Award No. 697
Docket No. DC-693

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Wm. H. Spencer, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD TRAINMEN REPRESENTING DINING CAR STEWARDS

TEXAS AND PACIFIC RAILWAY COMPANY

STATEMENT OF CLAIM: "Claim of Dining Car Steward L. E. Turner for the rate of pay applying to a dining car steward with over six years of service. Carrier's file T-13831."

EMPLOYES' STATEMENT OF FACTS: "L. E. Turner was employed as a dining car steward on June 19, 1929 and remained in continuous service in that capacity until January 14, 1932, or a period of approximately two years and six months, when he was furloughed account of reduction in force. He was recalled to the service in his turn in September, 1936 and during the period September, 1936 to September, 1937, was paid the rate of pay applicable to third year dining car stewards. He has since left the service of the Carrier of his own accord, but the principle here involved affects other dining car stewards."

POSITION OF EMPLOYES: "Rule 12, Dining Car Stewards' Agreement, reads:

'RATES OF PAY (Old rates)

	Per Month	Per Hour
Stewards (1st year)	$140.00	.58½
" (2nd year)	150.00	.62½
" (3rd year)	155.00	.64¾
" (4th year)	160.00	.66¾
" (5th year)	165.00	.68¾
" (6th year)	170.00	.71
" Over 6 years	175.00	.73'

"Rule 8, same agreement, reads:

> 'In reducing forces, ability, fitness and merit being sufficient seniority will govern. Superintendent of Dining Cars to be the judge as to employe's ability, fitness and merit. An employe whose services have been dispensed with because of reduction of force, who desires to retain his seniority, must file his address with the Superintendent of Dining Cars at time of reduction and advise that officer promptly of any change in address. Failing to report for duty or give satisfactory reason to Superintendent of Dining Cars for not doing so within fifteen (15) days from date of notification, will be considered out of service.'

"The above rules provide that under certain conditions dining car stewards hold their original seniority date, and while the agreement from which

the above rules are quoted was not made effective until May 16, 1936, it was understood during the negotiations that all former dining car stewards then on the seniority list would retain all seniority rights and privileges and would be recalled to the service in their turn if and when needed for active service. Mr. Turner, having retained all rights and privileges to the service, both before and subsequent to the effective date of the agreement, and having been recalled in his turn for service, reporting within the time prescribed in the rule, should therefore be paid the rate of pay applicable to a dining car steward with a seniority date of June 19, 1929, as is shown on the current seniority list.

"The committee holds that the rules cited support the claim of Dining Car Steward L. E. Turner for the rate of pay applicable to his age in the service, as is shown on the seniority list, and we respectfully request the Board to so decide."

CARRIER'S STATEMENT OF FACTS: "This is claim on the part of Dining Car Steward Turner for the rate of pay of a steward of over 6 years' service, based on rule 12 of the agreement, reading:

'RULE 12

'Rates of Pay

	Per Month	Per Hour
'Stewards (1st year)	$140.00	.58½
" (2nd year)	150.00	.62½
" (3rd year)	155.00	.64¾
" (4th year)	160.00	.66¾
" (5th year)	165.00	.68¾
" (6th year)	170.00	.71
" Over 6 years	175.00	.73' "

POSITION OF CARRIER: "Dining Car Steward Turner did not have 6 years' cumulative experience as a dining car steward; therefore, he would not be entitled to the rate of steward of 6 years' experience.

"Turner was first employed June 19, 1929, remaining in service until January 14, 1932, or 2½ years, when he was cut off account reduction in force.

"He was reemployed October 29, 1936, as an extra man to do extra work when called on, as he was operating a gasoline filling station at that time, and did not want a regular assignment but agreed to do extra work when called on, from that time until he resigned on September 16, 1937.

"Rule IV, of present agreement, reads as follows:

> 'Extra employes performing road service in place of regular assigned employes, or on an extra assignment, will be paid in accordance with their years of service and classification. When used for extra road service, employes will be paid for actual time worked, with a minimum of eight (8) hours for each day so used.'

"Rates of pay as shown in Rule 12 are based on cumulative years of service as provided in Rule 4."

OPINION OF BOARD: It was urged on behalf of the carrier that the Division should dismiss this claim because the employe in whose name the claim is presented has, since the alleged misapplication of the agreement between the parties, left its employment. The petitioner, however, asks that the claim be adjudicated because "the principle here involved affects other dining car stewards."

