Award No. 6696
Docket No. SG-6700

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

William M. Leiserson, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD SIGNALMEN OF AMERICA

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railroad Signalmen of America on the Elgin, Joliet and Eastern Railway:

(a) That the Carrier violated the provisions of the current Signalmen's working agreement between this Carrier and the Brotherhood, when on September 13, 14, and 17, 1951, at Waukegan, Ill., it caused an unauthorized diversion of signal line-wire work to an electrical T. & T. line gang.

Also when, on September 18, 1951, at North Chicago, Ill., it caused an electrical T. & T. line gang to perform signal line-wire work.

Also when, on September 19, 1951, at West Chicago, Ill., it caused an electrical T. & T. line gang to perform signal line-wire work.

(b) That the following Signal Department employes, to whom this work properly accrued under the agreement, be allowed the following overtime earnings to cover the work of which they were deprived as a result of the Carrier's violation of the Signalmen's working agreement:

H. C. Dieter—Signal Foreman	—40 hrs., at	$3.04	per	hour
D. Schumaker—Lead. Sig.	—40 hrs., at	3.0615	"	"
W. Timm—Signalman	—40 hrs., at	2.9355	"	"
N. Hilger—Asst. Signalman	—40 hrs., at	2.7735	"	"
F. Marshall Jr.—Asst. Sig.	—40 hrs., at	2.5215	"	"
R. Kovac—Asst. Signalman	—40 hrs., at	2.5215	"	"

OPINION OF BOARD: In this and the accompanying Docket TE-6722, the only question to be decided is whether notice of oral hearings must be given to others allegedly involved in the disputes in addition to the petitioners and respondents in these cases. What records there are in the two cases have been considered together. In each case, ex parte submissions were filed with the Third Division by the Organization representing the employes and by the authorized representative of the Carrier. In both cases the submissions requested oral hearings.

The normal practice of the Division in such cases has been to set a date for oral hearing, and its Secretary then sends out notices together with a copy of the Employes' submission to the Carrier and a copy of the Carrier's to the Employes. The written notice, besides giving the time and place of hearing, advises the parties:

> "In accordance with policy and practice adopted by the Third Division on October 9, 1935, exchange of the respective submissions is made herewith.
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> "In connection therewith you are hereby advised that the Third Division is not disposed to admit evidence at an oral hearing which has not theretofore been presented for consideration by the interested parties during negotiations between them in their undertaking to adjust the dispute without petition to the Adjustment Board."

The oral hearing is thus really oral argument on a record previously made, presentation of new evidence not being permitted by the rules. The record normally includes: (1) the original ex parte submissions which recount the handling of the dispute on the railroad in "the usual manner", as required by the Railway Labor Act; (2) the answers or rebuttal the parties file to each other's statements of facts and contentions after the submissions are exchanged. Later, written answers to arguments at oral hearing are also included in the record.

In the cases here, however, no such completed records were made. Because the five Carrier Members and the five Labor Members of the Division deadlocked on the question of who was entitled to notice, no oral hearing was held, and the ex parte submissions were not exchanged. The record in the present proceedings, therefore, consists only of the original submissions which contradict each other in important statements of fact, and neither party had an opportunity to refute the statements of the other, or to submit evidence to prove its statements.

After the Referee was appointed to sit as a member of the Division for the purpose of breaking the deadlock, a "Panel Argument" was held with none of the parties present, at which Labor and Carrier Members argued the issue of due notice before the Referee. Each group of Members submitted a memorandum in the nature of a brief (based on the incomplete record) supporting the respective positions of the petitioning Employes and the respondent Carriers as contained in their ex parte submissions. In so doing, they used the assertions of fact in the submissions as if they were proved and not in dispute.

Although all ten regular members of the Division are agreed that only the due notice issue is to be decided in the present proceeding, the Labor Members nevertheless raised the question of the departure from the usual practice which prevented the petitioners and respondents from answering each others' submissions and left the record incomplete. They argued:

> "The merits of this dispute cannot be considered at this time for reason that the parties have not yet been afforded an opportunity to complete their respective presentations. This state of affairs arises out of the fact that Carrier Members of the Third Division would not concur in setting the case for oral hearing unless notice of hearing was sent 'to other employes who are concerned' . . . (Further), the Carrier Members have not yet identified the 'other employes who are concerned.'"

