Award Number 322
Docket Number CL-261

NATIONAL RAILROAD ADJUSTMENT BOARD
Third Division

Robert G. Corwin, Referee

PARTIES TO DISPUTE:

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

SOUTHERN PACIFIC COMPANY (PACIFIC LINES)

DISPUTE.—

"Claim of A. H. Keegan, G. Montague, C. A. Clifford, R. Montague, O. Odin, W. B. Thompson, L. A. Lawson, E. J. Scott, A. E. Johnson, J. E. Bachman, Guy V. Hoopengarner, Florence Hutchins, Helen Clerkin, Lula M. Donovan, Mary G. Ross, Myrtle Hengstler, Elizabeth H. Read, and Ethel Montague, that the action of the Carrier in allowing employes of the Assistant General Managers' Seniority Districts at El Paso, Texas, and Los Angeles, California, to displace employes of the Superintendents' Seniority Districts at El Paso and Los Angeles, respectively, was in violation of rules of the current agreement between the Southern Pacific Company (Pacific Lines) and Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, effective February 1, 1922, revised to January 1, 1924, and that all the above named employes of the Superintendents' Seniority Districts who suffered loss of earnings and/or positions as a result of such displacement be restored to positions from which displaced and compensated for actual wage loss."

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

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

The parties to said dispute were given due notice of hearing thereon.

As a result of a deadlock, Robert G. Corwin was appointed as Referee to sit with the Division as a member thereof.

This case first comes before the Division on the question of its jurisdiction. The carrier refused to join in a joint submission and the claimants filed ex parte. Before answering to the merits, the carrier objected to the jurisdiction of the Adjustment Board. The dispute was pending before the Mediation Board on June 21, 1934, the date when the Amended Railway Labor Act became effective. Mediation had not been undertaken. On the 23rd of August 1934, claimants dismissed their case before the Mediation Board, took up its settlement with the carrier, and failing in obtaining a settlement, progressed their dispute to this Division. The question presented involves a consideration of the effect of a sentence in the latter part of Section 4, First, of the Amended Act which reads as follows:

"All cases referred to the Board of Mediation and unsettled on the date of the approval of this Act shall be handled to conclusion by the Mediation Board."

In awards 119 and 120 this Division, Judge Paul Samuell, sitting as Referee, held that this provision of the law was mandatory, and that a party could not be heard here who had withdrawn his case before it had been handled to conclusion by the Mediation Board. While we do not consider it necessary to reverse those awards because of the facts in this submission, which we shall

refer to later, the present Referee, who has the utmost regard for Judge Samuell's ability, must express his doubt of the correctness of his conclusion.

The language quoted, we take it, was used to prevent the possibility of any party losing his rights, and is evidence of an intent which pervades every section of the Act. To further interpret its meaning we must look to other provisions of the law if they are inconsistent therewith and give the whole such a construction as to effect the intent of the Congress. Paragraph (i) of Section 3 just as plainly provides that the proper Division of the Adjustment Board, newly created, shall have jurisdiction over all disputes between employees and carriers growing out of agreements concerning rates of pay, rules, or working conditions, "including cases pending and unadjusted on the date of approval of the Act." There is no exception noted of disputes pending before the Mediation Board. Section 5 provides that the services of the Mediation Board may be invoked in cases which are not referable to the Adjustment Board, and again no exception is expressed as to cases pending before it. To invoke the further services of the Mediation Board in a dispute of this kind, whereof the Act divests the Board of its former jurisdiction, might well warrant the Board in dismissing it for that reason. Over many disputes not involving the interpretation of agreements the Act in Section 4 continues the jurisdiction of the former Board of Mediation in the present Mediation Board. These, of course, it must handle to a conclusion. But can we say that the law means that the Board shall handle cases of which it has given jurisdiction to another tribunal upon its effective date to an ultimate conclusion? Is a dismissal by a party or by the Mediation Board for want of jurisdiction a conclusion so far as the latter is concerned and a compliance with the Act? It must be noted that under neither the earlier nor the present law has the Mediation Board or its predecessor the power to render a judgment.

