Award No. 16665
Docket No. TE-15892

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Robert A. Franden, Referee

PARTIES TO DISPUTE:

TRANSPORTATION-COMMUNICATION EMPLOYEES UNION

LOUISVILLE AND NASHVILLE RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of the Transportation-Communication Employees Union on the Louisville & Nashville Railroad (L&N District), that:

1. Carrier violated the terms of the parties' Agreement on May 25, June 2, 5, 11, 12, 16, 17, 18 and 23, 1964 when it required or permitted Telegrapher Installer (Electronics) Gene Comer to work as Telephone Maintainer on the Cumberland Valley Division.

2. Carrier shall, because of the violation set out in paragraph one hereof, compensate Assistant Telephone Maintainer C. G. Bray the difference between his rate as Assistant Telephone Maintainer and the rate of Telephone Maintainer account not being stepped up to fill this position of Telephone Maintainer.

3. Carrier shall now compensate 1st Class Lineman A. F. White, who was next in line for assignment to Class 1 work on these dates, the difference between his rate as 1st Class Lineman and the rate of Assistant Telephone Maintainer.

EMPLOYES' STATEMENT OF FACTS: There is in evidence an Agreement by and between the Louisville and Nashville Railroad Company, hereinafter referred to as Carrier, and its telephone and telegraph maintenance and construction employes represented by the Transportation-Communication Employees Union (formerly The Order of Railroad Telegraphers), hereinafter referred to as Employes and/or Union, effective July 1, 1956, and as otherwise amended and supplemented. Copies of said Agreements are available to your Board, and are, by this reference, made a part hereof.

An analysis of the facts of this case discloses that Carrier maintains at Corbin, Kentucky a telephone and telegraph maintenance force. That Gene Comer is the regular occupant of the Telephone Installer position at Corbin, Kentucky. That he was awarded this position pursuant to Bulletin No. CS 697A of November 28, 1961. That on the dates set forth in the substantive claim he was required or permitted by Carrier to perform in whole or in part the following items of work which are reserved by the Agreement to Tele-

Otherwise, to use Mr. Comer as he was used on the dates of the violations involved in this claim is to give him preferred seniority over all other employes who are working as helper, lineman and assistant telephone maintainers to qualify and establish seniority in those classes.

As we were unable to reach any settlement of this claim, this is to advise that we are referring the claim to President G. E. Leighty for further handling as he may deem fitting.

Yours truly,

/s/ K. B. Lane
General Chairman"

This concluded handling of the claim on Carrier's property.

(Exhibits not reproduced.)

OPINION OF BOARD: The Carrier has objected to the jurisdiction of this Board to render a decision on the case at bar. The ground for the jurisdictional objection is that under Section 3, First (h) of the Railway Labor Act the telephone and telegraph maintenance and construction employes are not within any class of employes over which the Third Division of the Adjustment Board has jurisdiction for the purpose of resolving disputes. The Carrier contends that the employes who are the Claimants herein are electrical workers whose disputes are properly before the Second Division.

The fact that the Transportation-Communication Employees Union (telegraphers) represents these workers does not change their character as a class of employes.

The Organization cites in support of its argument that the Third Division has jurisdiction over these workers awards wherein this Division assumed jurisdiction over telephone and telegraph maintenance and construction employes; Awards 16514, 15688, 16518. These jurisdictional findings were no more than perfunctory and are of little value as precedents.

Section 3, First (h) of the Act gives the Third Division jurisdiction as follows:

"Third division: To have jurisdiction over disputes involving station, tower, and telegraph employes, train dispatchers, maintenance-of-way men, clerical employes, freight handlers, express, station, and store employes, signalmen, sleeping-car conductors, sleeping-car porters, and maids and dining-car employes. This division shall consist of ten members, five of whom shall be selected by the Carriers and five by the national labor organizations of employes.

The Second Division has jurisdiction as follows:

Second division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheetmetal workers, **electrical workers**, carmen, the helpers and apprentices of all the foregoing,

coach cleaners, power-house employes, and railroad-shop laborers. This division shall consist of ten members, five of whom shall be selected by the Carriers and five by the national labor organizations of the employes." (Emphasis ours.)

