska Supreme Court, in an unanimous opinion, affirmed the action of the District Court, saying, in part:

> "The rule in equity by which the trial court was guided in sustaining the demurrer for defect of parties defendant and in finding that the employes were indispensable parties was stated in a former case as follows:
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> > ' "Indispensable parties" to a suit are those who not only have an interest in the subject-matter of the controversy, but also have an interest of such nature that a final decree cannot be made without affecting their interest or leaving the controversy in such condition that its final determination may be wholly inconsistent with equity and good conscience. Jones v. Evans, 99 Neb. 666, 157 NW 620.'
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> "* * * The 12 employes who are members of the union have a vital interest in the subject-matter of the suit. A final decree cannot be entered without affecting their interests. An injunction, if granted, might deprive them of their means of livelihood. * * * Neither inconvenience to the plaintiff nor risk of delay in reaching a final decision does away with the necessity for joining indispensable parties as defendants in this case."

In effect, what is held by the author of this award is that one Division may decide a dispute in the absence of an indispensable party, and without the benefit of the evidence on behalf of such indispensable party. Another Division may then decide a dispute involving the person who was an indispensable party in the first case, in the absence of the claimant in the first case, an indispensable party in the second case. Neither Division will have before it all of the parties, nor all of the evidence. Then, if conflicting awards are rendered, resort may be had to the Courts by the employes. What about the Carrier? It has no right to go to Court in either case if there is a sustaining award. It can only defend if a suit is instituted. To say that

a Division has jurisdiction to render an award in the absence of indispensable parties because it does not have jurisdiction over all of the parties is without support.

Obviously, under the above decisions and Awards No. 5432, Referee Parker, Nos. 5599 and 5600, Referee Robertson, and No. 5627, Referee Wyckoff, of this Division; Nos. 1523, 1524, 1525 and 1526, Referee Parker, of the Second Division; No. 14285, Referee Rader, No. 14475, Referee Weeks, Nos. 14673 and 14837, Referee Livingston Smith, No. 14763, Referee Guthrie, and Award No. 14903, Referee Bushnell, of the First Division, the Opinion herein is in error insofar as it relates to the jurisdictional feature.

/s/ W. H. Castle

/s/ R. M. Butler

/s/ A. H. Jones

/s/ C. P. Dugan

/s/ J. E. Kemp