As we understand Judge Samuell's earlier awards, he holds that, if the Mediation Board handled a case to a conclusion without that conclusion resulting in a final adjustment of the grievance on its merits, the claimant may then bring the dispute to the Adjustment Board as one pending and unadjusted at the time the law went into effect. In its argument in this docket the carrier insists that the cases were brought to a conclusion before the Mediation Board. We quote its language verbatim: "The employees * * * withdrew the cases which in fact and in law amounted to a 'conclusion' of the cases. 'Conclusion' means 'end' and the cases referred to are as certainly ended as any case can be."

Judge Samuell apparently thought that a voluntary dismissal of a case was not a conclusion. Carrier here seems to disagree with him, and, in our opinion, with some propriety. But if it admits and takes the position that a conclusion was reached, then it would follow that Judge Samuell's condition precedent has been met and the Division would have jurisdiction. The carrier's position here seems to be that the case is no longer pending and unadjusted and that the "conclusion" is a final adjudication of a claimant's rights, an end which can't occur until the proceeding is conclusively disposed of on its merits.

The former awards may have also been at fault in their failure to give weight to a principle of the law which has been adopted by the courts from the earliest times. The right of a party to dismiss his action without prejudice, so long as his adversary is not injured, has never been denied in any tribunal. To refuse it, the courts have said, would encourage litigation. A plaintiff has always been able to dismiss an action at law and file a suit in equity, to dismiss his case in one court and bring it in another having concurrent or proper jurisdiction.

But in the case before us we have the additional fact that the dismissal of the action pending before the Mediation Board was done under an agreement between the employes and the carrier, antedating the effective date of the Act. The latter had expressed its surprise that the cases ever had been filed without its knowledge and approval. It had suggested that there was still a possibility of amicable adjustment between the parties themselves, and when this prospect was advanced the General Chairman at once requested his President to dismiss the case on the docket of the Board, notifying the carrier of his request in a letter confirming the understanding and receiving no protest from the latter. It is true that such action was not taken by the Brotherhood until after the Amended Act became effective, but thereafter the parties met and attempted to get together in settlement. The record shows that there were eight cases in all between the same parties pending before the Mediation Board and that three of them were actually adjusted. Failing to reach that result in the instant

case, the Brotherhood brought it to this division which is expressly given the right to render an award in disputes pending and unadjusted. Surely the carrier, having agreed to a withdrawal of the case, cannot now be heard to say that such action has deprived the claimants of their rights, it having been instrumental in placing them in their present position. They acted in good faith and upon the representation that the carrier would consider the disputes as still pending and unadjusted, a confidence that the carrier's subsequent negotiations confirmed.

It is urged that the parties cannot confer jurisdiction of the subject matter on a tribunal by agreement if it has none under the law. This is unquestionably correct. But the Act expressly gives the Adjustment Board jurisdiction over cases pending and unadjusted. Judge Samuell has said that they must have been handled to a conclusion by the Mediation Board if they were on its docket. The dismissal by agreement constituting a conclusion as the carrier correctly asserts, the disputes remaining unsettled, the law, not the parties, provides that they may be referred by petition to the Adjustment Board to be handled by it to an enforceable termination.

To the foregoing we must add a further observation. In the mind of the present Referee there has always been most serious doubt as to how far the division can and should go in denying its jurisdiction. The act itself says that the emplyees and carrier may refer any grievance complying with Section Three First (i) to the appropriate division of the Adjustment Board for the purpose of securing an award on its merits. The Board in its general rules has prescribed that its divisions shall find in every case that they have jurisdiction. It is within the purview of the Act for the division to inquire whether the dispute between employee or a group of employees and the carrier grows out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, whether it has been handled in the usual manner before coming to the Board, and whether the division is the appropriate one to adjust it under the allotment of jurisdiction to the four independent divisions. The parties then have a right to be heard according to Section 3 of the Act, and if the Division cannot agree a Referee may be appointed to sit as a member and make an award. In short, the Division may determine whether the dispute has been properly progressed and is referable to it. But for either it or the Referee to extend its functions in adjudging the jurisdiction of another Board under another Section inapplicable to it may be going rather far afield from those duties ascribed to it in the provisions relating to its procedure. If the dispute were pending and unadjusted on the date of the approval of the Act, insofar as the division's work is defined, it may be referred to it for an award, the other elements mentioned as prerequisite being present.

