Award No. 5790
Docket No. CL-5763

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Adolph E. Wenke, Referee

PARTIES TO DISPUTE:

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

THE WESTERN PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: This is a claim of the System Commtitee of the Brotherhood that:

(a) The Carrier violated its agreement with the Organization when it abolished the position of General Clerk at Lyoth Q. M. Depot, and assigned the work of this position to an employe not covered by the agreement.

(b) The Carrier shall now re-establish, readvertise and reassign the position of General Clerk at Lyoth Quartermaster Depot in accordance with the Rules of the Clerks' Agreement.

(c) Mr. J. M. Rustan, and all other employes adversely affected, be compensated for all wage loss sustained subsequent to February 14, 1948, as a result of the improper abolishment of the position of General Clerk at Lyoth Q. M. Depot.

JOINT STATEMENT OF FACTS: In October 1942, the Department of the Army placed a Quartermaster Depot in operation at Lyoth, California, now known as the Lyoth Quartermaster Depot. Carrier has furnished rail service for the installation subsequent to that time. The Quartermaster Depot is located adjacent to the Railroad right of way, but in going to and from the Lyoth Station to the Headquarters Building at the Depot, the distance is approximately 4.5 miles.

Prior to October, 1942, Carrier maintained a one-man agency at its Lyoth station to perform all clerical and telegraph duties. Upon the opening of the Quartermaster Depot, the agent at Lyoth Station was unable to perform all of the station work himself and additional regular clerical positions were established to assist the agent as follows:

1—Station Clerk—effective October 20,1942

1—Station Clerk—effective October 21,1942

1—Station Clerk—effective July 26,1943

As activity at this station increased, and in view of the distance between the Lyoth Station and Quartermaster Depot it became necessary to separate the functions at the Lyoth Quartemaster Depot from those at Lyoth Station.

correctness of this statement is demonstrated by the reasoning contained in Award No. 1314 wherein it is said: 'Where the duties incidental and normal to a position not under the craft flow out directly to an assistant included in the agreement and taken on when work increased to a point where such assistance was necessary, it would seem that by the same token they could ebb back directly to the original position when the necessity for assistance no longer existed, provided that duties so involved in the ebb and flow were such as were indigenous to that position—normal and incident to it.' See also Award No. 931."

The joint Statement of Facts clearly shows that the work involved in this dispute was:

(1) Incident to a station agent's position covered by the Telegraphers' Agreement;

(2) Assigned to a position under the Clerks' Agreement only after the volume of work increased to the extent that the agent could not perform all of the work;

(3) Returned to a Station Agent's Position, the position to which it was incident, when the work load decreased.

Under the established rule of your Honorable Board, clerical work incident to a position outside of a Clerks' Agreement may flow from such position to positions under the Clerks' Agreement and, then, if it decreases revert to the position to which it is incident. There is no merit to the grievance here presented and you are urged to deny it.

All of the above has been presented to the Employes.

(Exhibits not reproduced.)

OPINION OF BOARD: This claim is based on the contention that Carrier violated the parties' Agreement when, as of February 16, 1948, it abolished the position of General Clerk at Lyoth Quartermaster Depot. The System Committee of the Brotherhood asks that Carrier be required to reestablish the position and compensate John M. Rustan, and all other employes adversely affected thereby, for all wage loss sustained by reason thereof.

The facts involved are not in dispute and were submitted by a joint statement of the parties. They will not be herein repeated or set forth except as it may be necessary to discuss them in connection with a disposition of the claim on its merits. Suffice to say that they raise the question of whether or not Carrier was, under the rules of the parties' Agreement then effective, authorized, when on February 16, 1948 it abolished the position of General Clerk at its Lyoth Quartermaster Depot, to assign to the agent there, a position not covered by the Clerks' Agreement, the remaining clerical duties of the General Clerk and have him perform them. These duties, up to that date, had been performed by the General Clerk.

