

Award No. 9121
Docket No. CL-8540

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Roscoe G. Hornbeck, Referee

PARTIES TO DISPUTE:

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

ERIE RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that the Carrier violated and continues to violate the Union Shop Agreement of August 29, 1952 when it fails and refuses to notify H. M. Hon, J. J. Lynch, F. C. Sloane, E. E. Dry, R. K. Rogers, R. W. Eckert, E. E. LaTourette, Clerks in the Valuation Department, Cleveland, Ohio, of their being charged with noncompliance of the aforesaid Union Shop Agreement in compliance with notice of December 5, 1955 addressed to and received by Comptroller Mr. G. W. Oakley, all in accordance with the provisions of Section 5 of the Union Shop Agreement dated August 29, 1952, and

That the Carrier shall be ordered and required to comply with request outlined in the aforesaid notice dated December 5, 1955. (Claim 1119.)

EMPLOYEES' STATEMENT OF FACTS: The employees named in the above claim have been in the employ of the Carrier at Cleveland, Ohio for varying periods of time. On August 1, 1955 a new agreement became effective on the Erie Railroad, and included in that Agreement are employees in the Valuation Department, Cleveland, Ohio. The only exception to certain rules of the Agreement is a Secretary in the Valuation Department, all other employees being fully covered by the rules of the Clerical Agreement. Among other things, it was agreed between the parties that employees who were in the employ of the Erie Railroad prior to August 1, 1955 and who were not subject to all the rules prior thereto, but who would be subject to all the rules on and after August 1, 1955, membership would not be required until December 1, 1955. Stated differently, such employees would be required to become members of the Organization on or before December 1, 1955 but not later than that date.

In accordance with the usual procedure each of the named employees were advised by the Organization that in accordance with the provisions of the Union Shop Agreement dated August 29, 1952 they were to become members of the Organization on or before December 1, 1955. Notice was

It should also be pointed out that although the Union Shop Agreement became effective September 15, 1952, Petitioner's purported Section 5 notice is dated December 5, 1955. Since the positions in question have been in existence for many years, a fact known to Petitioner, it isn't reasonable to assume that Petitioner was asleep for more than 36 months. The fact of the matter is that the employees here in question have never been subject to any part of the rules and working conditions agreement. Consequently, they have no seniority and are entitled to none. However, it should, perhaps, be mentioned that Petitioner has filed a claim in behalf of the employees here involved alleging that the Carrier failed and refused to include their names on the 1956 Roster No. 9. This places Petitioner in the anomalous position of requesting the Carrier to terminate the employees employment and at the same time requesting seniority for them.

The facts show that the employees are completely innocent of the entire situation. Petitioner has made them victims of circumstances over which they have no control and because of this they stand to suffer irreparable damage and harm. A sustaining award in this case would have the effect of saying that Petitioner has the right to bring a person to trial in an attempt to have his employment relation terminated and his means of livelihood brought to an end, although his innocence is known beforehand. Because the employees cannot show that they are members of the Brotherhood, a sustaining award would be the beginning of the end for them. This for the reason that the notice provisions contained in Section 5 of the Union Shop Agreement applies solely to employees who are subject to the rules and working agreement. Thus, if this Board should order that the December 5, 1955 notices be served, it would be saying that the work here in question is subject to the rules and working conditions agreement, and since the employees have failed to become members of the Brotherhood, they must stand trial before a neutral arbitrator with a remote chance of survival. Such award would no doubt serve as prima-facie evidence.

The Carrier has shown that the work in question has never been contracted to Petitioner. If Petitioner desires to now represent such work and the employees engaged therein, it should abandon the course it is here following and take the open path to negotiation. Should negotiation fail, Petitioner's source of aid is the Mediation Board.

The Carrier asserts that the alleged claim is clearly an intentional misrepresentation of a material fact made for the purpose of inducing this Board to impose upon the employees named therein and this Carrier conditions of employment and obligations not agreed upon by the parties. The Board has no authority to take such action.

The Carrier submits that the claim has not only been improperly submitted to this Board but that it is completely without merit and should be denied.

All data contained herein are known to the Petitioner.

(Exhibits not reproduced.)

OPINION OF BOARD: The Claim is that the Carrier violated Section 5 of the Union Shop Agreement, of August 29, 1952, in failing to comply with the request of the Organization to notify the persons named in the claim, therein designated as Clerks in the Valuation Department,

Cleveland, Ohio, that they had been charged with a violation of said Agreement.

The Carrier refused to notify the employees named for the reason that "they are not subject to the Union Shop Agreement", which refusal was based on the contention that they were not included in the Rules and Working Conditions Agreement between the Carrier and the Organization.

We hereinafter refer to the persons named in the Claim as "Employees".

At the outset, it will be well to clarify the issue which is, shall the Carrier be required to serve the notice of the Organization on the Employees that they have not complied with the Union Shop Agreement.

Determination of this issue can only be binding as it has application to the obligation of the Carrier to serve the notice under Section 5 (a) of the Union Shop Agreement. The Employees are not before the Board and we are without authority to bind them by an adjudication which will affect adversely their rights assured by the Union Shop Agreement. These rights are defined in Section 5 (a) to (g) inclusive of the Union Shop Agreement.

Section 5 (a) provides:

"Each employe covered by the provisions of this agreement shall be considered by a carrier to have met the requirements of the agreement unless and until such carrier is advised to the contrary in writing by the organization. * * *"

This sentence of the Agreement imposes no obligation on the Carrier to determine whether or not an employe is covered by the provisions of the Union Shop Agreement or by the Rules and Working Conditions Agreement and enjoins no action on its part.