In any event we are confident that in case of doubt the uncertainty should be resolved in favor of the Board's jurisdiction. If it errs in assuming jurisdiction, such error can always be questioned and corrected in the courts, through which an award is enforced. If the division errs in denying its jurisdiction, a claimant whose case may be of vital importance to himself may be unjustly deprived of his rights and left without recourse. He can no longer invoke the services of the Mediation Board and has lost his day in court which the Amended Act manifestly intended to insure to him.

We are of the opinion that the Division should assume jurisdiction.

Before considering the case on its real merits, several other objections raised by the carrier should be disposed of.

If we understand the carrier, it claims that under Rule 24 the petitioners, asking for payment for time, should have personally filed their claims in writing. That rule applies to claims of the character embraced in Article VI within which this grievance is not included. The Railway Labor Act provides that any employee may be represented in any controversy by representatives of the labor organization and of his choice. The rule referred to only requires the management to notify the claimant in writing with its reason for non-allowance when time is claimed in writing under Article VI. This grievance, we believe, is one of those covered by other rules, the terms of which have been complied with.

Carrier further urges that the claim has been changed since it was first presented. Originally the demand was made that: First, claimants be restored to the positions of which they have been deprived in contravention of the rules; second, that they should be compensated for wages lost; and third, that the employees who replaced them should be removed from service in the seniority

districts to which they were transferred. In the dispute as it is submitted to this Division the third element is omitted. We can see no reason why a claimant should not be permitted to abandon any part of his claim so long as the adverse party is not prejudiced and we can see no possible prejudice in such abandonment in this instance. All that is required is that no issue shall be submitted to the Adjustment Board which the parties have not had an opportunity of adjusting before it is submitted for final determination.

There is still another preliminary question. The carrier seems to contend that even if the claimants were improperly displaced, former seniority of the employees transferred would commence to run from the time of their assignment to their new positions by virtue of Rule 26. But under part F of Rule 45, unless the employee is properly transferred from one seniority district to another in pursuance of the earlier provisions of the rule, which in the instant case are alleged to have been violated, his seniority begins to run only from the date of his transfer.

This brings us to the real dispute which is involved in the submission. The record is excessively voluminous and all sorts of irrelevant and collateral matters are discussed at length which have no vital bearing on the issue before us for decision. It is of no consequence how other cases have been handled unless, as is not claimed, they afford a binding precedent. And yet the Division is compelled to scrutinize over 350 pages of record for fear of missing something that is material when the pertinent facts, and argument could have been condensed into about one-tenth that amount of space. The simple problem for our determination is whether the carrier violated the rules of the schedule in allowing the displacement of certain employees in this one instance. We shall state the essential facts as briefly as possible.

Prior to October 1, 1932, the carrier maintained offices for three Assistant General Managers at Los Angeles, El Paso, and Sacramento. In each of these certain employees were engaged and each office constituted a separate seniority district. On that date the offices were abolished. Two of the Assistant General Managers were called into the San Francisco general office and one retired on account of his health. The employees of the Sacramento office held acquired seniority on a certain division which they exercised and they are in no wise involved in this dispute. The employees of the other two offices were permitted to displace employees in the seniority districts of the Los Angeles and El Paso divisions on which they held no seniority. Such displacement was made on the basis of their seniority on the Assistant General Manager roster.