We are of the Opinion that the employes here involved do not belong to any class over which the Third Division has jurisdiction and therefore not properly before this Board.

This claim is dismissed without prejudice.

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 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 is without jurisdiction of the claim here presented.

AWARD

Claim dismissed without prejudice.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 25th day of October 1968.

DISSENT TO AWARD 16665, DOCKET TE-15892

The Referee has summarily dismissed the claim on the ground that the Third Division of the National Railroad Adjustment Board does not have jurisdiction of the class of employes involved.

It should first be pointed out, as a fact, that the Louisville and Nashville Railroad Company, the respondent, did not raise the question of jurisdiction. Neither party to the dispute raised nor discussed, in their written submissions of the dispute to the Board, the jurisdictional question. What the Referee means, when he stated: "The Carrier has objected to the jurisdiction of this Board. . . ." is that a Carrier member of the Board, in panel discussion, for the first time, suggested that the Board had no jurisdiction of the dispute.

The entire opinion of the Referee is based on the fact that he found the words "electrical workers" to be included within the jurisdiction of the Second Division. He does not cite any other authority. It may be trite, but it should be pointed out that allocation of jurisdiction to the respective divisions of the Adjustment Board has not been changed since 1934.

This member is able to find only one judicial interpretation of any part of Section 3, First (h) of the Railway Labor Act. In order of Railway Conductors vs. Swan (329 U. S. 520) the Supreme Court affirmed decision of the Seventh Circuit (152 F.2d 325), which in turn affirmed judgment of the District Court; holding that the Fourth Division had jurisdiction of disputes involving Yardmasters. It is clear, however, that the decisions were not made on the basis of the bare words of the Act, but only after an evidentiary hearing in the District Court. In approving the findings made by the District Court, at Page 525, the Supreme Court said:

> "There is no statutory definition of 'yard-service employes.' Nor is the term explained in any of the relevant legislative debates or reports; and it derives no meaning from the statutory policy or framework. Moreover, it is not in common or general usage outside of the railroad world. It is a technical term found only in railroad parlance. Evidence as to the meaning attached to it by those who are familiar with such parlance therefore becomes relevant in determining the meaning of the term as used by Congress."

Further, as a basis for judicial intervention, the Court found the existence of jurisdictional frustration at the administrative level, in that neither the First Division nor the Fourth Division would accept jurisdiction of yardmasters' claims. "A declaratory judgment action is therefore appropriate to remove such an administrative stagnation." In the present instance, no such stagnation exists. This is the first occasion wherein the Third Division has declined to exercise jurisdiction in cases involving this class of employes.

The Referee's attention was directed to the following awards, wherein the Board accepted jurisdiction of similar claims.

Award 11556 — (Referee David Dolnick) June 28, 1963 — The Order of Railroad Telegraphers v. Spokane, Portland and Seattle Railway Company.

Award 15688 — (Referee John H. Dorsey) June 30, 1967 — Transportation–Communication Employees Union (formerly The Order of Railroad Telegraphers) v. Louisville and Nashville Railroad Company.

Award 16358 — (Referee Arthur W. Devine) June 7, 1968 — Transportation–Communication Employees Union v. Missouri Pacific Railroad Company.

Award 16514 — (Referee Bill Heskett) July 26, 1968 —— (Same parties as in Award 16358)

Award 16518 — (Referee Arthur W. Devine) July 26, 1968 — (Same parties as in Award 16358)

It is true that none of the opinions discussed the jurisdictional question; it is true that routine findings. . . . "That this Division of the Adjustment Board has jurisdiction over the dispute involved herein" . . . were made in

each case. This was so, and for a very good reason: none of the parties; none of the Board members; and none of the Referees, sua sponte, raised the question. It had not occurred to anyone, during the more than thirty years of the Board's existence, to question the Third Division's jurisdiction of similar disputes. It will be noted that Award 15688, involved the identical parties; the identical agreement, and the identical class of employes.

The administrative interpretations by the Third Division do, therefore, have meaning. Both parties to the several disputes, Labor members and Carrier members on the Third Division, and the neutral members of the Board, have interpreted the Railway Labor Act provisions to provide jurisdiction in this Division, in such cases.

