Award No. 7387
Docket No. MW-5883

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

H. Raymond Cluster, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

THE DELAWARE AND HUDSON RAILROAD CORPORATION

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

(1) The Carrier violated the effective Agreement when on December 14, 1948, it allocated the work of maintaining the control panel on Boiler No. 346 at Oneonta, New York to employes not covered by the scope of the effective Agreement;

(2) Plumber Lyle Ellis be allowed pay at his stragiht time rate for the same number of man-hours as was consumed by employes of the Motive Power Department in maintaining the control panel on Boiler No. 346, subsequent to December 14, 1948.

EMPLOYES' STATEMENT OF FACTS: During the latter part of 1947, a new boiler designated as No. 346, was installed on the Carrier's property at Oneonta, N. Y., replacing a boiler designated as No. 211, which had been installed in 1927.

In connection with the installation of the new boiler, a panel control board that had been attached to Boiler No. 211, (the boiler being retired) was enlraged to conform with the requirements of the new boiler.

Employes, including plumbers, covered within the scope of the effective agreement, were assigned to the various phases of the erection and installation of the new boiler and its necessary controls.

Plumber Lyle Ellis and his helpers were assigned to the installation of the control panel board and to all other work incidental thereto. The control panel board was placed in operation on December 29, 1947.

Plumber Lyle Ellis was assigned to the work of making proper adjustments to the control panel board, and to its subsequent maintenance.

The original control panel board installed at the location involved in the instant dispute was constructed and erected by plumbers holding seniority under the effective agreement, they rebuilt it in 1927 to conform to the requirements of Boiler No. 211, which was installed in that year as a replacement.

The principles enunciated therein, are equally applicable to the instant claim.

We respectfully request that the claim be sustained.

It is hereby affirmed that all data herein submitted in support of our position have heretofore been presented to the Carrier and are hereby made a part of the question in dispute.

CARRIER'S STATEMENT OF FACTS: When stationary boiler No. 346 was installed at Oneonta Shop, it was under the direction of the contracting firm. Employes of the Maintenance of Way Department assisted in the installation of same. Its operation and maintenance since installation has been the duty of the employes of the Equipment Department.

POSITION OF CARRIER: Employes of the contracting firm from which which Carrier purchased boiler No. 346 for the Oneonta Shop (Motive Power) came to the property to supervise the installation. There were no employes of the Carrier who were qualified to set up this boiler. It was necessary that Carrier furnish help to erect it and plumbers of our Susquehanna Division Maintenance of Way Department were used. The control panel is the only one of its kind in the Equipment Department (Motive Power) and the Maintenance of Way plumbers, under the direction of the instructor from the contractor, did install the control panel. However, the operation and maintenance of the control panel and the entire boiler is the responsibility of the Equipment Department and any necessary adjustments thereto or work thereon is properly their duty. The employes of our Maintenance of Way Department do not maintain boilers at any point on the Carrier's property and it cannot be claimed as being within the Scope Rule of the working agreement.

Management affirmatively states that all matters referred to in the foregoing have been discussed with the Committee and made part of the particular question in dispute.

OPINION OF BOARD: This is one of four cases involving the same parties before this Board for decision at the same time, each of which involves a claim that work belonging to employes covered by the Maintenance of Way Agreement has been assigned by the Carrier to employes not under that Agreement and in violation thereof. In each case, the scope rule of the Agreement is relied upon to support the claim. This scope rule does not describe the work reserved to the class of employes covered by it. Under such rules, it has been said many times by the Board that the work reserved to the employes is that which has been traditionally and customarily performed by them. Thus, in each case it is incumbent upon the claimant to establish that the particular work he is claiming to be exclusively his under the Agreement, has traditionally and customarily been performed on the property involved by employes of the class or craft to which he belongs. This is a question of fact, and it can only be answered on the basis of the evidence presented in each case.

In this case, Claimant, a plumber in the Maintenance of Way Department, contends that the Agreement was violated when, on December 14, 1948, the work of maintaining the control panel board for Boiler No. 346 at Oneonta, New York, which had previously been assigned to him, was assigned to certain shop craft employes of the Motive Power Department. It appears that prior to 1947, there were four boilers at Oneonta, Nos. 39, 40, 41 and 211. There was one control panel for 39, 40 and 41, and another for 211. In the latter part of 1947, Boilers 39, 40 and 41 were replaced by a new boiler, No. 346, and a new control panel was installed for this boiler. The installation of the new panel was largely accomplished by Maintenance of Way plumbers under the direction of a representative of the manufacturer of the control equipment. The Carrier states that certain electrical work in connection with the installation was done by shop craft electricians, and that the

Contractor trained a plumber, electrician, some machinists and an appurtenance inspector in the operation of the new control panel. The control panel was placed in operation on December 29, 1947.

