Award No. 9921

Docket No. CL-11316

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

PARTIES TO DISPUTE:

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

PACIFIC ELECTRIC RAILWAY COMPANY

STATEMENT OF CLAIM: It is the claim of the System Committee of the Brotherhood that:

(1) The Carrier violated Rule 53 of the Agreement when it deferred the vacation of Phyllis Chubbic without giving her the ten days notice provided therein.

(2) Phyllis Chubbic now be paid at time and one-half instead of straight time already allowed for the ten days scheduled for the taking of vacation in the year 1958.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the Carrier and Employe involved in this dispute are respectively carrier and employe 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;

That the dispute was certified to the Third Division of the Adjustment Board ex parte by the complainant party; and

That hearing thereon was waived by the parties and under date of March 6, 1961, the parties jointly addressed a formal communication to the Secretary of the Third Division requesting withdrawal of this case from further consideration by the Division, which request is hereby granted.

AWARD

Case dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 14th day of April, 1961.

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

INTERPRETATION NO. 1 TO AWARD NO. 9221

DOCKET NO. TE-8375

NAME OF ORGANIZATION: The Order of Railroad Telegraphers.

NAME OF CARRIER: The Pittsburgh and Lake Erie Railroad Company and The Lake Erie and Eastern Railroad Company.

Upon application of the Carrier involved in the above Award, this Division was requested to interpret same because of an alleged dispute between the parties as to its meaning and application, as provided for in Section 3, First (m) of the Railway Labor Act.

Submitted on the ex parte request of Management for an interpretation of Award No. 9221 and on a motion of the Employes to dismiss the request.

The submission in this Award was presented to the Board on the claim of the Employes in two aspects.

The first and basic issue was whether the Carrier had violated the Agreement invoked by the Employes.

The second, if the first was resolved in favor of the Employes, to what extent and in what amount should Claimants be compensated.

The Award found that the Agreement had been violated and the "Claim allowed and compensation awarded as set up in part 2 of the Claim."

The statements, arguments and contentions of the parties in the original submission were devoted exclusively to the merit of the first issue. Not one word beyond the language of the Claim was addressed to that part of it relating to the compensation although it embraced one hundred eight separate and distinct items.

Part 2 of the Claim reads:

> "Carrier shall compensate the employes or occupants of positions here-in-after named for 8 hours at the pro rata rate of each position in addition to the compensation already paid, **for each and every violation occurring as here-in-above set out:"** (Emphasis ours.)

Acting upon the well recognized principle that a material proposition asserted by one party and undenied by the other may be accepted as estab-

lished, the Referee and, no doubt, the Board did not feel called upon to examine closely the merit of the many claims for compensation.

Upon this request for an interpretation of the Award attention has been focused on the correctness of the amount of compensation allowed.

With full appreciation of the effect of the Award and with the hope that we could find some basis upon which we could reconsider the question now for the first time urged by the Carrier, we have minutely examined the Award and the various items making up the Claim for compensation to learn if there is any ambiguity in either which will permit of interpretation. This is the sole test of the right to interpretation. So examining the record, the Claim and the Award, we find no basis for interpretation.

The result in this Award is unfortunate in that no issue was raised which required consideration of the extent of compensation to be awarded Claimants. It would be desirable if the right of rehearing and reconsideration could be accorded. But, under the law and the procedure controlling this may not be done. Sec. 3, First (m) of the Railway Labor Act. Strict adherence to the law, no doubt, in instances works injustice but, over all, it makes for a better and certainly a more expeditious disposal of the mass of controversies which must be resolved by this Board.

If the contention now urged by the Carrier had been presented at any time prior to the adoption of the Award it certainly would have deserved mature consideration and may have prevailed.

Much can be said for the proposition that the Agreement defining penalty by means of compensation does not contemplate an additional full days' pay to an operator for more than one violation occurring on the trick during which he is on duty. However compelling the argument it comes too late to be considered upon the record as we find it.

If the Carrier is confident of the merit of its position it may await the possibility of an action by Claimant in the District Court of the United States to enforce the Award.

The request for an interpretation of the Award will be denied.

