Award No. 8022
Docket No. CL-8086

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Paul N. Guthrie, Referee

PARTIES TO DISPUTE:

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

THE CHESAPEAKE AND OHIO RAILWAY COMPANY

(Chesapeake District)

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

(a) That the Carrier violated and continues to violate the terms of Clerks' Agreement No. 7; Mediation Agreement. Case No. A-3277, dated December 14, 1949, disposing by Agreement effective January 1, 1950; and Memorandum Agreement effective January 1, 1950, signed December 14, 1949, when on or about January 1, 1950, it removed clerical work from the scope and operation of above specified Agreements and did thereupon assign it to employes without the Scope of said Agreements to the detriment thereof and in a manner to cause loss to the clerical employes for whom the Agreements were consummated, and

(b) That Mr. L. G. Huth, Cashier; Mr. A. B. Hollenbaugh, Freight & Ticket Clerk, be allowed pay for the equivalent amount of the time the Agent and others outside the scope of Clerk' Agreement devoted to the performance of clerical work referred to in this claim in addition to all other earnings beginning January 1, 1950 and continuing until all corrections have been made.

OPINION OF BOARD: This case grows out of certain occurrences at Fostoria, Ohio, a point on the Respondent Carrier's property. Petitioner asserts that beginning on or about January 1, 1950, the Carrier removed certain work from the clerical agreement and gave it to certain employes without the scope of the effective agreements between the Petitioner and the Carrier. It is alleged by Petitioner that the work at issue was reserved by such agreements exclusively to the clerical forces, and that in removing said work from them the Carrier violated the effective agreements.

While it is not altogether clear from the record, it nevertheless appears that at least part of this claim is in the nature of a continuing claim. This appears to be the case with respect to certain ticket selling work.

The first question which must be considered here is a jurisdictional issue. The Carrier asserts, and the Carrier Members of the Third Division

assert that the so-called third party issue is involved. It is argued that The Order of Railroad Telegraphers, as an interested and involved party, is entitled to notice of the pendency of this matter in accordance with the requirements of Section 3, First (j) of the Railway Labor Act. Furthermore, it is contended that in absence of such notice this Division is without jurisdiction to make a valid sustaining award on the issue submitted.

It goes without saying, that this is not an issue which is before the Division for the first time. On the contrary, it has been before the Division many times. Over the years many awards have been made with respect to it; many of them with conflicting holdings. There is no necessity in this opinion to review the whole history of this issue. Suffice it here to comment mainly upon the current status of the matter and the way in which such status affects the case before us.

The record shows that in the course of handling the instant case the Carrier Members of the Division moved that notice be given to the alleged third party in accordance with the provisions of Section 3, First (j) of the Railway Labor Act. Such notice failed for the lack of majority support, hence the issue is reasserted with the Referee sitting as a member of the Division.

In appraising the current status of this issue of third party notice, primary consideration must be given to the decisions of various courts which have had the matter before them. The Division, in the judgment of this Referee, is bound by such decisions until either the Supreme Court resolves the matter once and for all, or the Congress amends the act in such way as to give a clear legislative mandate on the question.

Those who contend no notice need be given in a third party situation rely frequently upon the decision of the United States Supreme Court in Whitehouse vs. Illinois Central R. Co. (349 U.S. 366) which was decided on June 6, 1955. However, such reliance is not justified. The Court very specifically and categorically refused to decide the third party notice issue as well as a number of other questions which were pressed upon it in that case. We agree with the observation in Award 7975 of this Division that Labor Law Reports Weekly Summary, dated June 9, 1955, correctly appraised the Court's decision in the Whitehouse case when it was stated:

> The Supreme Court reversed these decisions on the narrow grounds that a request for judicial relief should not have been made before the Board had issued any award and that the railroad was not subject to irreparable injury which would justify the requested relief. By such action it avoided the necessity of deciding the following difficult questions: Was the Clerks' union entitled to notice? May a referee resolve a deadlock on the Board over a question of notice? Can claims of two unions be settled in a single proceeding before the Board? May defects in an N.R.A.B. award be cured in an enforcement proceeding? All these questions remain unanswered.

The Court confined its decision to the question of whether injunctive relief was justified at the time and stage.

Certain awards by this Division since the Whitehouse decision have apparently relied for their findings that notice was not required upon a particular sentence from the Whitehouse decision where it was stated: "The Board has jurisdiction over the only necessary parties to the proceeding and over the subject matter". This sentence must be read in the context in which it is given in order to judge its true meaning. The sentence does not say the "necessary parties" for a valid sustaining award, but rather the necessary parties to make some award which would be a condition precedent to asking the courts for injunctive relief. In brief, we do not believe the Court decided the third party issue in the Whitehouse case.

This view is reinforced in a very compelling fashion by the decision of the United States Court of Appeals for the eighth Circuit in the case of The Order of Railroad Telegraphers vs. New Orleans, Texas & Mexico Railway Company, which decision was made on January 10, 1956. Thus, this decision was not only made after the Whitehouse decision, but the Court commented at length regarding the holdings in the Whitehouse case in relation to the third party notice issue and the requirements of Section 3, First (j) of the Act. The conclusions of law underwritten by the Eighth Circuit in this case would seem to require the giving of notice in any case where a genuine third party issue is involved. It might be noted in passing that the Supreme Court denied Certiorari in this case in March 1956.

Another comparatively recent court action on this matter is to be found in Civil Action 50 C 684 in the United States District Court For the Northern District of Illinois. The final action there was taken June 22, 1956. Suffice it to say that the Court ruled that notice to third parties is required under Section 3, First (j) where other parties are involved.

There seems to be no escape from the conclusion that the present status of Court holdings is to the effect that notice must be given to involved third parties before the Board can make a valid sustaining award. Certainly the Railway Labor Act does not contemplate the appointment of a Referee to make an invalid award. Such would not be consistent with the over-all purpose of the Act.

It does not follow that other parties, other than the Petitioner and Respondent, are always involved in cases before the Division. Neither are other parties involved simply because one of the primary parties so asserts. The Court judgments cited above would seem to say that the Division must decide in the first instance whether so called third parties are involved. If they are, then notice is required.

In the instant docket it seems clear that the Order of Railroad Telegraphers is a party which is involved by an award on the merits. This is evidenced by the fact that the O. R. T. has counter claims involving some of the same work now before the Division. Under such circumstances the Division must bow to the judgment of the Courts and give notice.

In reaching this conclusion we agree with the major holdings of the Division in its recent Award Number 7975.

As in Award 7975 we will not dismiss the claim, but find instead that the merits are not properly before the Division for decision until proper notice to the Order of Railroad Telegraphers has been given.

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 has jurisdiction over the dispute involved herein, subject to the following finding as to notice:

That the Order of Railroad Telegraphers is involved in this dispute, and therefore, entitled to notice of hearing pursuant to Section 3, First (j) of the Railway Labor Act.

That the merits are not properly subject to decision until said notice is given.

AWARD

Hearing and decision on the merits deferred pending due notice to the Order of Railroad Telegraphers to appear and be represented in this proceeding if it desires, or to permit the parties involved to settle the claim if they wish to do so.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 25th day of July, 1957.

DISSENT TO AWARD NOS. 8022 and 8023,

DOCKET NOS. CL-8086 and CL-8087

We dissent.

/s/ J. H. Sylvester
/s/ C. R. Barnes
/s/ A. Covington
/s/ G. Orndorff
/s/ J. W. Whitehouse

Labor Members