Award No. 8200
Docket No. CL-7851

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Sidney A. Wolff, 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 the terms of Clerks' Agreement and memoranda in connection therewith, when, effective September 22, 1951, it unilaterally discontinued the position of Cashier No. A-15 (3) at Delaware, Ohio, as the work of the position was not abolished in fact, but remained to be performed, and

(b) That the Carrier further violated the terms of Clerks' Agreement and memoranda in connection therewith, when, commencing September 22, 1951, it required or permitted an employe not under the Clerks' Agreement to perform the work of position No. A-15 (3), and

(c) That the work shall be restored to the Clerks' Agreement and D. C. Waxler, who was the regularly assigned incumbent and who was improperly removed from position No. A-15 (3) at the time it was improperly discontinued on September 22, 1951, shall be restored to this position and paid for all loss in wages, plus travel and waiting time and other loss and necessary expenses incurred, and

(d) That all other employes who may have been adversely affected as a result of this improper action on the part of the Carrier, shall be restored to former positions and paid any loss in wages they may have sustained, plus travel and waiting time and other loss and necessary expenses incurred as a result of the discontinuance of position No. A-15 (3), Cashier, Delaware, Ohio.

OPINION OF BOARD: Prior to September 22, 1951, the Carrier, at its Delaware, Ohio, Freight and Passenger Station, maintained three positions—a cashier and a night clerk, covered by the Clerks' Agreement, and an Agent, covered by the Telegraphers' Agreement.

Effective September 22, 1951, the Carrier unilaterally abolished the cashier's position, the duties of which then "were assigned to the Agent",—

a position not covered by the Clerks' Agreement. Such unilateral action, the Clerks assert, is violative of Scope Rule 1 (b) which provides:

> "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, in turn, provides:

> "This Agreement shall be effective as of January 1, 1945, and shall continue in effect until it is changed as provided herein or under the provisions of the Railway Labor Act as amended.
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> "Should either party to this Agreement desire to revise or modify these rules, thirty (30) days' written advance notice, containing the proposed changes, shall be given and conference shall be held immediately on the expiration of said notice unless another date is mutually agreed upon."

Although contending it had a perfect right to abolish the position and to assign the remaining work to the Agent, the Carrier, as a preliminary issue, questioned our jurisdiction of the claim involved on the ground that the Telegraphers' Organization had not been given due notice, and an opportunity to be heard. It is argued by the Carrier that the duties assigned the Agent consist of the same work that the Telegraphers have been doing since the start of this Railroad; that the Telegraphers' Organization should be a party to this proceeding in order to protect the rights of the employes under the Telegraphers' Agreement and also to avoid possible overlapping of contractual obligations.

While this claim was being processed, the Carrier members of this Board moved that notice be given "to all parties involved in the proceeding" in accordance with Section 3, First (j) of the Railway Labor Act. The motion, however, failed for lack of a majority and the issue of notice was thus presented with the Referee sitting as a member.

It is obvious that while the Clerks' Organization seeks an adjudication under its Agreement, yet any determination made will of necessity have a decided bearing upon the status of the Agent whose rights are grounded in the Telegraphers' Agreement. It is desirable, therefore, for the Telegraphers to be heard if justice is to be done to all "involved".

Thus, in the case of **The Order of Railroad Telegraphers** vs. **New Orleans, Texas and Mexico Railroad Co.**, 229 Fed. (2nd) 59, decided January 10, 1956 (cert. den. 76 Sup. Ct. 548), the Circuit Court of Appeals, 8th Circuit, after reviewing the authorities, declared void this Board's Award No. 4734 because the Clerks' Organization had not been given notice of the dispute with an opportunity to be heard. There we had sustained a claim filed by the Telegraphers that the Carrier violated its Agreement when it assigned to the Clerks work claimed to belong to the Telegraphers. In voiding the award, the Court, in language appropriate here, said:

> "Obviously it is desirable to settle controversies such as these involving so-called 'overlapping contracts' on the basis of the existing contracts wherever possible instead of compelling resort to the machinery provided by Sec. 6 for changing agreements. Of course this may not always be possible, but it is certainly much more likely to result if both parties to the dispute are brought before the Board with their respective agreements and each is considered in the light of the other, together with the usage, practice and customs of the industry, or of the particular carrier."
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> "The carrier has a right to abolish any position in the agreement provided the duties of the position are in fact abolished. The giving of the clerical work to the clerks under Award 2254 of

necessity took that work away from the Telegraphers. To now give the disputed clerical work to the Telegraphers under authority of Award No. 4734 will of necessity take that work away from a member of the Clerks' organization who is now performing the clerical work as Cashier at the station of Anchorage. The controversy now before the Court therefore involves conflicting claims of the Clerks and Telegraphers to the same clerical work. The Clerks are involved in the dispute as that term is used in Section 3, First, (j) of the Railway Labor Act."

