

Award No. 10693
Docket No. CL-10020

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Richard F. Mitchell, Referee

PARTIES TO DISPUTE:

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

**THE DENVER AND
RIO GRANDE WESTERN RAILROAD COMPANY**

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated and continues to violate terms of the Union Shop Agreement signed January 28, 1953, effective February 16, 1953, when it failed and refuses to notify Mr. Ernest A. Sampson that he was charged with non-compliance of the aforesaid Union Shop Agreement, notice dated May 22, 1957, received by Carrier official May 23, 1957, all in accordance with the provisions of Section 5 (a) of the Union Shop Agreement.

(2) That the Carrier shall be required and ordered to comply with the terms of the Union Shop Agreement.

EMPLOYEES' STATEMENT OF FACTS: An Agreement bearing the effective date of February 16, 1953, by and between the parties and referred to herein as the Union Shop Agreement is in evidence, copies thereof are on file with the National Railroad adjustment Board.

Under date of May 22, 1957, the following letter was sent to Dr. E. A. Hinds, Chief Surgeon, which we are quoting for the Board's ready reference:

"File 301

May 22, 1957

**"CERTIFIED MAIL —
RETURN RECEIPT REQUESTED**

"Dr. E. A. Hinds, Chief Surgeon
Denver & Rio Grande Western Railroad Company
Equitable Building
Denver 2, Colorado

Dear Sir:

"You are hereby advised that Mr. Ernest A. Sampson, Manager, Chief Surgeon's Office, Denver, Colorado, has failed to comply with the terms of the Union Shop Agreement of February 16, 1953, due to delinquency in dues.

and with respect thereto, Carrier asserts that Section 5 has no force or effect until it is first determined whether the employee involved is subject to Section (1) or (2), reading:

"Section 1.

"In accordance with and subject to the terms and conditions hereinafter set forth, all employees of the carrier now or hereafter subject to the rules and working conditions agreements between the parties hereto, except as hereinafter provided, shall, as a condition of their continued employment subject to such agreements, become members of the organization party to this agreement representing their craft or class within sixty calendar days of the date they first perform compensated service as such employees after the effective date of this agreement, and thereafter shall maintain membership in such organization; except that such membership shall not be required of any individual until he has performed compensated service on thirty days with a period of twelve consecutive calendar months. Nothing in this agreement shall alter, enlarge or otherwise change the coverage of the present or future rules and working conditions agreements.

"Section 2.

"This agreement shall not apply to employees while occupying positions which are excepted from the bulletining and displacement rules of the individual agreements, but this provision shall not include employees who are subordinate to and report to other employees who are covered by this agreement. However, such excepted employees are free to be members of the organization at their option."

The employee involved, Mr. Ernest A. Sampson, occupies an official position, does not acquire any seniority rights and therefore is not subject to the terms of the Union Shop Agreement.

Furthermore, it is Carrier's position that the particular question as to whether or not the employee is an official does not come under the jurisdiction of your Board.

There is no merit to this claim and it should be denied.

All data in support of Carrier's position have been submitted to the Organization and made a part of the particular question in dispute. The right to answer any data not previously submitted to Carrier by Organization is reserved by Carrier.

OPINION OF BOARD: The Union Shop Agreement on The Denver and Rio Grande Western Railroad Company became effective February 16, 1953.

We quote Section 5 (a):

"Each employee covered by the provisions of this agreement shall be considered by the carrier to have met the requirements of the agreement unless and until the carrier is advised to the contrary in writing by the organization. The organization will notify the carrier in writing by Registered Mail, Return Receipt Requested, or by personal delivery evidenced by receipt, of any employee 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. The form of notice to be used shall be agreed upon by the carrier and the organizations involved and the form shall make provision for specifying the reasons for the allegation of non-compliance. Upon receipt of such notice, the carrier will, within ten calendar days of such receipt, so notify the employee concerned in writing by Registered Mail, Return Receipt Requested, or by personal delivery evidenced by receipt. Copy of such notice to the employee shall be given the organization. An employee so notified who disputes the fact that he has failed to comply with the terms of this agreement, shall within a period of ten calendar days from the date of receipt of such notice, request the carrier in writing by Registered Mail, Return Receipt Requested, or by personal delivery evidenced by receipt, to accord him a hearing. Upon receipt of such request the carrier shall set a date for hearing which shall be held within ten calendar days of the date of receipt of request therefor. Notice of the date set for hearing shall be promptly given the employee in writing with copy to the organization, by Registered Mail, Return Receipt Requested, or by personal delivery evidenced by receipt. A representative of the organization shall attend and participate in the hearing. The receipt by the carrier of a request for a hearing shall operate to stay action on the termination of employment until the hearing is held and the decision of the carrier is rendered.

"In the event the employee concerned does not request a hearing as provided herein, the carrier shall proceed to terminate his seniority and employment under the Rules and Working Conditions Agreement not later than thirty calendar days from receipt of the above described notice from the organization, unless the carrier and the organization agree otherwise in writing."

The issue before us is whether or not the Carrier violated Section 5 of the Union Shop Agreement after being notified by letter dated May 22, 1957 by the Organization that Mr. Sampson had failed to comply with the Union Shop Agreement, in that Mr. Sampson had failed to pay dues which the Claimants had assessed against him. The Carrier refused to so notify Mr. Sampson because it claimed that Sampson was not a clerical worker, but was an officer of the Company, therefore he was not subject to the Union Shop Agreement between the Clerks and the Carrier, and since he was not an employee subject to the Agreement the Carrier had no duty under the Agreement to give the notice requested by the petitioners.

The Organization contends that the position Mr. Sampson held was not excepted from the Agreement, and that he performed clerical duties together with his other duties, he was a clerk and not an officer and came under the Agreement.

We quote from a recent Award No. 9121 (Hornbeck) which we believe controls this case.

Section 5 (a) provides:

"Each employee 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 employee 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."

Under the Union Shop Agreements, the parties provided special procedure to determine the merits of the controversy. It is the duty of the Car-

rier to give the notice to the employe under Section 5(a) of the Agreement. There was no other course for the employes to take because the proceeding subsequent to the notice which would determine the validity of the claim against the employe 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 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 of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the claim will be allowed as set out in the Opinion.

AWARD

Claim allowed as set out in the Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 19th day of July 1962.