Carrier members of the Division now seek to bring into this case the question of notice not having been given to the Organization representing the Agent at the Lyoth Quartermaster Depot and contend that, pursuant to Section 3, First (j) of The Railway Labor Act, such notice is required in order for the Division to have jurisdiction to render a valid award. We are fully aware of the principle applicable in courts that the question of jurisdiction can be raised at any time. However, The Railway Labor Act provides, when a Division is unable to agree upon an award and the case is deadlocked, that a referee is to be selected to sit with the Division as a member thereof "and make an award." See Section 3, First (1). This language, and the intent evidenced by all the provisions of "Sec. 3, First," means an award based upon issues raised by the parties upon which the Division itself could not agree and not upon issues which, up to that time, had never been raised.

Scope rules which cover classes of employes by referring to positions generally reserve to employes covered by the Agreement all work usually and customarily performed by the occupants thereof at the time of the negotiation and execution of the Agreement. In the case of Clerks' Agreements it has been held that it does not purport to reserve all clerical work to clerks. This is evidenced by the many awards of this Division recognizing certain qualifications thereof or exceptions thereto. However, clerks have the right to perform all clerical work in the absence of it falling within such qualifications or exceptions. See Awards 2334 and 3003 of this Division.

These exceptions and qualifications include the right of telegraphers to perform it, although they cannot be detached from their post and be sent elsewhere to perform it nor can the work be brought to them. See Awards 636, 4288, and 4867 of this Division. Others include the ebb and flow principle which is applicable when the duties are incident and normal to a position not under the Clerks' Agreement. See Awards 931, 1314, and 2334 of this Division. But, as stated in Award 4559 of this Division, "* * *, the parties can provide otherwise by their Agreement." Under these and other Awards of this Division the Carrier had the right to assign this work to the agent at the Lyoth Quartermaster Depot when it became a one-man agency as of February 16, 1948, unless the following provisions of the parties' Agreement prevent it from doing so.

> "Positions within the scope of this agreement belong to the employes covered thereby and nothing in this agreement shall be construed to permit the removal of positions from the application of these rules, except in the manner provided in Rule 64." SCOPE, Rule 1.
>
> "Should either party to this agreement desire to revise or modify these rules, 30 days' written advance notice, containing the proposed changes, shall be given and conference shall be held immediately upon the expiration of said notice unless another date is mutually agreed upon." Rule 64.

In determining the meaning of the foregoing provision quoted from Rule 1 Carrier asks us to consider the rule proposed by the Organization during negotiations preceding its adoption. If a rule is clear then the history of the negotiations leading up to its adoption should not be considered in determining its meaning for we are then limited to a consideration of the intention made manifest thereby as we do not have authority to rewrite or amend the rules or provisions of the Agreement itself. See Awards 2467, 4181, 4506, 5133, and 5430 of this Division. Of course, if the rule or provision agreed to can be said to be ambiguous the opposite would be true.

The word positions, when used in connection with an agreement, has been defined by this Division as " 'positions' which are subject to the agreement are protected to the craft by the agreement, and since 'work' is of the essence of a position such work which is the manifestation of the position and the identity of it is likewise protected to the craft." Award 1314 of this Division.

At the time the agreement containing this provision became effective, on December 16, 1943, clerical forces were performing the work at the Lyoth Quartermaster Depot and the work they were performing became subject thereto. Later, as of July 1, 1944, an agency was established at the Lyoth Quartermaster Depot. As of February 16, 1948, when the last clerical position, that of General Clerk, was abolished Lyoth Quartermaster Depot became a one-man station and the agent, an employe not covered by the Clerks' Agreement performed all the work at that point.

We find that the provision of Rule 1 herein quoted prohibited the Carrier from doing what it did in the manner in which it was done. Carrier should

have complied with these provisions of its Agreement with the Clerks which relate thereto.

Under a comparable provision of a Clerks' Agreement this Division so held in its Award 3563. Therein it stated: "The work being that of clerks, it could not be removed from the agreement except by agreement." Such is the effect of the provision here which abrogated the Carrier's right to do so in the absence thereof. As stated in the foregoing award: "The foregoing awards (awards relating to the principle of ebb and flow) do not apply because of the express provisions contained in the confronting agreement to the effect that 'no position shall be removed from this agreement except by agreement.'"

