Award No. 8079

Docket No. CL-7545

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Edward A. Lynch, Referee

PARTIES TO DISPUTE:

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

THE CHESAPEAKE AND OHIO RAILWAY COMPANY

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

(a) That the Carrier violated terms of Clerks' Agreement No. 7 when on April 28, 1948, it nominally abolished position classified as Ticket Clerk, rate $9.39 per day, located at Paintsville, Kentucky, and

(b) That Mr. Eugene Daniels be returned to the position and other employes displaced by reason of Carrier's actions be accorded like treatment, and

(c) That Mr. Eugene Daniels and other employes adversely affected, be compensated for any and all wage loss sustained subsequent to April 28, 1948, and until correction is made.

EMPLOYES' STATEMENT OF FACTS: Immediately prior to April 28, 1948, the Group 1 clerical force regularly assigned in Carrier's passenger and freight station facility at Paintsville, Ky., was as follows:

Title	Incumbent	Seniority Date	Hours	Rate
Cashier	W. E. Fitch	6- 9-12	8 A.M. - 5 P.M.	$9.89
Chief Clk.	J. V. Trimble	7-31-22	8 A.M. - 5 P.M.	9.74
Ticket Clk.	Eugene Daniels	8- 1-22	10 A.M. - 7 P.M.	9.39
Yd. Clk.	Nollis Meade	8- 4-22	8 A.M. - 4 P.M.	8.94
Foreman	J. W. Blair	4-12-23	8 A.M. - 5 P.M.	9.64
Yd. Clerk	Geo. C. Perry	5-26-23	4 P.M. -12 P.M.	8.94
Clerk	Delmar Wells	2-24-24	8 A.M. - 5 P.M.	9.39
Check Clk.	C. A. Hicks	7- 3-42	8 A.M. - 5 P.M.	8.94
Yd. Clk.	H. F. Wheeler, Jr.	9-14-43	12 P.M. - 8 A.M.	8.94

Effective April 28, 1948, the position of Ticket Clerk, rate $9.39 per day, hours 10 A. M. to 7 P. M. daily except Sunday, held by Mr. Eugene Daniels with Group 1 clerical seniority dating from August 1, 1922, was abolished.

the ticket selling to the telegraph operators, the revenue had gone down to $26,222.72.

But look further. By 1954 this revenue had diminished to $6,180.88, or slightly more than $500.00 per month.

The following is especially significant. When the ticket clerk position was put on in May, 1943, the ticket business was averaging $5,643.83 per month. By April, 1948, when the ticket clerk position was abolished, the ticket selling had gone down to $2,402.07 in that month. By October, 1950, the ticket sales were only $601.00. By 1954, as shown by the general tabulation, the average was down to $500.00.

Scanning the ticket office records for a week recently shows that the average number of tickets sold per day was 10. This, with the fact that there are now only two trains a day instead of six, makes plain that the ticket selling is purely incidental and does not justify a ticket clerk assigned to do such work. Your Board should so find.

CONCLUSIONS

The Carrier has supported by its evidence in this Response the seven points made at pages 22-23 of this submission, and the claim should be denied on the basis of those points.

All data in this submission have been discussed in conference or by correspondence with the Employe representatives.

(Exhibits not Reproduced.)

OPINION OF BOARD: Initially, we must deal here with the third party issue raised by the Carrier.

The Railway Labor Act stipulates, among its five General Purposes, as follows:

> "(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."

To that end the Act established the National Railroad Adjustment Board, composed of four Divisions, (Sec. 3, First (h)) "whose proceedings shall be independent of one another."

The Act likewise provides (Sec. 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."

In the years since the above language became law, this Division (and it is equally true of the other Divisions) has never been able to agree as to when "due notice shall be given" or not given, as the case may be. The Division is always deadlocked on the question.

When the question arises in a docket on which the Board is deadlocked and a referee is appointed to sit with the Division to make an Award, there have ensued many Awards. Some have held that due notice must be given while others, and they may be in the majority, have held otherwise.