By the second sentence of Section 5 (a) the Organization notifies the Carrier "of any employe who it **is alleged** has failed to comply with the terms of this agreement and who **the organization therefore claims** is not entitled to continue in employment subject to the Rules and Working Conditions Agreement." (Emphasis ours.)

The fourth sentence of the Section provides:

"Upon receipt of such notice, **the carrier will**, within ten calendar days of such receipt, **so notify the employe concerned** in writing * * *." (Emphasis ours.)

This language requires the Carrier to notify the employe of the charge which the Organization has made against the employe. It imposes a mandatory duty upon the Carrier to serve the notice. By so doing, the Carrier only observes a step set up in the procedure provided by the Section leading to the ultimate determination of the merits of the charge of the Organization. By giving this notice the Carrier does not thereby endorse the subject matter of the notice, indeed it would be contrary to the spirit of the Union Shop Agreement if it did so.

The prescribed procedure continues and provides for a hearing for the employe notified, if he disputes "the fact that he has failed to comply with the terms of this agreement."

If such dispute develops, the Carrier is then empowered to determine the issue:

"Section 5 (b) The carrier shall determine on the basis of the evidence produced at the hearing whether or not the employe has complied with the terms of this agreement and shall render a decision within twenty calendar days * * *". (Emphasis ours.)

This is the first and only time that the Carrier is authorized to determine the status of the employe under the Union Shop Agreement and necessarily under the Rules and Working Conditions Agreement.

Following the decision of the Carrier further steps are outlined whereby the dispute may eventually be resolved by a neutral arbitrator.

The foregoing terms of Section 5 of the Union Shop Agreement have been mutually agreed by the parties to this submission. They have defined every step of the whole proceedings with precision and meticulous care.

An important phase in the procedure is that which empowers and directs the Carrier to determine on the evidence the very question which it seeks now to have this Board decide.

It will be observed that the time required from the inception of the claim of the Organization that the employes are violating the Union Shop Agreement until the final decision in the matter is carefully fixed and will not exceed fifty days. This is of vital importance to the Organization and the employes, and in marked contrast to the time within which the question could be determined by the present proceeding.

To hold that the Carrier has the right under the Union Shop Agreement to refuse to serve the notice here involved is incongruous and unreasonable and at variance with the manifest purpose of Section 5 of the Union Shop Agreement.

It seems obvious to us, that under Section 5 of the Union Shop Agreement, the right is assured to the employes and the Organization to have the issue on the merits here presented fully determined in one proceeding and in the manner and by the triers of the fact therein designated and not by this Board.

We are not without precedent.

In Award 6744, Parker, Referee, it was the claim that the Carrier had violated the Union Shop Agreement when it permitted certain employes to hold the positions classified as General Agent (Minor) when they should have become members of the Order of Railroad Telegraphers.

The Carrier defended on the proposition that the employes involved were not subject to the Agreement between the Carrier and the Organization.

The Award is helpful in two respects.

(1) It holds that this Division of the Board has the right to consider a Union Shop Agreement.

(2) It holds that the issue whether or not the employees were properly classified as Telegraphers could not be determined on its merits because the "parties themselves made that action impossible when they placed the ultimate decision of the question therein involved in the hands of an arbitrator by expressly agreeing" to that effect.

In Award 7085, Whiting, Referee, this Board, referring to the provision in a Union Shop Agreement like that found here, and approving Award 6744, *supra*, said:

"That agreement" (the Union Shop Agreement) "established a special procedure to resolve disputes thereunder concerning individual employees, which terminates in arbitration, if necessary. We held" (in Award 6744) "that the Carrier could not arbitrarily refuse to give the notice to individual employees, which inaugurates such procedure, on the basis of its claim that the employees were not subject to the Union Shop Agreement.

"We also properly held that, in view of the special procedure agreed upon, we would not determine the dispute on its merits."

We are in accord with the rationale of the foregoing cited Awards.

The Organization is well within its rights in invoking an order of this Board which will require the Carrier to give the notice to the employees which the Organization requested that it give under Section 5 (a) of the Union Shop Agreement. The Organization had no other course to take because the proceedings subsequent to the notice which would determine the validity of the claim against the employees could not be invoked until the notice was served.

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 Employees involved in this dispute are respectively Carrier and Employees 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 Claim should be allowed on the ground announced in the Opinion.

AWARD

Claim allowed on the ground announced in this Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

DISSENT TO AWARD NO. 9121, DOCKET NO. CL-8540

At the adoption proceedings covering Award 9121, the Carrier Members pointed out that, in the cases covered by Awards 6744 and 7085, it was agreed between the parties that the employes involved therein were covered by the Scope Rules of the applicable Rules Agreements, which is the disputed issue here. However, the Referee emphasized that Award 9121 gives no consideration whatever to that issue here, but that it simply holds that it was a mandatory obligation on the Carrier to serve notice at the Organization's request, in conformity with the Union Shop Agreement, for ultimate decision, if necessary, by the arbitrator under the procedures provided for therein; hence his denial of the claim as prematurely instituted in Award 9122, adopted this same date. Accordingly, Award 9121 did not take jurisdiction over or decide the issue of whether or not Claimants' positions here are included within the scope of the Clerks' Agreement.

/s/ **W. H. Castle**

/s/ **J. E. Kemp**

/s/ **C. P. Dugan**

/s/ **J. F. Mullen**