"2. Even if it be held that Award No. 4734 now under consideration does not involve a jurisdiction controversy but merely the interpretation of a labor agreement between the Telegraphers and the Carrier, the Clerks are nevertheless involved in the dispute for as stated in Order of Railway Conductors v. Pitney, 326 U. S. 561, 567:

> "'* * * interpretation of these contracts involves more than a mere construction of a "document" in terms of ordinary meaning of words and their position. * * * For O.R.C.'s agreement with the railroad must be read in the light of others between the railroad and B.R.T. And since all parties seek to support their particular interpretation of these agreements by evidence as to usage, practice and custom, that, too must be taken into account and properly understood.'"

In the present claim the Telegraphers are "involved" just as the Clerks were in the cited case. Notice of this dispute should therefore have been given to the Telegraphers as required by the Railway Labor Act, (45 U.S.C.A. 153):

> "(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and 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."

See also **Missouri-Kansas-Texas Railroad Company** vs. **National Railroad Adjustment Board, Northern District of Illinois, Eastern Division,** Civil Action 50 C 684, 128 Fed. Supp. 331, in which a final decree was made declaring null and void a series of awards of this Board because of the failure to give notice to all involved.

In opposing the need for notice to the Telegraphers, and contending no such notice was required, the Clerks rely chiefly upon **Whitehouse** vs. **Illinois Central Railroad**, 75 Sup. Ct. 845, reversing 212 Fed. (2nd) 22. This decision, however, furnishes no support since the Supreme Court specifically refused to pass upon the third party notice and other issues. While recognizing them to be "perplexing questions", the Court restricted itself to a narrow procedural issue, not pertinent here. The limited scope of this Supreme Court decision has been generally recognized:

The Commerce Clearing House, in Labor Law Reports Weekly Summary, dated June 9, 1955, had this to say about the decision:

> "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 any 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 remained unanswered."

And the Bureau of National Affairs, Labor Relations Report, in its Summary of Developments for June 13, 1955, wrote:

> "In deciding a jurisdictional dispute case under the Railway Labor Act, the U. S. Supreme Court fails to settle the question whether the National Railroad Adjustment Board may resolve a grievance initiated by one union without making the other union a formal party to the proceeding. Several U. S. Courts of Appeal have held that an award based on participation by one union is invalid. Because of these decisions, the employer in the case taken to the Supreme Court sought to enjoin further proceedings before the Adjustment Board pending notice to the other union.
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> "By a 5-to-3 vote, the Supreme Court decides only that the employer was not entitled to the injunction. It points out that the employer sought this relief even before he could be sure that the award would be damaging to him or subject him to liability or claims from the excluded union. (Whitehouse v. Illinois Central R. R., 36 LRRM 2203)."

Since the Whitehouse decision, the Circuit Court of Appeals for the 8th Circuit spoke in **The Order of Railway Telegraphers** vs. **New Orleans, Texas & Mexico Railroad Co.** (supra). With certiorari denied by the Supreme Court, this Circuit Court decision stands as the most recent authoritative statement of the law on the issue here presented and requires notice to involved third parties before we can make a valid award. It is not for this Board to take a contrary position, for clearly no purpose can be served by an award that will only be declared null and void by a Court on the basis of the existing authorities.

It is our conclusion that there is a third party involved herein with a genuine interest. As a result, this Board is unable to proceed on the merits until the requisite third party notice is given. See Awards 7975 (Coffey), 8022 (Guthrie) and 8050 (Beatty).

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:

This Board will not proceed with a final determination of the claim until after notice to The Order of Railroad Telegraphers.

AWARD

Hearing and decision on the merits of this claim deferred pending due notice to The Order of Railroad Telegraphers as provided by Section 3, First (j) of the Railway Labor Act.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 8th day of January, 1958.