Carrier suggests the claim is stale and for that reason should not be allowed. Final denial was made on the property as of February 28, 1949, and the appeal to this Division was lodged here on June 13, 1951, or over 2 years and 3½ months later. The Railway Labor Act carries no limitation which bars claims by reason of lapse of time. See Award 1608 of this Division. If such limitation is desired it must be by amendment to The Railway Labor Act and not by Awards of this Division.

We think Carrier violated the Agreement when it had the agent at Lyoth Quartermaster Depot, on and after February 16, 1948, perform the clerical duties which, up to that date, had been performed by the General Clerk. However, the fact that Carrier must assign this work to clerical employes under the Clerks' Agreement who are entitled thereto and have it performed by them does not necessarily mean that the position of General Clerk must be restored. It is sufficient compliance with the Clerks' Agreement if the work be assigned to and performed by clerical employes entitled thereto. Nor is the Claimant, or any other employe who has been adversely affected thereby, necessarily entitled to all monetary loss he or they may have suffered as a result of the position being abolished. His or their claim for compensation must necessarily be limited to the extent of compensation for the work which the agent has actually performed since February 16, 1948, which immediately prior thereto was being performed by the occupant of the position of General Clerk. To that extent the claim is allowed but otherwise denied.

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

The Carrier violated the Agreement.

AWARD

Claim sustained but only to the extent as set forth in the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

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

Dated at Chicago, Illinois, this 23rd day of May, 1952.

DISSENT TO AWARD 5790, DOCKET CL-5763

The author of this Award takes the erroneous position that the question of jurisdiction may not be considered by the Division unless that question has been put in issue by one of the parties involved. In other words, if neither party raises the issue of jurisdiction, the Division must make an award even though it admittedly lacks jurisdiction of the dispute. The holdings of courts and administrative bodies on this point are unanimously opposed to the position taken by the author of this Award. Affirmative relief cannot be granted by an administrative body in any case until it is definitely ascertained that the subject-matter of the complaint is clearly within its jurisdiction. **Snook v. Central RR. Co. of New Jersey.** 17 ICC 375. In a case involving a dispute between an employe of one carrier and the employes of another carrier, it was held this Division was wholly without jurisdiction of the subject-matter of the dispute, and our Award No. 183 was "an absolute nullity, binding on no one." **Stephenson v. New Orleans and NER Co.,** (1937) 177 So. 509, 180 Miss. 147. The question of jurisdiction is not merely an issue, which must be raised by one of the parties before it will be considered by the Division, but is rather a prerequisite to the exercise of the Division's statutory powers, which the Division must determine for itself even if not put in issue by either party. Justice Robert H. Jackson, while Attorney General of The United States, expressed the opinion that: "Every case filed with the Railroad Adjustment Board involves a question of jurisdiction. *** * * If the Board is to function at all** it must decide these jurisdictional questions subject, of course, to review by the courts in suits to enforce awards of the Board or other proper proceedings." (Emphasis added). 39 Op. Att. Gen. 415 (February 19, 1940). It is the duty of the administrative agency in the first instance to determine the problem of jurisdiction. **Myers v. Bethlehem Shipbuilding Corp.,** (1938) 303 U. S. 41; **Order of Railway Conductors v. Swan.** (1947) 329 U. S. 520.

If there is a lack of jurisdiction, it is the duty of the Division on its own motion to deny the petition, if neither party to the dispute raises the question of jurisdiction. The Interstate Commerce Commission, in **Chandler Cotton Oil Co. v. F. S. & W. Ry. Co.,** 13 ICC 473, said:

> "In all controversies before it if there is lack of jurisdiction, whether from absence of essential facts or through want of power in The Statute, **it is the duty of the Commission, of its own motion,** to deny jurisdiction. This question it is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties. This rule applies to all tribunals of limited power. Mansfield, Coldwater and Lake Michigan Railway Co. v. Swan, 111 U. S. 382."

Therefore, in raising the question of notice to the Organization representing the Agent, the Carrier Members did not seek to raise a new issue, but properly sought to determine whether the Division had jurisdiction to render a valid Award.