Referee Roscoe G. Hornbeck who sat with the Division, as a member, when Award No. 9221 was adopted, also participated with the Division in considering the application for interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 21st day of July, 1960.

SPECIAL CONCURRING OPINON,

INTERPRETATION NO. 1 TO AWARD NO. 9221,

DOCKET NO. TE-8375

The Referee correctly held that under the law and our procedures governing interpretations there was no basis for entertaining the Carrier's

request; and quite properly denied that request. For these reasons alone the Labor Members voted with the Referee for adoption.

However, the document contains a considerable amount of the Referee's personal opinion with which we do not agree, and which is mere surplusage in any event.

When the author reached the conclusion that we had properly acted upon "the well recognized principle that a material proposition asserted by one party and undenied by the other may be accepted as established" he had completely fulfilled his duty with respect to interpretation of the award. There was no proper reason for the Referee's "hope that we could find some basis upon which we could reconsider the question now for the first time urged by the Carrier".

The majority which adopted this interpretation had no such hope. I doubt that the Carrier Members seriously entertain such an idea because if one party can be so favored to-day the other one can be given aid to-morrow. The Railway Labor Act clearly does not permit such actions.

The Referee's attitude of consolation toward the Carrier ill becomes one whose selection was based upon a law requiring absolute neutrality of such persons. That attitude is not shared by the other members of the majority. The rule upon which the claims were based plainly provides for a penalty payment of eight hours in addition to the regular pay each time a violation of the agreement occurs. When the Carrier chose to violate the agreement seven times within any period of time it by natural inference also chose to pay the prescribed penalty for each violation. The claims asked no more, were not challenged as being excessive by the Carrier or any member of this Board, and were properly sustained. The Referee's attempt to cast doubt upon the propriety of his own finding certainly will have the effect of suggesting further violation of the agreement by the Carrier, a result diametrically opposed to the primary purpose of the Railway Labor Act. I am firmly of the opinion that Referees should not suggest action which will very likely result in further disputes.

Finally, I feel it is necessary to publicly repudiate the Referee's suggestion that the Carrier refuse to comply with the award, thereby provoking a law suit for enforcement, and thus secure a further opportunity to make its spurious argument.

It is appalling to see such a Referee inciting litigation. Aside from its conflict with the announced purpose of the Railway Labor Act, this suggestion is contrary to the established principle, known to every beginning law student in the nation, that the law, as embodied in our system of justice, discourages litigation and favors settlement of disputes by agreement.

This Board has travelled the road of retrogression a long way. In the event the Carrier chooses to follow the Referee's suggestion to await court action, I feel that the Court should have before it not only my views as herein expressed, but also those of Congress in the early days of the Railway Labor Act and this Board.

On March 25, 1937, Senator Borah of Idaho introduced in the Senate a resolution, SR-101, to investigate the action of the Chicago Great Western Railroad in its refusal to abide by the award made by the National Railroad Adjustment Board, under the Railway Labor Act.

The resolution reads as follows:

"Whereas the National Railway Labor Act and amendments thereto were enacted by Congress and approved by the President for the express purpose of supplying machinery for the peaceful adjustment of controversies concerning wages, working conditions, or other matters, which might arise between the railroads and their employes; and

"Whereas an essential part of this machinery is the National Railroad Adjustment Board with headquarters in Chicago, and made up of an equal number of representatives of the carriers and of the recognized unions of the employes; such Board constituting what might be described as a supreme court for the settlement of all disputes between the railroads and their employes; and

"Whereas said Board, after extended hearings and full consideration of the facts, recently decided that the Chicago Great Western Railroad had violated its wage agreement with certain organizations of its employes, and thereupon made awards to individual employes totaling approximately $50,000; and

"Whereas the trustees of the Chicago Great Western have refused to pay said awards, thus setting a precedent which, if it is followed by other railroads, may destroy the machinery set up by Congress for the peaceful adjustment of railroad labor disputes; and

"Whereas an emergency commission selected by the President of the United States, by authority of the Railroad Labor Act, has failed in its effort to persuade the trustees to recognize the validity of awards made by the National Railroad Adjustment Board; and

