

Award No. 9397

Docket No. TE-8044

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Martin I. Rose, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

**UNION PACIFIC RAILROAD COMPANY
(South-Central District)**

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Union Pacific Railroad (South-Central and Northwestern Districts), that:

- (1) The Carrier violated and continues to violate the terms of the agreement between the parties, when effective September 1, 1949, it declared abolished the telegrapher-clerk position at Moapa, Nevada, and unilaterally removed a portion of the work of this position from the agreement and from the employees covered thereby, and transferred such work to employees not subject to said agreement;
- (2) The Carrier shall forthwith restore to the agreement and to the employees holding rights under said agreement all of the work of said telegrapher-clerk position which has since September 1, 1949, been assigned to and performed by outside employees; and
- (3) In consequence of such violation, the agent-telegrapher employed at Moapa shall be paid an amount equal to a call each day since September 1, 1949, that he has not been called out to perform the work in question.

EMPLOYEES' STATEMENT OF FACTS: This is a resubmission of the dispute which reached your Board on July 16, 1951, covered by Docket TE-5827. On the 26th day of January, 1953, in Award 6051, the following Opinion and Findings were issued:

"OPINION OF BOARD: This claim is based on the abolishment of the telegrapher-clerk position, assigned hours 2:30 P. M. — 10:30 P. M., at Moapa, Nevada as of September 1, 1949 and removing a portion of the work of this position from the Agreement and from the employees covered thereby to other employees outside of the agreement. The claims also asks that the work be restored to the Agreement and to the employees holding rights under the Agreement and for a call for each day since September 1, 1949 for the agent-telegrapher.

that movement on November 15, 1949. Obviously no agency work was performed on the 12th so that part of the claim is without merit.

"On Saturday, November 3, 1951, Saturday, November 10, 1951, and Sunday, November 18, 1951, a Conductor picked up cars of sugar beets at Kuna, signed the bill of lading prepared by an employe of the sugar company and moved the cars to Nampa where the waybill was completed. The station at Kuna was closed on those days.

"It appears that for many years the instructions issued by the Carrier to agents and conductors have provided that agencies not open 24 hours per day would be treated as non-agency stations when employes were not on duty, and carload shipments would be moved on conductor's memorandum waybill to the first open agency where the train stopped for billing.

"There is no evidence that an agent has ever been called on a rest day to bill such carload shipments and since **billing cars is not work belonging exclusively to telegraphers, there is no basis for the claim.**

"In most of our Awards sustaining claims on the basis that station work at one man stations outside the Agent's assigned hours belongs to the Agent, there has been some prior practice of calling the Agent to perform the work involved. Here that is not the case so those Awards are not controlling. Here the Carrier merely adopted an alternative procedure in accordance with instructions in effect for many years without any prior challenge thereof." (Emphasis ours.)

Claim was there denied.

The Carrier has shown (1) that this Board is without jurisdiction to docket this case or to hear and determine it and (2) that in any event the claim here attempted to be presented is without merit.

All information and data contained in this Response to Notice of Ex Parte Submission are a matter of record or are known by the Organization.

OPINION OF BOARD: This docket resubmits a claim which is the same as the claim in Award 6051. The award therein states: "Claim dismissed without prejudice."

Carrier contends that this prior award constitutes a "final" disposition of the claim and that the words "without prejudice" do not permit resubmission of the same claim. Petitioner maintains that these words and the nature of Award 6051 authorize resubmission of the claim.

In a court action, the Referee would regard a judgment of dismissal without prejudice as leaving open for consideration matters which were not to be prejudiced by such judgment. We are governed by the Railway Labor Act's provision that the Board's "awards shall be final and binding upon both parties to the dispute, except in so far as they shall contain a money award." Section 3, First (m).

In view of this provision of the Act, a bare statement that a claim is dismissed without prejudice may leave some uncertainty as to the finality of such an award. See Second Division Interpretation No. 1 to Award 1740. Cf.

Awards 8220, 8107, 8106. However, in the Interpretation cited, the Second Division stated that by the use of the words "without prejudice" it was not intended to permit resubmission of the identical claim. This Referee cannot say what was intended by the use of those words in the award in Award 6051 made with another Referee sitting with the Board.

The question posed by the contentions of the parties is not one of first impression in this Division. The Third Division has repeatedly regarded an award dismissing a claim without prejudice as a final disposition and refused to consider the same claim on resubmission in another docket. Awards 9377, 9376, 9255, 9254, 9026, 8760, 8752, 8419. Nothing in the record before us suggests any reason for disregarding these precedents.

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 dismissed in accordance with the Opinion.

AWARD

Claim dismissed in accordance with Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 11th day of May, 1960.