The question reached the U. S. Supreme Court once (No. 131—October term, 1954—J. W. Whitehouse, et al., petitioners, v. Illinois Central Railroad Company, et al.,) on a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

Mr. Justice Frankfurter delivered the Opinion of the Court, Mr. Justice Harlan did not participate and Mr. Justice Reed, Mr. Justice Douglas and Mr. Justice Minton dissented.

The Opinion recited the history of the case, involving originally a dispute between the Telegraphers' Organization and the Illinois Central Railroad. When the dispute reached the Board, a Carrier member objected that "due notice" should also be given the Clerks' Union because it would be involved should the Telegraphers' claim be sustained, but the Board deadlocked. Between the end of hearing and announcement of an Award, the Railroad filed an action against the Board.

"The Complaint", according to the Supreme Court decision, "sought temporary and permanent injunctions directing the Board to issue notice to Clerks and Shears (clerical employe said to be involved), and restraining it from proceeding with any disposition until such notice had been given."

This is exactly what Carrier involved in the case now before this Division is seeking to accomplish.

The Case went through the District Court and the U. S. Court of Appeals for the Seventh Circuit.

The District Court "issued a preliminary injunction restraining the Board from proceeding further in the matter unless formal notice was given to Shears and Clerks," as Mr. Justice Frankfurter's Opinion noted.

On appeal, the Court of Appeals held that there could be "hardly any doubt" that Clerks and Shears were "involved" and that any Award rendered without notice to them would be void and unenforceable.

Reading further from the Supreme Court Opinion, we find this statement:

> "The Court (of Appeals) found that the Board had already refused to give notice and held that the Referee had no authority to cast a vote on a 'procedural' matter."

The Supreme Court also observed:

> "We have been urged to resolve the present dispute regarding the requirement of notice to persons not formal parties to a submission to the Board, a dispute which has resulted in numerous conflicting decisions by the Board. This remains a perplexing problem despite the substantial agreement among Courts of Appeals which have considered the question in holding that notice is required to other persons in varying situations. The wording of the notice provision of § 3 First (j) does not give a clear answer. In the context of other related provisions it is certainly not obvious that in a situation like that now before us notice need be given beyond the parties to the submission. See § 3 First (i), (l), (m). Analogy to the law of parties as developed for judicial proceedings is not compelling and in any event does not approach constitutional magnitude."

The Court Opinion, after delving into the legal aspects involved, noted:

> "These are perplexing questions. Their difficulty admonishes us to observe the wise limitations on our function and to confine ourselves to deciding only what is necessary to the disposition of the

> immediate case. Here relief is sought prior to any decision on the merits by the Board. Apart from some lower courts dicta, there is no reason for holding, in the abstract, that any possible award would be rendered void by failure to give notice to an outside even if related interest that cannot be compulsorily joined as a party to the proceeding. The Board has jurisdiction over the only necessary parties to the proceeding and over the subject matter. If failure to give notice be treated as an error, in an award in favor of the Railroad it would constitute at best harmless error which could not be made the basis of challenge by Railroad, Telegraphers or Clerks. The Railroad's resort to the courts has preceded any Award, and one may be rendered which could occasion no possible injury to it. The inevitable result is to disrupt the proceedings of the Board. * * *"

Thus did the Supreme Court of the United States speak. Ostensibly it did not, for the reasons it cited, pass directly on the due notice issue.

However, its action was to reverse the Circuit Court, which had held (and again we quote from the Supreme Court decision):

> (that) "there could 'hardly be any doubt' that Clerks and Shears were 'involved' and that any award rendered without notice to them would be void and unenforceable. It rejected the contention that this action was premature because the award might be dismissed upon the deciding vote of the Referee based on failure to give notice. The court found that the Board had already refused to give notice and held that the Referee had no authority to cast a vote on a 'procedural' matter. Since no administrative channel was found available for review of the failure to give notice, the court held that there was no need to await the conclusion of proceedings before the Board,"

and having thus held, it (Court of Appeals) "affirmed" the decision of the District Court, which "issued a preliminary injunction restraining the Board from proceeding further in the matter unless formal notice was given to Shears and Clerks."

The Carrier here involved is asking this Division, with the Referee participating, to do what the Supreme Court of the United States refused to do.