"Whereas because of the trustee's refusal to pay such awards the railroad labor organizations involved have polled their members and have been authorized by a substantially unanimous vote to withdraw all their members from service on the Chicago Great Western, thus threatening a serious interruption of interstate commerce: Therefore be it

"Resolved, That the Committee on Interstate Commerce, or any duly authorized subcommittee thereof, is authorized and directed to make and to report to the Senate the results of a thorough and complete investigation of all facts relating to the failure of the Great Western Railroad to adjust and settle the awards of the National Railroad Adjustment Board, and to make any recommendations necessary to carry into effect the awards of said Board; and any other facts or circumstances surrounding the failure of the said railroad to abide by the decision of the Board.

"For the purposes of this resolution the committee, or any duly authorized subcommittee thereof, is authorized to hold such hearings, to sit and act at such times and places either in the District of Columbia or elsewhere, during the sessions, recesses, and adjourned periods of the Senate in the Seventy-fifth Congress, to employ such experts, and clerical, stenographic, and other assistants, to require by subpena or otherwise the attendance of such witnesses and the production and impounding of such books, papers, and documents,

to administer such oaths, and to take such testimony and to make such expenditures as it deems advisable. The cost of stenographic services to report such hearings shall not be in excess of 25 cents per hundred words. The expenses of the committee, which shall not exceed $2,500, shall be paid from the contingent fund of the Senate upon vouchers approved by the chairman."

March 31, 1937, Senators Wheeler of Montana, Lewis of Illinois and Barkley of Kentucky, made the following statements on the floor of the Senate:

Mr. WHEELER: "Mr. President, on Thursday of last week, the senior Senator from Idaho (Mr. Borah) presented a resolution directing the Committee of Interstate Commerce to inquire into the refusal of the trustees of the Chicago Great Western Railroad to pay certain awards made by the National Railroad Adjustment Board in favor of employes who are members of five of the standard railroad labor organizations—the Engineers, the Firemen and Enginemen, the Conductors, the Trainmen, and the Switchmen's Union of North America. The resolution came before the commitee, and we are about to take it up and set it down for hearing; but I am glad to be able to report that since the Senator from Idaho introduced his resolution the trustees of the Chicago Great Western Railroad have agreed to pay the awards in full, thus ending the unfortunate controversy. I have no doubt that the action of the Senator from Idaho in calling the matter to the attention of this body had a most wholesome influence, and contributed materially to the result achieved. In fact, I am sure it was the only thing that compelled the trustees to agree to settle on the basis on which they were justly entitled to settle.

"The amount involved in this case was not great—approximately $50,000—but the principle was of major importance.

"When Congress enacted the amended Railway Labor Act a few years ago, we endeavored to set up machinery which would facilitate the speedy adjustment of disputes between the carriers and their employes. The law recognizes in the most definite way the railroad worker's right to join the labor organization of his choice. It bans company-supported unions and outlaws the vicious 'yellow-dog' contract. Finally, it sets up what the Senator from Idaho, in his resolution, very happily described as 'a supreme court for railroad labor.' We may later wish to destroy all the courts; but the act sets up what is commonly recognized by the railroad employes as a supreme court for railroad labor. This is what is known as the National Railroad Adjustment Board. It consists of 36 members, 18 selected by the carriers and 18 by the standard railroad labor organizations.

"When a dispute arises concerning the proper interpretation of an agreement entered into between a carrier and a union the law contemplates that the representatives of the carrier and the union shall endeavor to reach an understanding. If that proves impossible, then an appeal may be taken to this supreme court—a tribunal made up of equal numbers of representative of the carriers and the employes—and all men thoroughly familiar with every phase of rail-

road work. Should that tribunal become deadlocked, a referee may be called in.

"It is difficult to imagine a fairer, a saner, method of adjusting industrial disputes. That the system has worked is evidenced by the fact that there has been no serious interruption of interstate traffic since this salutary law was enacted.

"The National Railroad Adjustment Board has rendered a great number of decisions. Some were in favor of the unions, and some were in favor of the carriers. As I understand, the unions in every case have accepted the verdict of the Board. In some cases the carriers have not.