The Supreme Court, when faced with a similar problem of statutory interpretation, in regard to intendment of Sec. 5(2(f) — (Title 49 USC) — said:

> "In short, we are unwilling to overturn a long-standing administrative interpretation of a statute, acquiesced in by all interested parties for 20 years, when all the sign posts of congressional intent, to the extent they are ascertainable, indicate that the administrative interpretation is correct." (Brotherhood of Maintenance of Way Employes v. United States — 366 U. S. 169.)

Thus, in view of the administrative history of accepting jurisdiction of these cases, the Referee was clearly in error in basing his decision solely on the words "electrical workers." As stated above, it has been judicially declared that the words used in allocating jurisdiction to the several Divisions, "are technical terms" used only in the railroad industry. To give meaning to them, other than the historical concept given in awards of the Third Division, as illustrated in the awards shown, should require something more than use of a mere dictionary definition of an electrical worker.

Jurisdiction of a dispute should not be denied, in the face of a long time exercise of such jurisdiction. In Amell v. United States (16 L ed 2d 445), the Supreme Court had a similar question. In that case, petitioners, employes of various federal executive departments working aboard government vessels, filed contractual actions in the Court of Claims, alleging they were entitled to back pay increases and overtime pay for their labors, invoking various federal pay statutes and regulations. Their employer, the United States, moved to transfer the claims to various federal district courts on the ground that the claims were of a maritime nature and justiciable exclusively under the Suits in Admiralty Act. The transfers would have had the effect of barring the claims, because this Act has a two-year limitation, while the Tucker Act, under which the suits were brought, has a six-year limitation period. The Court of Claims granted the motion without opinion, simply citing to three unreported cases in which it had made similar dispositions. The Court said:

> "In effect, the Government asks us to repeal the former practice by implication. We have held in numerous cases that such a request bears a heavy burden of persuasion. . . . Further, Congress had the opportunity in 1964 to deprive government-employed claimants of their rights when it amended the Tucker Act itself. * * *

As in other jurisdictional questions involving intersecting statutes, there is no positive answer. We can do no more than to exercise our best judgment in interpreting the will of Congress. In this instance, we believe the traditional treatment of federal employes by the Government tips the balance in favor of Court of Claims jurisdiction. The Court of Claims possesses the expertise necessary to adjudicate government wage claims. It also serves as a centralized forum for developing the law, particularly in large wage claim suits. These tasks have been its responsibility since 1887. In multi-party wage suits of large amounts, having one forum eliminates any problem of transferring venue from several district courts to one locale, see 28 USC Section 1406 (1964 ed.). If we are here misconstruing the intent of Congress, it can easily set the matter to rest by explicit language. We therefore reverse and remand the suits to the Court of Claims for further proceedings."

In the instant case, the Referee did not have any evidence on the question; he did not have the benefit of any argument by either party. Thus, the summary dismissal, on a ground not adequately presented, either as to facts or discussion, was erroneous.

J. M. Willemin
Labor Member

CARRIER MEMBERS' REPLY TO LABOR MEMBER'S DISSENT TO AWARD 16665, DOCKET TE-15892

Referee Franden

As to the five prior awards involving telephone and telegraph maintenance and construction employes in which the Third Division assumed jurisdiction, the Referee found that the jurisdictional findings in those awards were no more than perfunctory and of little value as precedents.

This Board has consistently ruled that statutory jurisdictional matters may be raised at any stage of the proceedings. (Fourth Division Award 2036; Third Division Awards 12223, 10315, 9578, 8886.) Also, in Award 16786, the Third Division held:

"While the record indicates that the question of jurisdiction was not raised on the property, such failure to object is irrelevant. Jurisdictional conditions are absolute under the Act, cannot be waived, and can always be considered at any time in the proceedings. See Awards 8886, 9578, and 10315."

Contrary to what the dissenter says in the concluding paragraph, the matter of jurisdiction was discussed at length with the referee prior to the rendition of Award No. 16665. The dismissal of the claim was not erroneous, but was clearly in accordance with the provisions of the Railway Labor Act under which the jurisdiction of each Division is established. The dissent does not detract from the Award.

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C. L. Melberg
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