

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

J. Harvey Daly, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

NEW ORLEANS AND NORTHEASTERN RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on New Orleans and Northeastern Railroad, that:

1. Carrier violated the agreement between the parties when, on February 22, 1956, it did not fill the position of Clerk-Telegrapher at Hattiesburg, Mississippi, and required and permitted an employe having no rights under the agreement to perform the work thereof.
2. Carrier be required to pay P. L. Daly, regular incumbent of the position, eight hours at the time and one-half rate on February 22, 1956.

EMPLOYEES' STATEMENT OF FACTS: The agreements between the parties are available to your Board and by this reference are made a part hereof.

At the time cause for this claim arose there was, under the Telegraphers' Agreement at Hattiesburg, Mississippi, one position of Clerk-Telegrapher assigned hours 8:00 A. M. to 5:00 P. M., with one hour for meal, seven days per week; assigned rest days Friday and Saturday, the rest day relief performed by a regularly assigned relief employe.

Claimant P. L. Daly, was notified by bulletin, dated February 9, 1956, that the position would not work on February 22 (Washington's Birthday) and, in accordance with those instructions he did not show up for work on that date. During the holiday on which this position was not filled several occasions arose requiring the handling of messages concerning the movement of trains and traffic. The Chief Train Dispatcher, A. K. Killingsworth, received by means of Morse telegraph and telephone the messages containing the information necessary to the Carrier's operations.

Claim was filed and handled in the usual manner up to and including the highest designated officer of the Carrier and failing of adjustment we are now before your Board.

ceedings. In the instant case there was no compliance with the statute on the part of petitioner. The usual manner of negotiating with the carrier was not complied with. There was no failure to reach an adjustment in the usual manner.'

Due to the claimant's failure to pursue the required method of presenting his grievance, this Division of the National Railroad Adjustment Board is without power to pass upon his claim."

Also see Second Division Awards Nos. 1746, 1748 and 2023.

As the claim is **not** properly before the Board and the Board has no jurisdiction over it, no award can be made other than that claim be dismissed.

All pertinent data and facts used by the Carrier in this case have been made known to Employe representatives.

OPINION OF BOARD: The Carrier contends that this claim is not properly before the Board because it was not discussed in conference as required by the Railway Labor Act, by the Rules of Procedure of the National Railroad Adjustment Board, and by the pertinent provisions of the Telegraphers' Agreement.

The record, however, indicates that none of the above contentions was raised on the property and, therefore, they may not be introduced before this Board.

It might be beneficial to point out that neither the pertinent provisions of Railway Labor Act nor the National Railroad Adjustment Board's Procedural Rules make it mandatory that a conference be held between the parties prior to submitting the dispute to this Board.

In Award 3269 Referee Carter stated:

"The Carrier contends that the claim has not been properly handled in that no conference was held between the representatives of the Organization and the highest officer of the Carrier designated to handle such disputes. Such officer did pass upon and deny the claim by letter. Under such circumstances, a conference would be a vain thing. We have held that under such a situation all rule requirements have been met."

In Award 7403 Referee Larkin stated:

"Neither the Railway Labor Act nor the procedural instructions given to this Board specifically requires that the final step in handling such claims on the property be taken up in oral conference by the Manager of Personnel and the General Chairman, if they elect to waive the oral discussion, as was done in this instance. Such a conference is necessary only where requested by one of the parties. The one thing necessary for our records is that all claims be put in writing, together with a written response by the proper official authorized to handle such matters. In this instance, the position of the parties is made clear in the exchange of written communications. Obviously, neither the Manager of Personnel nor the General Chairman felt that anything would be gained by further discussion."

The record indicates that on February 22, 1956, the Chief Train Dispatcher did use the Morse wire and other communication facilities at Hattiesburg, Mississippi, to receive information. The Carrier, however, contends that the Chief Train Dispatcher has authority to communicate with operators by Morse wire and that this practice has been followed for many years.

This Board might agree with the Carrier's contention, *supra*, under a different factual situation than the instant one. In the case before us, the Claimant was prevented from working on Washington's Birthday, February 22, 1956, because the Carrier instructed him by a Bulletin dated February 9, 1956, that his services would not be needed on that day. The record discloses, however, that the Claimant's services were needed on February 22, 1956, as evidenced by the clerk telegrapher's work performed by the Chief Train Dispatcher — work which the Claimant would have performed had he been permitted to work on that day. The work performed by the Chief Train Dispatcher constituted a violation of the Scope Rule of the current Agreement — as that work clearly belonged to the Claimant.