The Division is of the opinion that under the Railway Labor Act it has jurisdiction to pass judgment on the present claim. Section 3 (i) of the Act

states that the Adjustment Board shall have jurisdiction over "disputes between an employe or group of employes and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of the approval of this Act."

That there is a dispute between the carrier and its stewards with respect to the proper interpretation and application of Rule 12 of the agreement is nowhere denied by the carrier in its submission. Neither the fact that the employe in whose name the dispute was presented, nor the fact that a monetary claim is not being made, should deprive the Board of its authority to settle this dispute which, by the admission of the carrier, still exists between it and this group of employes. Viewed from another point of view, the agreement which is alleged to have been violated is an agreement between the petitioner and the carrier. In the opinion of the Division, the petitioner, as a representative of this group of employes, is entitled to have the Board pass judgment on this dispute even though no individual employe may be able to show a pecuniary loss as a result of the alleged violation.

On the basis of the award which the Division has just rendered in Docket DC-689, Award No. 696, the Division is of the opinion that the carrier violated Rule 12 of the agreement between the parties in applying the schedule rates of pay in the case of Steward L. E. Turner. In this dispute, there is even less basis than in the preceding dispute for the contention that cumulative experience, instead of years of service as determined by seniority, is the proper guide for applying progressive rates of pay.

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 employe involved in this dispute are respectively carrier and employe 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 carrier misapplied Rule 12, as claimed.

AWARD

The claim is sustained as an interpretation of Rule 12.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 25th day of July, 1938.

DISSENT ON AWARD NO. 697, DOCKET DC-693

The evidence of record in this case shows that the carrier has consistently applied the progressive basis of pay based on years of service as was provided in Supplements 18 and 27 to General Order No. 27, in compensating its stewards since January 1, 1919, the effective date of Supplement 18, and that this progressive basis of pay was written into the agreement May 16, 1936.

As the award in this case is based on the Opinion and award in Docket DC-689, ward 696, our dissent on that award is adopted as our dissent in this case on the merits.

This award (No. 697) also deals with a question not involved in Award 696; i. e., the jurisdiction of the Board. We also dissent from the conclusions of the majority in respect thereto.

The claimant, Turner, left the service of the carrier by resignation prior to the submission of the case to this Division, no monetary claim being asserted. The petitioner, while contending "the principle here involved affects other dining car stewards," made no showing, nor even attempted to show that an award would affect in any way stewards in the service. The award itself shows that no interest of any employe will be affected by it. It is a simple abstract interpretation of a rule which can have no possible concrete application. Section 3 (i), which gives us our only jurisdiction, reads:

> "The **disputes** between an employe or group of employes and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including **cases** pending and unadjusted on the date of approval of this act." * * **

Section 3 (m), directing the action we shall take, reads:

> "The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the disputes, except insofar as they shall contain a money award. In case a dispute arises involving an interpretation of the award the division of the Board upon request of either party shall interpret the award in the light of the dispute.'"

It is clear that we are directed to act solely in a judicial capacity, in cases where by our act some relief may be had, which we must either grant or deny. We are not the forum for academic disputation. It is unnecessary to decide in the present case whether our jurisdiction covers the whole field of justiciable controversies between carrier and employe. On this subject see our Award 42. It suffices to demonstrate the error of the majority, that we are confined to that field.

We cite in support the following authorities:

In 15 C. J., 783 et seq., Section 77, under title "Courts," appears the following:

> 'g. **Fictitious or Unnecessary Controversies and Questions.** As the purpose for which courts are constituted is to administer justice by determining the rights of litigants, and not to determine abstract questions, a suit which is brought merely to obtain a decision upon some abstract question of law, or to establish a precedent for subsequent cases, will not be entertained; and where it appears that the controversy is fictitious, the action will be dismissed at the suggestion of either a party to the record or of any person in interest or who may be prejudiced by the judgment, or even at the instance of a stranger who appears as amicus curiae, or by the court on its own motion when the fact appears. So also where the trial by a court of an election contest would be vain and fruitless proceeding, and another trial by the state senate would be necessary to determine the rights of parties, the court will not assume jurisdiction for any purpose. The courts cannot, however, refuse to entertain and decide controversies on the ground that they are fictitious and collusive, merely because the motives of the parties and promoters may be self-serving.