In the first instance, the Referee now participating with the members of this Division, derives his authority from Section 3, First (l), viz.,

> "to sit with the division as a member thereof and make an award."

The Referee certainly lacks the authority to pass upon an Act of Congress—he may pass upon and decide the case on its merits—and he likewise has no intention, much less authority, to substitute his judgment for that of the Supreme Court of the United States.

So, in the absence of a majority vote of this Division without a Referee, and lacking any further dictum from the Supreme Court of the United States or an enactment on the point by the Congress, we, having jurisdiction over the only necessary parties and over the subject matter, shall vote against Carrier's raising of the "due notice" issue and proceed to the merits of the case here before us.

Here the material facts are not in dispute.

In justification of its action in abolishing the ticket clerk position, Carrier claims that it first established the ticket clerk's position at Paintsville, Kentucky, on May 10, 1943, because of an increase in business occasioned by World War II; that when it did establish the position, its Superintendent

issued instructions that "made it plain that the telegraph operators were not being relieved of all ticket selling duties, (which Carrier maintains were handled solely by Telegraphers from 1929) * * * that while the ticket clerk should be able to take care of the ticket work between 8:45 A. M. and 5:45 P. M., the first and second trick operators should understand that they are not entirely relieved of selling any tickets between these hours and should do so if the conditions warrant. * * * The first trick operator should sell tickets up to 8:45 A. M., and the second trick operator should sell tickets after 5:45 P. M. * * *"

Carrier, following the "ebb and flow" principle, cites its passenger revenues at Paintsville by years from 1938 through 1954—the highest revenue being $43,659.18 for 1947, which declined to $6,180.00 in 1954, as follows:

1947	$43,659.18
1948	26,222.72
1949	15,073.35
1950	9,457.61
1951	11,412.92
1952	10,115.53
1953	7,040.06
1954	6,180.88

Carrier also asserts that when it established the ticket clerk position six scheduled trains, including two mixed, were scheduled through Paintsville. Two of these trains were eliminated November 1, 1949 and two May 31, 1954.

Organization claims Carrier's action violated Rules 1 (Scope) and 65 (Date Effective and Changes).

Organization observes that Rule 1 "very clearly specifies the class of employes and work embraced within the Agreement. This rule was negotiated and adopted by the parties effective January 1, 1945. The inclusion of 'ticket sellers' as a distinctive classification covered by the provisions therein plainly shows that the position and work here involved is definitely fixed by negotiation within the scope of the Agreement.

"To prohibit the removal of positions," the Organization continues, "or work from the scope and operations of the Agreement except through negotiation and agreement, we fortified this rule with the clear and clean-cut provisions of Section (b)—of Rule 1—reading:

> 'Positions within the scope of this Agreement belong to employes herein covered and nothing in this Agreement shall be construed to permit the removal of such positions from the application of these rules except as provided in Rule 65.' "

Rule 65, Organization notes, is the "terminating rule which sets up the procedure to be followed should the parties desire to effect any changes in the Agreement; i.e., Notice—Conference—Agreement. The unilateral action of the Carrier in abolishing this clerical position and assigning the work to an employe not covered by the Agreement was a flagrant and willful violation of Rules 1 and 65."

Carrier maintains that prior to May 10, 1943 "the telegraph operators had been able to handle all of the ticket selling work at Paintsville." The start of World War II caused a sharp increase in rail traffic through Paintsville.

"To meet this condition," Carrier asserts the position involved in the instant case was established May 10, 1943. Carrier further asserts it became necessary, because "over-all conditions at Paintsville warranted," to establish an additional clerical position there on March 13, 1945. This new position was selling tickets from 8 A. M. to 10 A. M., at which hour Claim-

ant Daniels came on duty. "This revised assignment," Carrier asserts "enabled taking care of the late trains by the old Ticket Clerk position without overtime.

"Still later," Carrier continues, "as the passenger business declined, the Ticket Clerk assigned 10 A. M. to 7 P. M. (Claimant Daniels) had freight work assigned to fill out his tour of duty, which consisted of answering telephone inquiries with respect to freight business, handling unemployment records, and handling freight loss and damage claim matters. The Ticket Clerk continued to sell tickets for the late passenger trains between 4:00 P. M. and 7:00 P. M."