Claimant states that he was assigned to the work of making proper adjustments to the panel at that time, and to its subsequent maintenance. Carrier states that Claimant performed such work under the direction of the manufacturer's representative until, in the manufacturer's opinion, the control board was working properly and acceptable to the Carrier. Claimant was then assigned to the maintenance of the panel until the Carrier thought it was in proper condition to turn over to the Motive Power Department to maintain. The record is not clear as to just what kind of maintenance work was performed by Claimant. It would appear from the claim and the submission supporting it that all the maintenance work was done for a year by Claimant, that it was all taken away from him and assigned to other employes and that he claims the right to do it all and to be paid for any maintenance work done on the panel by anyone else since December 14, 1948. The Carrier states that a considerable amount of the work of installation of the panel was done by electricians, that a number of the recording devices on the panel are electrically operated and that these electrical devices were installed and are maintained by electrical department employes.

As to past practice on the property with regard to the maintenance of boiler control panels, there is diametrically conflicting evidence. Claimant states that plumbers were exclusively assigned to the maintenance of the control panel board of all boilers at Oneonta from the date of their installation until December 14, 1948. Carrier states that controls on Boiler No. 211 have been and still are maintained by Motive Power Department employes, and submits statements from machinists to the effect that they have repaired and tested gauges on the panel board for Boiler 211 since 1927. Carrier also states that at other locations on the property where there are panel boards, plumbers perform maintenance work up to the panel boards, but the maintenance of the panel board and its controls are the work of shop craft employes. Carrier asserts that this is the proper division of work —*that any work on the piping or tubing leading up to and connecting with* the control board belongs to the plumbers, but work on the control board instruments belongs to shop craft employes.

Both parties submit descriptions of the control panel and its operations. Claimant stresses that the control system consists largely of pipe lines connected to instruments which register through pressure. Carrier stresses that several of the instruments register through electrical impulses.

It can be seen that from this record the Board is in no position to determine whether the kind of work claimed has traditionally and customarily been reserved to plumbers. First, the precise kind of work involved is not clear—it appears to involve both plumbing and electrical work. Second, the question of which class of employes has maintained boiler control panels in the past is in direct dispute and there is no basis upon which the Board can resolve the contradictory evidence. Third, although it appears that Claimant was assigned to the maintenance of the new boiler from the time of its installation *until December 14, 1948, it is not clear whether this maintenance involved* only work on the piping leading to the panel or actually included work on the gauges, and if the latter, whether it included only pressure gauges or also electrical work on the gauges operated by electrical impulses.

In the face of this confused and conflicting evidence and the fact that the new control panel apparently involves instruments not found on previous panels in use on the property when the scope rule was negotiated, the very most that can be said is that the work in question could be assigned either to plumbers or shop craft employes. We cannot find that there has been any agreement to reserve the work to plumbers to the exclusion of shop craft employes.

It appears from the record in this case that a motion was made and seconded by Carrier members of the Division that the hearing be postponed until notice is given to certain third parties whose interests might be affected by this award. The motion failed to carry. The issue of notice to third parties is one of long standing and has been the subject of considerable discussion in many awards of this Division and decisions of the courts. This is the first time the problem has been raised before the referee sitting as a member of the Division in this case. In his view, based upon careful study of these awards and court decisions, as well as the Railway Labor Act, it is neither his function nor responsibility to pass upon the question of whether the Division is obligated to give such notice. It has been stated by the United States Supreme Court in a similar factual situation that the Board had jurisdiction over the only necessary parties to the proceeding and over the subject matter. See **Whitehouse v. Illinois Central R.R.**, 349 U.S. 370. A "*dispute . . . growing out of grievances or out of the interpretation* or application of agreements concerning rates of pay, rules, or working conditions . . ." has arisen between the present parties to this case and has been referred to the Board under Section 3, First (i) of the Railway Labor Act. The Division has failed to agree upon an award and has agreed upon and selected this referee to sit with the Division for the purpose of making an award in the aforementioned dispute, as provided in Section 3, First (l) of the Act. He is limited to performing the function for which he was selected—to render an award in a dispute growing out of grievances or the interpretation or application of agreements. The eventual resolution of whether or not the Division is to give notice to third parties must be left to administrative determination by the permanent members of the Division or to judicial determination by the courts.

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 the Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 27th day of July, 1956.