The Carrier Members' contention is that the Division has no jurisdiction over the disputes until proper notice is given to all concerned. They strongly object to the Division "assuming jurisdiction and proceeding without first giving notice of the proceedings to the New York, New Haven and Hartford Railroad Company . . . , the Pennsylvania Railroad Company . . . , and to

the Pennsylvania Railroad Telegraphers . . . " (TE-6722), and to the International Brotherhood of Electrical Workers in SG-6700. They further state:

> "In any dispute where the jurisdictional issue is raised, our first inquiry should be to determine who are the employe or employes . . . in the dispute? **For our answer we must look to the courts.** By proceeding in this orderly manner we do not risk the complete chaos which results when the same work is given to two crafts."

They also cite court decision and awards of the Third and other Divisions of the NRAB in support of this position.

It is plain from the above that the Carrier Members have identified the "others" who (they contend) are entitled to notice of hearings, in addition to the parties to the working Agreements which are alleged to have been violated. But if, as the Carrier Members say, an inquiry must first be made to determine who are the employes and carriers involved, this must be done by the Division, as the statement implies, and not by the courts. We cannot look to the courts for "our answer", until the Division has first made its determination. The question arises therefore whether the Division can make such a determination on the incomplete record where the facts as to who is entitled to notice are in dispute.

Obviously the mere naming of others than the parties to the agreements and asserting that they are involved cannot be conclusive. There must be evidence beyond mere assertions on which to base a finding that the others are in fact involved. A court does not rule that a third party is entitled to notice of hearing in a dispute between two parties to a contract without evidence showing that the third party has a legitimate interest in the dispute. Thus the first step in an inquiry by the Division would be to ask the parties who filed ex parte submissions to answer each other's contradictory statements of fact and submit evidence to clear up the discrepancies. This was not done because, under the procedure followed, the ex parte submissions could not be exchanged and the necessary clarification made until the cases had been set for oral hearing.

By not permitting the parties to complete their presentations, the Division has created a difficult problem for itself, which the Carrier Members' brief makes plain:

> "The claim that is here advanced by the Signalmen (SG-6700) is based on an alleged diversion of signalwire work and holds that such work has customarily been performed the same as here by its electrical T&T line gangs represented . . . by the International Brotherhood of Electrical Workers.
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> "While the petitioner (in TE-6722) charges a change in the practice July 23, 1951, he offers no satisfactory evidence of any change in the operating procedures at that time. The Carrier denies any change and states, (without it being refuted)*, that at least for 40 years the program for handling New Haven trains to and from the P.R.R. has remained the same as now."

At the Panel Argument, the phrase marked (*) was, on request, struck from the brief as written, admittedly because there had been no opportunity for refutation. But whether there was diversion of work or not, and whether there was a forty year practice which was changed or not, are questions that have a direct bearing on the issue of due notice, as well as on the merits of the disputes. For if there was no diversion of work and no change in practice, the others alleged to be concerned would hardly be involved in the disputes. How then is the Division to determine who must receive notice of oral hearings when the parties were not afforded an opportunity to submit rebuttal evidence so that the Division could make a finding whether work was actually diverted

and the practice changed so as to involve others than the parties to the working agreements?

The Referee cannot agree with the contention of the Employes that complete presentations as to the merits of the claims must be made before the question of due notice is decided. But with respect to diverting work or changing practices or any similar matters that have a bearing on due notice, it appears essential that the parties who file ex parte submissions should have these exchanged and be given opportunities to answer each other's conflicting statements of fact. Otherwise the Division would lack a factual basis for determining what carriers and employes are involved in disputes.

It seems to the Referee, therefore, that the procedure followed by the Division in the instant cases was faulty; but he makes no decision on the question. Such a procedural matter is for the ten regular Members of the Division to decide. The question is discussed here both because it was argued in the briefs, and also because the incomplete state of the record makes determination of the due notice issue particularly difficult in Docket TE-6722 as will appear in the separate decision in that case. Fortunately the problem is not so important in Docket SG-6700.