Carrier adds:

"Assignment of the ticket selling work continued in that manner until April 28, 1948, when the passenger work had receded to the point at which it could all be handled by telegraph operators as part of and incident to their other work, just as it had been handled by the telegraph operators between * * * December 31, 1929 and May 10, 1943, or for more than thirteen years, when the Ticket Clerk (Claimant Daniels) was put on to assist in the handling of ticket selling."

While Organization relies on Rule 1—particularly 1-(b), and Rule 65 in support of its position, it is argued on behalf of Carrier that "Rule 1 (b), which incorporates the provisions of Rule 65, is not applicable, and therefore not subject to being violated unless and until it is shown that the Carrier has, in fact, violated the provisions of the Scope Rule—see Award 6269 (McMahon)."

"As pointed out," argument on behalf of Carrier continues, "the language of Rule 1 (b) merely prevents the removal of such position from the scope of the Agreement. The record is very clear that this Carrier does not intend to remove Ticket-Clerk positions from the Agreement's application.

"That Carrier's right to abolish positions without the necessity of resorting to negotiation and agreement remains intact, see Rule 18 of the Agreement (Reducting Force and Abolishing Positions). Note that this Rule permits the Carrier to abolish positions and that proper notice (no less than four days) is the only condition set forth."

Many prior Awards have been cited by or in behalf of Carrier. We have examined 82 of these Awards and are unable to find one case where the applicable Agreement contains a provision similar to 1 (b) here.

We have likewise examined many Awards cited by or in behalf of Organization. One of these is Award 7372, same parties as here and the same principles. It was a sustaining Award.

Because of the identity of interest, we read the positions of the parties as well as the Award in No. 7372. Section 1 (b) was involved in that case, as it is here.

We discovered that save for about a dozen paragraphs, which deal with the necessary specifics of this case, pages 43 through 77 of this docket quote verbatim from Carrier's position and argument in Award 7372.

It is argued on behalf on behalf of Carrier here that "basically, this is a Scope Rule dispute, since the issue here is whether the Carrier violated the scope provisions of the Agreement when it assigned so-called clerical work to employes not included within the Agreement's coverage.

"Our awareness of the true nature of this dispute," continues the argument, 'compels us to recognize the fact that Rule 1 (b) which incorporates the provisions of Rule 65 is not applicable, and therefore not subject to being

violated unless and until it is shown that the Carrier has, in fact, violated the provisions of the Scope Rule."

We believe the record here is clear that the position and work in question are amply covered by Rule 1 (a). Carrier's Superintendent described them as "selling tickets, handling baggage, etc., handling unemployment insurance matters and O. S. and D. work."

Scope Rule 1 (a) specifically lists "employes who regularly devote not less than 4 hours per day to the compiling, writing, and/or calculating incident to keeping records and accounts, * * * checking baggage * * * and similar work. Also * * * ticket sellers."

Furthermore, there is no evidence these duties performed by Claimant Daniels disappeared upon abolition of his position, for Carrier's Superintendent admits:

> "The work of selling tickets and handling baggage, etc., is now being performed by the Telegraph-Operator, and the duties of handling Unemployment Insurance Matters and OS & D work are now being performed by the Agent at that point."

Therefore, because Rule 1 (b) provides,

> "(b) Positions within the scope of this Agreement belong to employes herein covered and nothing in this Agreement shall be construed to permit the removal of such positions from the application of these rules except as provided in Rule 65,"

and Carrier (1) concedes it abolished Claimant's position, and (2) distributed the work of his position between two persons not covered by the applicable Agreement, we hold that the Carrier in the instant case has violated the Agreement.

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 violated.

AWARD

Claim (a), (b) and (c) sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 26th day of September, 1957.

DISSENT TO AWARD NO. 8079, DOCKET NO. CL-7545

We are again compelled to dissent to the majority's finding that we have jurisdiction over the only necessary parties and over the subject matter, and that due notice to the Order of Railroad Telegraphers is not required. In previous dissents and concurring opinions we have pointed out that where,

as here, another party is involved in a dispute before this Division, we must give such party the due notice, and opportunity to be heard, prescribed by Section 3, First (j) of the Railway Labor Act. In general, the Dissents to **Awards 7311, 7372 and 7960**, and the Special Concurrence to **Award 7387**, are equally applicable here, and are made a part of this Dissent. In addition, we desire to point out certain errors peculiar to the majority's opinion in this dispute.