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 Employee involved in this dispute are respectively Carrier and Employee 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

The Carrier violated the Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 27th day of October 1961.

DISSENT TO AWARD NO. 10139, DOCKET NO. TE-9042

The first paragraph of the Opinion of Board in Award No. 10139 outlines Carrier's challenge to the Board's jurisdiction to consider the claim because it was not handled in accordance with the provisions of the Railway Labor Act, the Rules of Procedure of the National Railroad Adjustment Board, and the effective Telegraphers' Agreement. The second paragraph of the Opinion erroneously disposes of this challenge by stating:

"The record, however, indicates that none of the above contentions was raised on the property and, therefore, they may not be introduced before this Board."

It is a well-settled rule that jurisdictional issues may be raised at any time. The only jurisdiction that this Board has is that conferred by Congress in the Railway Labor Act, and any question as to whether under the powers granted by Congress this Board has jurisdiction to act at all in a dispute before it may be raised at any time. It is elementary that any challenge to the Board's jurisdiction must necessarily address itself to the Board. The Carrier's challenging of the Board's jurisdiction in its submission thereto was proper.

Section 2, Second of the Railway Labor Act is mandatory that

"All disputes * * * shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute."

This Board owes its existence to Section 3 of the Railway Labor Act. Section 3, First (i) of the Act reads in part:

"(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements * * * shall be handled **in the usual manner** up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board * * *." (Emphasis added.)

The above provision is the source of this Board's jurisdiction. It follows that unless, within the meaning of the Railway Labor Act, the parties have failed to handle a dispute on the property **in the usual manner**, this Board has no jurisdiction of such dispute.

The record in this docket shows without dispute that on this Carrier it has been the established procedure "throughout the entire period the Railway Labor Act, as currently amended, has been in effect — for the General Chairman to appeal claims, in writing, up to and including the highest officer designated by the Carrier to handle such disputes. The Carrier's officer investigates the claims appealed and, as to each, notifies the General Chairman, in writing, of his decision. The General Chairman then lists for discussion in conference those claims which the Employees desire to handle further."

As the dispute in this docket was not handled in the "usual manner" as required by the Railway Labor Act, the Board should have properly dismissed it for lack of jurisdiction.

The conclusion of the majority that as the contentions as to jurisdiction were not raised on the property and, "therefore, they may not be introduced before this Board," is absurd inasmuch as no question of jurisdiction arises unless and until the dispute is referred by petition to the Board and because the parties to the dispute cannot extend the Board's jurisdiction one whit by agreement or otherwise. After reaching such an absurd conclusion, the majority then gratuitously proceeds to advise about something that it had, in the previous paragraph, concluded "may not be introduced before this Board." The advice that

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is as illogical on the facts of record as the prior conclusion that the jurisdictional contentions "may not be introduced before this Board."

The conclusion of the majority as to the merits of the dispute is also erroneous. The Claimant's services were not needed on February 22, 1956, simply to handle the communication between the Chief Dispatcher and another Telegrapher. The Chief Dispatcher only performed work on that day of the character usually and customarily performed by him.

For the foregoing reasons, we dissent.

/s/ P. C. Carter

/s/ R. A. Carroll

/s/ W. H. Castle

/s/ D. S. Dugan

/s/ J. F. Mullen

**ANSWER TO CARRIER MEMBERS' DISSENT
TO AWARD 10139, DOCKET TE-9042**

The Carrier Members' dissent to Award 10139 merely repeats contentions that have clearly and consistently been rejected by numerous awards of this Division; see for example, Award 9578.

Jurisdiction — the power to decide — resides in this Board by virtue of the statute, the Railway Labor Act. Obviously, no question other than one which may be answered by reference to Section 3, First (h), of the Act can properly be considered as involving our jurisdiction.

No question raised by the Carrier's contentions challenging our jurisdiction can be answered by such reference, therefore they can not possibly be jurisdictional in nature. It follows that the Referee correctly decided that since those contentions were not raised on the property, "... they may not be introduced before this Board."

The award is correct and the dissent in no way impairs its probity.

J. W. WHITEHOUSE
Labor Member