SPECIAL CONCURRENCE TO AWARD NO. 7387, DOCKET NO. MW-5883

The Majority properly held that the Maintenance of Way Agreement does not reserve the maintenance of boiler control panels exclusively to plumbers and has denied the claim. The conclusion reached on the merits made it unnecessary to comment on the question of "due notice" required by Section 3, First (j) of the Railway Labor Act, because shop craft employes cannot be adversely affected by a denial award. **Awards 6526, 6363 and 6269.**

While we concur in the conclusion on the merits, we are compelled to dissent to the gratuituous and erroneous remarks on "due notice."

In two recent Dissents we have pointed out that Adjustment Board Awards are null and void when rendered without "due notice" to all parties involved. The Dissents to **Awards 7311 and 7372** are equally applicable here, and are made a part of this Special Concurrence. In addition, we are compelled to point out the erroneous statements relative to "due notice" contained in the opinion.

Prior to any hearing in this dispute a Carrier Member moved that the Division withhold action pending the giving of "due notice" to other parties involved. This motion failed adoption because of a deadlock or inability to secure a majority vote of the Third Division as originally constituted.

At all stages of the proceedings in this dispute the permanent members of the Division have been in disagreement relative to certain questions of fact and law—the Carrier Members contending that Section 3, First (j) of the Railway Labor Act required that other parties be given "due notice" of all proceedings, that there were other parties involved who should be given such notice, and that, in any event, there had been no violation of the effective Agreement. The Labor Members contended otherwise on all points.

Upon the Division's failure to agree upon an award, in accordance with Section 3, First (l) of the Railway Labor Act, the present Referee was appointed to sit with the Division as a member thereof, and make an award. In so sitting for every purpose of this case the Referee became a member of this Division with right and equal authority to that of any other member, including the right to deal with matters of procedure arising therein. 1942, 40 Opinion of Attorney General, 212.

The Division as originally constituted had a statutory duty to give "due notice" to all parties involved in this dispute. Such notice "* * * if properly required is jurisdictional and if not given when required the Awards of the Board are a nullity." **Templeton vs. A.T.&S.F. Ry. Co., 84 F.** Supp. 162; affirmed 181 F. 2d 527; certiorari denied 330 U. S. 823. However, after the Division failed to give such "due notice" any referee subsequently appointed became a member of the Division and was "charged with the duty of inquiring into its jurisdiction when put on notice that such may be in question." **First Division Award 15220.** After a referee has been selected to sit with the Division for the purpose of making an award he has a corresponding responsibility coequal to that of every other member to make certain that the award is valid.

The present Referee has decided that it is not his function or responsibility to pass on the question of whether the Division is obligated to give such notice, and that the eventual resolution of the issue must be left to administrative determination by the permanent members of the Division or to judicial determination by the Courts.

Histroically, when the permanent members deadlocked on a contention that notice was required to others than the claimant and the Carrier, a referee was appointed to sit with the Division as a member and decide the case. Referees sitting with this Division passed on the question of "due notice" in scores of awards without anyone questioning their right to do so.

In one instance, the contention that the Referee was without authority to participate in a decision as to whom notice shall be served upon was advanced to the Court. In that case, **Illinois Central vs. Whitehouse, et al.,** 212 F. 2d, 22 the United States Court of Appeals for the Seventh Circuit, while conceding that it could find no precedent for such contention, nevertheless held that from its study of the statute the contention was sound. In that case the Circuit Court also held that if a motion to give "due notice" failed, any subsequent award would be void and that upon the permanent members' failure to give "due notice," the Division should either "(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."

In other words, once the "due notice" issue was raised there would not be a referee appointed until such notice had been given.

On June 6, 1955, the foregoing decision of the Circuit Court was reversed by the United States Supreme Court on the narrow grounds that the "injuries were too speculative to warrant resort to extraordinary remedies." **Whitehouse v. Illinois Central R. Co.,** 349 U. S. 366. Although Whitehouse argued that a Referee could decide the issue of "due notice," and asked the Supreme Court to so hold, the Court refused to rule specifically on the question of whether a Referee "may vote to dismiss the proceedings because of a failure to give the required notice," by inference the Supreme Court did so hold, for, in stating that an award might be rendered which could occasion no posible injury to Illinois Central, the Supreme Court could only have had in mind awards made in "due notice" disputes which denied the claim on the merits, as well as those awards which denied or dismissed the dispute for lack of "due notice," and the disputes which resulted in sustained awards which the Courts have subsequently declared null and void for lack of "due notice."

For the reasons herein given, we, as Carrier Members, dissent to the "due notice" part of this Award.

/s/ R. M. Butler
/s/ W. H. Castle
/s/ C. P. Dugan
/s/ J. E. Kemp
/s/ J. F. Mullen