While the issue of who is entitled to notice is the same in both cases, there is a vital difference between them. In SG-6700 there is a Tripartite Agreement signed not only by the Carrier and the Signalmen who are admittedly parties to the dispute, but also by the Electrical Workers whose right to notice is questioned. In TE-6722 there is no such Agreement. The dispute in that case alleges violation of an Agreement between the Long Island Railroad Company and its telegrapher employes, while the other Carrier and Employes who are alleged to be involved are in no way parties to this Agreement, but have separate working Agreements of their own.

Confining ourselves now to the specific issue in SG-6700, there is in evidence in this case the following Agreement:

> "It is tentatively agreed between the Elgin, Joliet and Eastern Railway Company, the Brotherhood of Railroad Signalmen of America and the International Brotherhood of Electrical Workers that until such time as a definite agreement can be entered into by the above mentioned brotherhoods on the matter of who will construct and/or maintain signal line wires on the Elgin, Joliet and Eastern Railway, the T. & T. forces will be allowed to construct any new signal lines and the signalmen will be allowed to maintain the signal lines, without either party making a grievance which would put the Elgin, Joliet and Eastern Railway Company to any additional expense account one party claiming the other party is doing their work.
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> Signed this 7th day of July, 1947.
> For B. of R.S. of A.—/s/ David F. Letts, General Chairman
> For I.B. of E.W.—/s/ John H. Barnes, General Chairman
> For E.J. & E. Ry. Co.—/s/ W. K. Waltz, Signal Engineer"

This tentative Agreement is still in effect, no other Agreement having been made to supplant it. The Agreement is attached in typewritten form to the printed current working Agreement between the E. J. and E. Railway Company and the Signalmen. Presumably it is similarly attached to the current contract between the Electrical Workers and the Carrier. In any event, despite the fact that the Signalmen sent a copy of their ex parte submission to the Electrical Workers, the latter have made no attempt to intervene in the case.[1]

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[1]We do not consider the question whether the Electrical Workers have had actual notice as is done in some of the court cases, since the issue here is whether they are entitled to any notice at all.

The lack of intervention is understandable because the Railway Labor Act prescribes that the Second Division shall have jurisdiction over Electrical Workers, and if they are aggrieved they can have their rights determined by that Division. It is important to note in this connection that the National Railroad Adjustment Board composed of 36 Members does not have jurisdiction over any disputes between Carriers and Employes. Only the Divisions with their smaller memberships have authority to hear and decide disputes, and the Act gives each of the four Divisions limited jurisdiction over disputes involving specified classes of employes. The application of this provision (Section 3, First (h)) needs to be fully considered where employes subject to the jurisdiction of different Divisions are alleged to be involved in the same case.

In the instant case, however, the problem is simplified by the fact of the three-party Agreement. The Electrical Workers are as much a party to this Agreement as are the Carrier and the Signalmen. Although the Brotherhood of Railroad Signalmen charges in its ex parte submission that "the Carrier violated the provisions of the current Signalmen's working agreement between this Carrier and the Brotherhood" (i.e., the Agreement of December 1, 1945) as well as the Tri-partite Agreement of July 7, 1947, it nevertheless states:

> "By the medium of tri-partite agreement, an exception to the coverage of the Signalmen's Agreement of all generally recognized signal work exists, which provides that 'the T.&T. forces will be allowed to construct any new signal lines'.
>
> "The Carrier's interpretation and improper application of this provision in the tri-partite agreement created the issue in this dispute and the resultant claim." (underlining added)

Clearly therefore the Division will have to interpret and apply the Tri-partite Agreement in determining the issue since no provision of the 1945 Signalmen's Agreement is cited as having been violated. But the dispute is whether the T.&T. forces were assigned work that fell within the scope Signalmen's duties, or whether it was work that the Tri-partite Agreement specified the T.&T. forces were allowed to do. In deciding this question the Division can hardly avoid determining the rights of the Electrical Workers under the Agreement at the same time that it decides whether the Signalmen's claims are valid or not.

It was the obligation of the Carrier under the Agreement, of course, to maintain the line of demarcation between the two kinds of work as stipulated in the Agreement. But instead of confining itself to denying the alleged violation and the resulting claims, it maintained throughout the handling of the dispute on the railroad property, that this was a jurisdictional dispute between the two Brotherhoods. It therefore insisted to the Signalmen the proper course of action was "for your Organization and the I.B.&W. to meet for the purpose of agreeing upon a mutually acceptable interpretation of the agreement which is the subject of this dispute, or rewriting such agreement." But it specified conditions for its own acceptance of what they agreed upon. If the Brotherhood could not agree, it further suggested "that the matter be arbitrated . . . (adding) The Carrier believes it can protect its interests by appropriate provisions in the arbitration agreement, to which it would be a party."