"**Matters occurring after an action is commenced,** but before a hearing therein, may render merely a moot question one as to which a real controversy existed at the time when the action was brought, in which case the question will not be considered, unless it is one of great public importance."

In **United States** v. **Alaska S. S. Co.,** 253 U. S. 113, 116, the Court says:

" . . . Where by an act of the parties, or a subsequent law, the existing controversy has come to an end, the case becomes moot and should be treated accordingly. However convenient it might be to have decided the question of the power of the Commission to require the carriers to comply with an order prescribing bills of lading, this court 'is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it. No stipulation of parties or counsel, whether in the case before the court or in any other case, can enlarge the power, or affect the duty, of the court in this regard.' **California** v. **San Pablo & Tulare R. R. Co.,** 149 U. S. 308, 314; **United States** v. **Hamburg-American Line,** 239 U. S. 466, 475, 476, and previous cases of this court therein cited."

In **Ashwander** v. **Tennessee Valley Authority,** 297 U. S. 288, 324-5, the Supreme Court says:

" . . . We agree with the Circuit Court of Appeals that the question to be determined is limited to the validity of the contract of January 4, 1934. The pronouncements, policies and program of the Tennessee Valley Authority and its directors, their motives and desires, did not give rise to a justiciable controversy save as they had fruition in action of a definite and concrete character constituting an actual or threatened interference with the rights of the persons complaining. The judicial power does not extend to the determination of abstract questions. **Muskrat** v. **United States,** 219 U. S. 346, 361; **Liberty Warehouse Co. v. Grannis,** 273 U. S. 70, 74; **Willing v. Chicacago Auditorium Assn.,** 277 U. S. 274, 289; **Nashville, C. & St. L. Ry. Co.** v. **Wallace,** 288 U. S. 249, 262, 264. It was for this reason that the court dismissed the bill of the State of New Jersey which sought to obtain a judicial declaration that in certain features the Federal Water Power Act exceeded the authority of the Congress and encroached upon that of the State. **New Jersey** v. **Sargent,** 269 U. S. 328. For the same reason, the State of New York, in her suit against the State of Illinois, failed in her effort to obtain a decision of abstract questions as to the possible effect of the diversion of water from Lake Michigan upon hypothetical water power developments in the indefinite future. **New York** v. **Illinois,** 274 U. S. 488. At the last term the Court held in dismissing the bill of the United States against the State of West Virginia, that general allegations that the State challenged the claim of the United States that the rivers in question were navigable, and asserted a right superior to that of the United States to license their use for power production, raised an issue 'too vague and ill-defined to admit of judicial determination.' **United States** v. **West Virginia,** 295 U. S. 463, 474. Claims based merely upon 'assumed potential invasions' of rights are not enough to warrant judicial intervention. **Arizona** v. **California,** 283 U. S. 423, 462.

"The Act of June 14, 1934, providing for declaratory judgments, does not attempt to change the essential requisites for the exercise of judicial power. By its terms, it applies to 'cases of actual controversy,' a phrase which must be taken to connote a controversy of a justiciable nature, thus excluding an advisory decree upon a hypothetical state of facts. See **Nashville, C. & St. L. Ry. Co.** v. **Wallace,**

supra. While plaintiffs, as stockholders, might insist that the board of directors should take appropriate legal measures to extricate the corporation from particular transactions and agreements alleged to be invalid, plaintiffs had no right to demand that the directors should start a litigation to obtain a general declaration of the unconstitutionality of the Tennessee Valley Authority Act in all its bearings or a decision of abstract questions as to the right of the Authority and of the Alabama Power Company in possible contingencies."

The foregoing principles have heretofore been given effect by this Division. In its Opinion in Award 619, Docket PC-584, the following appears:

"The evidence shows that Mr. Becker's name was removed from the seniority roster June 25, 1937. While this was subsequent to the complaint in this case, it was before the matter reached this Board, and as the situation complained of no longer subsists the case is moot. It must, therefore, be dismissed without prejudice to the organization's right to renew the complaint at any time should Mr. Becker's name be restored to the seniority list on the basis complained of herein."

/s/ J. G. TORIAN
/s/ GEO. H. DUGAN
/s/ A. H. JONES

DISSENT—AWARD NO. 697, DOCKET DC-693

Dissent to Award No. 696, Docket DC-689 expresses our dissent to this award, No. 697.

/s/ C. C. COOK
/s/ R. H. ALLISON