The majority devotes seventeen paragraphs of its opinion to a historical account of **Whitehouse v. Illinois Central R. Co.**, 349 U. S. 366, and ends up concluding that the decision therein did not pass directly upon the issue of due notice. We will not comment on the majority's gratuitous remarks relative thereto, inasmuch as it is generally agreed that in the Whitehouse case the Supreme Court of the United States only decided one point, viz., that Illinois Central should not have asked for judicial relief prior to the issuance of an Award. However, it is unfortunate that the majority has so little comprehension of this dispute, and the Whitehouse Case, that it could not distinguish the judicial relief sought by Illinois Central from the present Carrier's insistence that this administrative agency must comply with the jurisdictional and procedural requirements which are a condition precedent to a valid award.

The present referee was appointed to "sit with the division as a member thereof and make an award." Section 3, First (l), Railway Labor Act. The Carrier Members recognize that (1), the award could have dismissed this dispute because of the Division's failure to give Telegraphers the due notice prescribed by Section 3, First (j), of the Railway Labor Act, e.g., see **Awards 6812** (Robertson); **6680** (Bakke); **6482** (Ferguson); **6051** (Begley); **5751** (Munro); **5432** (Parker); **2596** (Blake); and many others, or (2) the award could have deferred hearing and decision on the merits pending due notice to the other party involved to appear and be represented if it so desired, e. g., see **Awards 7975** (Coffey); **8022** (Guthrie) and **8050** (Beatty), or (3), the claim could have been denied and the failure to give due notice would have, in the words of the Whitehouse Case, become "harmless error which could not be made the basis of challenge by Railroad, Telegraphers or Clerks", **e. g.**, see **Awards 8070** (Beatty); **6625** (Shake); **6526** (Rader) and **6269** (McMahon), or (4) the award could have been, as it was, sustained; however it was pointed out to the Referee that the Courts which have ruled directly on the lack of due notice in such cases have unanimously held such awards to be null and void, e. g., **Awards, 3932, 3933, 3934, 4734, 4735, 5014** and many others.

The Referee is most inconsistent in stating that he lacks authority to pass upon an Act of Congress, while in the same opinion deciding that we have jurisdiction over the only necessary parties and over the subject matter. Such finding passed on and rejected the Congressional mandate expressed in Section 3, First (j) of the Railway Labor Act that the Division "shall give due notice of all hearings to the employe or employes * * * involved in any disputes submitted to them."

The Referee is equally inconsistent in admitting that the Supreme Court "did not * * * pass directly on the due notice issue," and stating that he "has no intention, much less authority, to substitute his judgment for that of the Supreme Court of the United States," for the Referee did pass upon an act of Congress, and did substitute his judgment for the Supreme Court, and did decide an issue which the Supreme Court specifically avoided. To make matters worse—in doing what he said he lacked authority to do, the Referee decided the issue contrary to the holding of the United States Circuit Court of Appeals for the Eighth Circuit, which subsequent to the Whitehouse Case, ruled on the very question. **Order of R. R. Telegraphers v. New Orleans, T. & M. Ry. Co.**, 229 F2d 59 (8th C. C. A.), certiorari denied 350 U. S. 997.

The Referee's reliance on dictum in the Whitehouse Case and his inference that he will hold to this opinion "lacking any further dictum from

the Supreme Court," causes us to admonish the Referee to remember that dictum is an opinion expressed by a court but which, not being necessarily involved in the case, lacks the force of an adjudication. We also remind the Referee that the Supreme Court stated as early as 16 Howard, 287, that "this court has never held itself bound by any part of an opinion which was not needful to the ascertainment of the question between the parties."

In view of the fact that this award is invalid account of jurisdictional error, we deem it unnecessary to comment on the Referee's glaring errors on the merits. See **Awards 5404, 6758.**

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