"Perhaps the most flagrant example of a carrier's attempt to flaunt decisions of the National Railroad Adjustment Board is to be found in this case on the Chicago Great Western. The awards were made last June and July. They involved a number of individual grievances. The employes were so clearly right that in only one instance did the Board find it necessary to call in a referee.

"Nevertheless, the trustees refused to pay the awards. I am informed they even appealed to Federal Judge Charles E. Woodward, the judge responsible for their appointment. Judge Woodward made the grave mistake of advising the trustees that it was not necessary for them to pay the awards until they were instructed to do so by a court of competent jurisdiction, notwithstanding the fact that he himself was a court of competent jurisdiction. Of course, that meant a lawsuit, and the unions very properly, in my judgment, refused to become parties to long and expensive litigation.

"They held that if the awards of the National Railroad Adjustment Board were not accepted, and if carriers persisted in appealing to the courts the elaborate system which Congress had devised for the adjustment of disputes between carriers and their employes would be weakened and possibly destroyed.

"So the unions polled their members, and the members voted to strike if the trustees did not accept the awards made by the National Railroad Adjustment Board. At that point the President of the United States appointed an emergency board to inquire into the facts, and that board, finding the facts substantially as I have stated them, endeavored to persuade the trustees to enter into fresh negotiations with the unions' representatives.

"These negotiations dragged, and a few days before the Senator from Idaho introduced his resolution the trustee suggested they would settle on the basis of 10 cents on the dollar. Of course, the unions rejected that offer, and now the trustees have paid 100 cents on the dollar.

"In my judgment they paid it only because of the fact that they were threatened that an investigation into the whole matter would be taken up by the committee on Interstate Commerce.

"All through these proceedings the representatives of the unions exhibited the patience and good judgment which we have come to

associate with the leadership of the standard railroad labor organizations. Sorely provoked, they might have ordered the strike which their members had authorized them to call. Had they done that, we would have had another serious industrial struggle on our hands, and all because two trustees, appointed by a Federal court, refused to comply with the letter and spirit of a law which has won such widespread approbation that even the National Association of Manufacturers—an organization noted for its opposition to trade unionism —has suggested that it might be used as a model for a Federal law to govern all industries.

"I am sure we are all glad the trustees of the Chicago Great Western have retreated from their untenable position. It is to be hoped that the managements of other railroads will follow their example.

"We cannot afford to permit the amended Railway Labor Act, or any of its essential features, to be weakened or destroyed by shortsighted employers who, in order to gain a temporary advantage, are willing to invite an industrial war.

"Of course, we should take exactly the same attitude toward the unions should they attempt to scuttle this beneficient legislation. There is not much danger of that however. It is to their credit that the standard railroad-labor organizations sponsored the amended Railway Labor Act—the legislation with which the country is now so pleased. I am sure they will never do anything to jeopardize the structure they assisted in erecting.

"I am sure that if other industrial organizations and other unions would adopt the same methods which have been adopted by the railroad brotherhoods and the railroads, many industrial disputes, such as those from which the country is now suffering, would be avoided, and we would generally be in a very much happier and better state.

Mr. LEWIS. "Mr. President, permit me to say, in connection with the remarks of the able Senator from Montana (Mr. WHEELER), that this subject matter arose in a jurisdiction which I have the honor in part to represent. When the able Senator from Idaho (Mr. BORAH) presented his resolution I assumed then to state to the Senate that I had been informed that the difference between the company, the trustees, and the men was very slight, and I felt that it could be composed, but that there was a difference as to the facts. The Senator from Idaho stated he was quite sure the resolution would give opportunity of investigation which would reveal the real facts.

"Since then, while I have been in the Senate, I have been advised by the trustees and the counsel for the companies that a composure has been effected, as the Senator from Montana has just related, and I am pleased to join with him and with the officers of the company likewise in felicitations that complete peace and mutual confidence have followed between the company and its men.