Thus both the Signalmen and the Carrier have assumed that there were only two parties to the dispute; the former by insisting that only they and the Carrier were involved, the latter by claiming that the dispute was between the two Brotherhoods. Both positions are clearly untenable, and both in effect admit this; the Signalmen by sending a copy of their submission to the Electrical Workers, thus acknowledging that it had an interest in the dispute; the Carrier by insisting that it must consent to any agreement for

settling the dispute by the two Brotherhoods or, if arbitration is resorted to it must be a party to the arbitration Agreement.[1]

But the Labor Members of the Division argue in their brief:

> "Admittedly the agreement involved in this dispute is one between the Carrier and the Brotherhood of Railroad Signalmen . . . and the International Brotherhood of Electrical Workers . . . However, this is not something new; we had the same situation before us in the disputes represented in Awards 2147, 2148, 2149, 2150 . . ."

An examination of those cases, however, shows that they were not the same as the one here. Each of them involved an Agreement between the C.B.&Q. and the Telegraphers. The claims were based on an allegation that a Mediation Agreement by which the National Mediation Board settled a dispute involving six different organizations of employes "supplemented and amended" the working Agreement between the Carrier and the Telegraphers. The Third Division ruled it had jurisdiction of the claims, holding: "Where the parties to a contract subsequently enter into another contract concerning the same subject matter the two contracts must be read together in order to ascertain the rights and obligations of the parties with respect to the subject matter." Thus the rights of the other parties to the Mediation Agreement were not involved in the cases cited. Although the Division has handled other cases involving Mediation Agreements in the same manner, the Referee could find no cases considered by the Divisions of the N.R.A.B. or by the courts where the issue was whether only two or all three parties to a tri-partite contract are entitled to notice of hearings.

The case here is no more a jurisdictional dispute between the two Brotherhoods, as the Carrier contends, than it is a dispute only between the Signalmen and the Carrier. Before the Tri-partite Agreement was made, the two Brotherhoods by claiming the same work may have had a jurisdictional dispute. But that dispute was settled by the Agreement which specifically provided that work was to be done by the Signalmen and what work the Electrical Workers will have the right to do. The Carrier is a party to this Agreement and obligated to maintain the division of work as stipulated therein. The dispute therefore requires interpretation and application of the Agreement to determine whether it was violated or not. No question requiring settlement of an inter-union dispute is involved.[2]

The question remains, however, whether the Third Division has jurisdiction over the Electrical Workers, since the Railway Labor Act provides that the Second Division shall have jurisdiction over them. If the Electrical Workers were not a party to the Agreement which must be interpreted by the Third Division but had a separate working Agreement with the Carrier

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[1]It is noteworthy in this connection that all the Division will be doing when the question of notice is settled is to arbitrate the dispute as to the alleged violation. Because the N.R.A.B. is set up as a Government agency, the fact that the sole function of the four Divisions is to arbitrate disputes arising out of agreements is often overlooked as the Carrier here seems to have forgotten it. In most industries arbitration boards perform the same function by provisions made by the parties in their collective labor agreements; and the Government has no connection with them, except that, on request, it may designate neutral arbitrators as it designates Referees for the Adjustment Board Divisions.

[2]In Award No. 5432, this Division stated: "A jurisdictional dispute [for resolution by the National Mediation Board and Emergency Boards] 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."—The instant dispute clearly falls within the latter classification.

covering the same subject matter, it might well be contended that they had no direct interest in the dispute here. For as the Court of Appeals said in Washington Terminal Co. v. Boswell, (124 F. (2d) 235:

> "But if it were shown that the Carrier had bound itself by conflicting contracts allocating the work . . . it would not follow that the enforcement suit is inadequate or was not intended to be exclusive . . . We know of no constitutional protection against the consequences of making inconsistent contracts concerning the same subject matter nor of any which renders inadequate a proceeding, otherwise sufficient, merely because others not parties to it may assert claims inconsistent with its result and perhaps sustaining them by independent litigation."