The carrier contends that it was within its rights in making such transfers under the provision of Rule 45 of its agreement with the Clerks and that the operation fell within either paragraphs A, C, or F of that rule. It could only be under one of them, if any. Paragraph A permits transfer of employees with their positions, retaining their seniority from one district to another. This can only apply to a partial transfer of work and of employees, the two districts remaining thereafter intact. Paragraph C covers the case of consolidations, where two districts are merged and thereafter become one. Paragraph F relates to transfers of employees to districts in which they have no seniority, in which event they may retain their standing in their former districts or establish new seniority from the date of transfer in those to which they are assigned. Manifestly the carrier can only seek the benefit of paragraph C, and what it did was either a consolidation of the two districts or a disregard of the rules. This was the resource upon which the carrier relied in its final argument. But in respect to consolidation, carrier's position through the numerous briefs which it filed is not altogether consistent. At first it took the stand that most of the work performed in the Assistant General Managers' offices was turned over to the division superintendents; then a substantial part, and, finally, that it wasn't necessary under the rule to transfer any work at all.

This last hypothesis is wholly untenable. A consolidation of seniority districts implies a combination of the work formerly performed by the employees of the two or more districts. The employees are allowed to retain and exercise their seniority rights on the theory that there will be substantially as much work for each and all as there was before. Of course, if work disappears before or after a consolidation, positions may be abolished, but when the rule states that employees may occupy positions similar to their former ones it indicates that the work has been merged into a new combined office and will be there to be done. The elemental purpose of seniority districts is to insure the employees so much service as business conditions will afford, and to say that a large num-

ber of employees holding no rights in the district may be brought into it without bringing with them enough work to keep them fairly busy was certainly never the intent of those who negotiated the rules and who were trying to preserve the jobs of workers whose length of service warranted their protection.

Was there then a consolidation of seniority districts in a proper sense of that term? It seems that the Assistant General Manager's functions were previously largely those which are delegated often to general superintendents, that each exercised supervision over a number of districts and acted as intermediaries between the division superintendents and the president and general manager. When they were taken into the San Francisco office they continued to do much of this work. One later took over the supervision of operations on a larger number of districts, another helped to handle employee disputes arising over a larger territory. Matters with the divisional offices once handled with the Assistant General Managers are now taken up directly with the home office in San Francisco. It is certain that these supervisory powers over various divisions were not delegated to the superintendents. But it is claimed that certain files were turned over to them, their duties with reference to issuing passes were enlarged, engineers who had been attached to the offices abolished, though not in the clerical departments, worked thereafter out of the divisional offices, and certain official positions in subsidiary companies previously occupied by the Assistant General Managers were later filled by the superintendents. To attempt to analyze these contentions in this finding, as we have outside it, would lengthen it unduly, and in view of the award we have concluded to reach would hardly be justified.

It is rather significant that while a considerable number of employees were displaced, the volume of work in the divisional offices after the transfer did not necessitate any increase in either instance in the total staff. It is true that force reductions may have been obviated but such it is said had already been rather drastically made. It is extremely difficult to define from the carrier's testimony just how much work was turned over. The employees say that they have made an actual check over a period of three years and that all of it together would not take more than thirty minutes of one person's time each day. If this summation is unfair to the management it would have been easy for it to have shown just what did happen, and we wish that more of the space consumed had been devoted to a development of this most salient subject. It seems almost certain that insufficient work went over to occupy a very substantial part of the time of the employees transferred.

Some distinction has been essayed in the transfer of men to excepted positions. None, we think, can be made. One holding such a position is only entitled to retain his seniority in his own district or transfer it to another in one of the exceptional situations covered by Rule 45.

In order to be fair to the management, we believe that if it can prove that more work was consolidated than is indicated by the only definite evidence we have before us, it should be credited therewith. Under Rule 2, Clerks of the character of those involved are entitled to classification and protection of the agreement if they devote not less than four hours a day. We feel that in an adjustment of our award between the Brotherhood and the carrier the latter should be allowed the transfer of one employee for each four to eight hours of service per day of substantial regularity brought into the divisional districts through the transfer, whether it can be called a consolidation or not.

AWARD

Claim sustained as to replacement and reimbursement to the extent that the complainants under all subsequent circumstances would have benefited, had they not been displaced, with deductions of all intervening earned income, and subject to the credit allowable in the last paragraph of the findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of the Third Division

Attest: H A JOHNSON
Secretary

Dated at Chicago, Illinois, this 20th day of October, 1936.