Mr. WHEELER. "Mr. President, I wish to say just a word. An award was made by the board and the company offered 10 cents

on the dollar in settlement of it. The President of the United States appointed a mediation board, and still the company refused to settle. It was only after a resolution was introduced in the Senate for an investigation of the situation that the Chicago Great Western finally paid the award, which had been made some time last June.

"I hope that when other disputes of this kind arise the parties will settle them among themselves, following an award by the Board, regardless of whether the award is in favor of the unions or in favor of the companies, and that it will not be necessary every time, in order to get them to settle the award, to have a resolution introduced in the Senate for an investigation of the situation.

Mr. TYDINGS obtained the floor.

Mr. BARKLEY. "Mr. President—

The PRESIDING OFFICER. "Does the Senator from Maryland yield to the Senator from Kentucky?

Mr. TYDINGS. "I yield.

Mr. BARKLEY. "I cannot let the opportunity pass without just a word of gratification over the result of this legislation, not only before the Supreme Court but in its operations throughout the country. The cause of my gratification is that it was my good fortune to introduce in the House of Representatives the bill, like one introduced in the Senate by Senator Howell, of Nebraska, and which became known throughout the country then as the Howell-Barkley bill. The railroads desperately fought the measure in the House at that session, and were able to defeat it, but at the end of the session it was suggested by Members of the House and the Senate that the railroads and their employes get together during the recess of the Congress and see whether at the next session legislation of this character might not be enacted without serious opposition.

"As a result of that suggestion the railroads and their employes, after many conferences during the recess, came to an agreement on the principle of the original bill, with very slight amendments, and the bill was enacted at the next session of the Congress. It is gratifying to all those who had any hand in the enactment of the law that it has been one of the most successful laws for settling labor disputes that has ever been placed on the statute books of the United States.

"It is to the credit of both the railroads and the employes that they have in most cases tried in good faith to observe the spirit of the law. We all know that the standard railway brotherhoods are among the highest class of organized employes in the United States, and the success of the law and its final justification before the Supreme Court in a unanimous decision offer hope that in the near future we may be able to work out legislation which will solve all other industrial disputes with as much efficacy and with as much peace and lack of disturbance.

Mr. WHEELER. "Mr. President, I do not think the Senator from Kentucky was in the Senate when I first spoke, but he refreshes

my memory. After the railroad brotherhoods and the railroads agreed upon this particular piece of legislation and both sides came before the Committee on Interstate Commerce of the Senate, the attorney for the National Association of Manufacturers came before the committee and opposed the proposed legislation, notwithstanding the fact that both sides had agreed to it. Now we find the National Association of Manufacturers lauding the law, stating that it is a good law and that it ought to be worked out in industrial organizations. I am extremely glad to see that the National Association of Manufacturers have finally seen the light and are coming to the conclusion that this is a good law."

These excerpts from the Congression Record certainly do not support the Referee's suggestions.

Furthermore, as I said to the Referee at the adoption session, the right of employes to strike as a last resort is as well established as the right of a carrier to go to court. Therefore, the suggestion should also have included such an observation if it were intended to be nothing more than a reminder of legal rights.

To the extent indicated I disagree with this "Interpretation", otherwise, I concur.

J. W. Whitehouse,

Labor Member.

ANSWER TO SPECIAL CONCURRING OPINION OF THE LABOR MEMBER TO INTERPRETATION NO. 1 TO AWARD NO. 9221,

DOCKET NO. TE-8375

The Interpretation to which the Special Concurring Opinion of the Labor Member takes exception, in part, clearly states that, in writing and adopting Award 9221, "the Board did not feel called upon to examine closely the merit of the money claims for compensation", and indicates that, notwithstanding the possibility of an injustice in its not so doing at this time, the majority was motivated by the desirability for strict adherence to the law in the consideration given to the Carriers' request for an Interpretation. Criticism over the inclusion of a simple statement of fact concerning the parties' rights under the law in a minor dispute of this kind is unwarranted, and the inclusion thereof is particularly unassailable in the interpretation in this case considering the absurdity of the compensation claimed.

/s/ W. H. Castle

/s/ R. A. Carroll

/s/ C. P. Dugan

/s/ J. E. Kemp

/s/ J. F. Mullen