Here, however, there are no separate contracts dealing with the same subject matter, which might be in conflict. There is only the one Tri-partite Agreement covering division of work between the Signalmen and the Electrical Workers. If, therefore, the Third Division decides the dispute between the Signalmen and the Carrier, and the Second Division were to decide the dispute between the Electrical Workers and the Carrier differently then it could not be because the Carrier made two conflicting contracts. Both Divisions would be interpreting the same Tri-partite Agreement, and if their Awards differed, one of them would be clearly wrong. The same Agreement cannot mean different things in different Divisions. Therefore a determination by the Third Division of the merits of the Signalmen's claim would at the same time determine the rights of the Electrical Workers under the Agreement. The rights and obligations of all three parties would thus be finally adjudicated by the Third Division as to which employes were entitled to the work; and the Second Division could not, in good conscience, rule otherwise.

Under these circumstances the provision in Section 3, First (j) of the Railway Labor Act that the several Divisions of the Adjustment Board shall give due notice of hearings "to the employe or employes and the carrier or carriers involved in any disputes submitted to them," and the Adjustment Board's own rule that "all parties to the dispute must be stated in each submission" can have but one meaning. Since the Electrical Workers are as much a party to the Tri-partite Agreement as are the Carrier and the Signalmen, the due notice requirement applies equally to all three parties.

FINDINGS:

AWARD

Notice of oral hearing must be given to the Electrical Workers as well as to the Carrier and the Signalmen.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 25th day of June, 1954.

SPECIAL CONCURRING OPINION IN AWARD NO. 6696, DOCKET NO. SG-6700

This Docket and Docket No. TE-6722 were companion cases in connection with which the referee was appointed by the National Mediation Board on November 5, 1953, to treat only the question of due notice under Section 153 First (j) of the Railway Labor Act. Thus the referee's appointment was well in advance of the judgment of the Court of Appeals entered on March 19, 1954, in **Illinois Central R. Co. v J. W. Whitehouse, et al.,** 212 F 2d 22. There the Court said, relating to due notice, "the Board has the choice of two alternatives, (1) proceed no further or (2) comply with the statutory requirement and proceed to a hearing on the merits, with an opportunity for all parties to be heard."

The Opinion in Docket SG-6700 concludes that notice must be given to the other employes involved. In that we specially concur, it having been our opinion from the start. In Docket TE-6722 the referee concluded that due notice should not be given, although there another Carrier and a group of its employes were involved. The same conclusion should have been reached in both cases for the reason that under the plain language of the Act, other "carriers" may be as closely involved as other "employes". However, the Labor Members of this Division steadfastly refuse to recognize the existence of the statutory duty of this Board; consequently, they disagreed with the conclusion in each Docket and for that reason no Award was adopted in TE-6722 at all. Judge Elmer F. Schnackenberg's allegory in his dissenting opinion in **Pelley v. United States of America,** No. 11054, C.A. 7, June 23, 1954, is particularly apt in considering what our lawful function should be. He said: "If one hires a team of horses, one is not getting proper service if only one of the horses is performing while the other is pulling back."

This Board (Division) is a bipartisan creature of statute and is composed of five Carrier Members and five Labor Members. It employs, pursuant to the Railway Labor Act, an Executive Secretary. While its duty to give due notice is clearly expressed in the statute, the subject has proven to be of a most litigious character. The Executive Secretary has followed the practice of not giving due notice in those instances where it has been ordered by a referee Award unless the Labor Members' Chairman joins in giving him such direction. That direction has been withheld by the Labor Members of this Board irrespective of the many Court Cases holding the giving of notice to be our non-discretionary duty.

We can only look to the law and its interpretation by the Courts for our guide in the administration of our duty. Where that function is checked in the face of such a clear expression of our duty as lies before us in many cases, we are impelled to explain our position and concur in this referee's conclusion, which we think is to "proceed no further," because when an Award has the effect of ordering due notice, and the giving of it is withheld, we are actually "proceeding no further". Surely, there can be no accumulation of liability under any claim beyond the point where this Board has failed to comply with what has been so effectively enunciated as its statutory duty.

/s/ E. T. Horsley

/s/ R. M. Butler

/s/ W. H. Castle

/s/ C. P. Dugan

/s/ J. E. Kemp