

Award No. 13563
Docket No. MW-14669

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION
(Supplemental)

Ross Hutchins, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
MILWAUKEE-KANSAS CITY SOUTHERN JOINT AGENCY

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

(1) The Carrier violated the Agreement when, beginning on or about August 27, 1962, it failed to call and assign Water Service Foreman J. E. Allinder to the temporary position of water service foreman at Kansas City, Missouri. (Carrier's file 013.31-67).

(2) Water Service Foreman J. E. Allinder now be reimbursed for the earnings he would have received had he been called and assigned to the temporary position referred to in Part (1) of this claim.

EMPLOYEES' STATEMENT OF FACTS: Beginning August 27, 1962, the regular water service foreman at Kansas City, Missouri was absent from duty because of illness. During the period of his absence, the work of his position was assigned to and performed by a water service helper, who does not hold any seniority as a water service foreman.

The claimant, who was the senior furloughed water service foreman, was available, willing and qualified to fill the temporary vacancy but was not called or assigned to do so.

The Agreement in effect between the two parties to this dispute dated January 1, 1947, together with supplements, amendments, and interpretations thereto is by reference made a part of this Statement of Facts.

POSITION OF EMPLOYEES: At the outset, we wish to point out that the water service foreman's position was **not** abolished during the absence of the regular water service foreman nor was the work of the position suspended during his absence. This fact was frankly admitted by the Carrier in a letter of claim declination reading:

"December 17, 1962

Mr. A. Hart, General Chairman
Brotherhood of MofW Employees
2910 Elgin
Muskogee, Oklahoma

Dear Sir:

I have your claim dated October 5, 1962, and also your revised

days, for a total of only 67½ hours. General Chairman Hart has never made mention of carrier's offer of disposition, and it is evident that he does not understand that carrier is not obligated to fill the place of a disabled employe in a "one man shop". Carrier has the privilege and did proceed to close up the shop, deferring all scheduled work, which was of small volume.

At no time did the organization request a conference or give reasons why the equitable offer of carrier should not be accepted, and we had no alternative but to assume that the organization was not interested in disposing of the matter in accordance with Section 2—Second of the Railway Labor Act and the Rules of Procedure of the Third Division.

Your attention is respectfully referred to the many previous awards of the National Railroad Adjustment Board, as follows: First Division Awards 4887, 4890, 7161, 10250, 12284, 13132, 13216, 13234, 13235, 13271, 13272, 13288, 15158, 13136, 13176, 14762, 16667, 16928, 17836, 18254, 18679 and 18826; Third Division Awards 10348, 10769 and 10852.

For the above reasons, Carrier requests denial or dismissal of the dispute.

(Exhibits not reproduced).

OPINION OF BOARD: The record reveals that no conference was held on the property in an attempt to resolve this dispute before filing of the petition with this Board. The Board must determine whether it has jurisdiction. This gives rise to the question whether such a conference on the property is an indispensable condition precedent to invoking this Board's jurisdiction. The question must be resolved by application of the principles of statutory interpretation to the Railway Labor Act, as a whole, and in particular Section 2, Second and Section 3, First (i) of the Act; also, Circular No. 1 of the Board's rules of Procedure promulgated pursuant to the Board's rules making power vested by Section 3, First (u) of the Act. Rules promulgated by statutory authority have the force and effect of statutory enactment.

This jurisdictional issue has been raised in a substantial number of cases. Unfortunately our Opinions are conflicting. This is demonstrated in the following Opinions:

JURISDICTION:

Awards 2786 (Mitchell), 3269 (Carter), 7403 (Larkin), 10424 (Dolnick), 10567 (LaBelle), 10675 (Ables), 10950 (Ray), 12853 (Coburn), 13023 (Coburn).

NO JURISDICTION:

Awards 10769 (Ables), 10852 (McGrath), 10868 (Kramer), 10939 (Mc Mahon), 11136 (Moore), 11434 (Rose), 11484 (Hall), 11737 (Stark), 11896 (Hall), 11971 (Stack), 12290 (Kane), 12468 (Kane), 12499 (Wolf), 13013 (West), 13120 (Dorsey).

It is a fundamental principle of Administrative Law that a party has no resort to the courts until having exhausted the administrative remedies. We are of the opinion that this principle is equally applicable in the handling of disputes under the Railway Labor Act. That is to say, the parties must, on the property, exhaust the procedures prescribed in the Act—which include "conference between representatives designated and authorized so to confer"—as an indispensable condition precedent to perfecting a petition to this Board.

To hold otherwise would ascribe meaningless to words of the statute.

We find, absent a conference on the property, this Board has no jurisdiction. We will dismiss the Claim for lack of jurisdiction.

This Opinion is not to be construed to mean that either party can evade this Board's jurisdiction by refusing or otherwise evading a conference when requested. The statutory indispensable condition precedent is satisfied if either party requests a conference and the other party fails, refuses or evades its obligation to confer within a reasonable time.

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

That the parties waived oral hearing;

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 is without jurisdiction over the dispute involved herein.

AWARD

Claim dismissed for lack of jurisdiction.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 30th day of April 1965.