The jurisdiction of the Division is limited by Sec. 3, First (h). If the Division undertakes to make an Award in a dispute which is outside its jurisdiction, any Award entered is an absolute nullity. **System Federation No. 59 vs. Louisiana C. A. Ry. Co.,** (1941) 119 F. 2d 509, certiorari denied, (1942) 314 U. S. 656. Failure to serve notice required by Sec. 3, First (j) renders an award null and void. **Nord v. Griffith,** (1936) 86 F. 2d 481, certiorari denied 300 U. S. 673; **Hunter v. AT & SF Ry. Co.,** (1949) 171 F. 2d 594, certiorari denied 337 U. S. 916.

Similarly, an order of a state administrative body is void where the administrative body lacks jurisdiction of the subject-matter of the dispute. **Security State Bank of San Juan v. State,** (1943) 169 S. W. 2d 554, error refused (Tex. Civ. App.). The Nebraska Supreme Court, in an appeal from a ruling of the Nebraska State Railway Commission setting aside a prior transfer by the Commission, of a certificate of public convenience and

necessity, under circumstances remarkably similar to those in the claim before us, held, in an opinion by Justice Adolph E. Wenke, the very author of this Award:

> "No hearing having been had on **or notice given to interested parties** of application M-8664 before the order entered on December 26, 1947, it was made without authority and therefore **null and without force and effect.**" **Application of Noylon,** (1949) 151 Neb. 587, 38 N. W. 2d 552. (Emphasis added).

Section 3 First (h) sets up four Divisions of the Adjustment Board, whose proceedings shall be **independent** of one another, and gives each Division jurisdiction of disputes involving certain specified classes of employes. Section 3 First (i) provides that "* * * disputes may be referred by petition of the parties or by either party to the **appropriate** division * * *," (emphasis added), not that disputes may be referred to any Division.

If, as the author holds, the Division must abdicate its power and duty to determine the question of jurisdiction, unless the issue is raised by a party, the acquiescence of parties to disputes could circumvent the clear language of Sec. 3, First (h) and confer on the Third Division the power to make an award in a dispute over employes which another Division of this Board has, by specific provision of the Railway Labor Act, exclusive jurisdiction. Surely the language of Sec. 3 does not show an intent that the Division should be powerless to prevent such chaos.

The author of this Award also errs in dismissing the Carrier's contention that the claim is stale. The author's reason for so doing is that . . . "The Railway Labor Act carries no limitation which bars claims by reason of lapse of time." This conclusion is erroneous.

We direct attention to the fact that one of the general purposes of the Railway Labor Act, as stated therein, is "(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." Railway Labor Act, Sec. 2. While it is true that a time limit in which an appeal must be taken to this Board from an adverse determination by a Carrier is not stated in the Act, or in the agreement before us, it is contemplated that disputes arising under it shall be handled expeditiously. The parties are entitled to a reasonable time to appeal in the light of all the circumstances. For over two years the Organization took no steps to bring the claim to this Board. The elapsed period exceeded that which could be said to be reasonable under all the circumstances shown. The Carrier had a right to assume after a period of over two years that the Organization had accepted the Carrier's determination of the issue. The purposes of the Act would be frustrated if disputes could be so held in abeyance and raised again at any future time when the chances of success might appear more favorable.

For the reasons given above, the opinion herein is in error insofar as it relates to the jurisdictional question and to the question of the time limitation for making a claim.

After failing to dismiss the Claim by reason of lack of notice to parties whose interest is affected by this Award, the majority, which included Referee Wenke, then renders an Award sustaining the Claim. Error is compounded upon error.

Award 3563 is cited as having in the Clerks' Agreement a provision comparable to Scope Rule 1, here involved. But Docket CL-3542, which resulted in Award 3563, did not involve clerical work performed by telegraphers.

Award 615 and other awards that follow from the basic background for all subsequent awards on this question, and have been cited with approval and as authority by referees time and time again in their awards.

By this dissent we do not undertake a complete discussion of either the jurisdictional question, or of the erroneous holdings in the Opinion. We have demonstrated the fact that the Award is void. It should be treated as such.

/s/ J. E. Kemp

/s/ C. P. Dugan

/s/ R. M. Butler

/s/ W. H. Castle

/s/ A. H. Jones