Award No. 844
Docket No. TE-861

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

William H. Spencer, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

CLINCHFIELD RAILROAD COMPANY

STATEMENT OF CLAIM: "Claim of the General Committee of The Order of Railroad Telegraphers on the Clinchfield Railroad Company that the names of Fenden Willis and Paul Kinkead, who are on the seniority list of the Telegraphers and also on the seniority list of the Clerks, should be removed from the Telegraphers' Seniority Roster."

EMPLOYES' STATEMENT OF FACTS: "Fenden Willis entered the class of service covered by the Telegraphers' Agreement on October 20, 1927, and continued to work jobs covered by the agreement until March 11, 1932. Account reductions in force, his service, whereby he performed the class of work covered by the Telegraphers' Agreement, was dispensed with by the carrier, whereupon he accepted a clerical position not covered by the Telegraphers' Agreement, but covered by the Clerks' Agreement, under which Willis accumulates seniority as a clerk. Willis has performed no work coming within the classes covered by the Telegraphers' Agreement since March 11, 1932, but has since that date and still is being carried on the Telegraphers' Seniority Roster. Since March 11, 1932, he has worked clerical positions exclusively, which work is covered by the Clerks' Schedule, and accumulated clerks' seniority since that date.

"Paul Kinkead entered the class of service covered by the Telegraphers' Agreement on March 27, 1931, and continued to work jobs covered by the Agreement until August 31, 1931. Account reduction in force, his service, whereby he performed the class of work covered by the Telegraphers' Agreement, was dispensed with by the Carrier, whereupon he accepted a clerical position not covered by the Telegraphers' Agreement, but covered by the Clerks' Agreement, under which Kinkead accumulates seniority as a clerk. Kinkead has performed no work coming within the classes covered by the Telegraphers' Agreement since August 31, 1931, but has since that date and still is being carried on the Telegraphers' Seniority Roster. Since August 31, 1931, he has worked clerical positions exclusively, which work is covered by the Clerks' Schedule, and accumulated Clerks' seniority since that date.

"Both Willis and Kinkead have had opportunities to return to and work positions covered by the Telegraphers' Agreement, but declined to do so, preferring to remain on and continue to work clerical positions covered by the Clerks' Agreement."

POSITION OF EMPLOYES: "An agreement bearing date September 1, 1935, as to rules and working conditions, and August 1, 1937, as to rates of pay, is in effect between the parties to this dispute.

o: In filling temporary vacancies known to be for not less than thirty (30) days or more than four months duration, the oldest competent extra employe will be given preference.

p: Leave of absence for a period not exceeding ten days will be granted upon verbal request. Application for leave exceeding ten (10) days must be made in writing and approved by Chief Dispatcher.

Except in case of sickness or disability, employes will not be granted leave of absence in excess of ninety days and retain their seniority rights.

q: Seniority roster will be prepared by Superintendent in January of each year and will be open to protest for a period of sixty (60) days. A copy will be mailed to each employe covered by this agreement.' "

POSITION OF CARRIER: "The Carrier contends that there is nothing in Rule 9, of the Agreement between the Carrier and the Telegraphers, which sustains the position of the General Chairman, and that it has no authority to remove the names of these two men from the Telegraphers' Seniority Roster. Paragraph 'c' of Rule 9 specifically provides that 'employes declining promotion do not forfeit seniority to any other position when vacancies occur.' Paragraph 'e' of Rule 9, upon which the General Chairman relies to sustain his position, does not apply. The most that Paragraph 'e,' of Rule 9, does is to give the incumbent of an abolished position, or to a displaced employe, the right within the thirty days after such abolition or displacement to displace a junior employe. The only right given or limited by this Rule is the right to displace. It does not in any way limit the right of those on the seniority list to submit bids for positions if and when positions are advertised, nor does it require the removal of the name of an employe from the seniority roster when he fails to displace a junior employe. The General Chairman also relies upon Paragraph 'p,' of Rule 9. That section only relates to leaves of absence, and, in the Carrier's opinion, does not apply to the cases in dispute.

"Carrier contends that, there being nothing in the rules governing the facts in these cases, it is powerless to take any action and is without authority to remove the names of these men from the seniority roster."

OPINION OF BOARD: Under date of December 23, 1938, the Order of Railroad Telegraphers and the Clinchfield Railroad Company transmitted to the Third Division of the National Railroad Adjustment Board a joint submission of a dispute that had arisen between them with respect to the seniority rights of two employes. On December 27, 1938, the Division as a matter of routine received the submission and assigned a docket number to it.

The facts of the dispute are brief and simple. Fenden Willis entered the carrier's service on October 20, 1927, in a position covered by the Telegraphers' Agreement. In 1932, his then position having been discontinued in a force reduction, Willis was transferred to service covered by the Clerks' Agreement. Since 1932 he has worked continuously in this service, and has been accumulating seniority on the Clerks' Roster. Meanwhile, however, his name has been continued on the Telegraphers' Roster. The facts with respect to the status of Paul Kinkead are practically identical with the facts in Willis' case, and need not be recited. The Committee of the Order of Railroad Telegraphers requested the carrier to remove the names of these two employes from its seniority roster. The carrier replied that under the rules of the Agreement with the Telegraphers, it had no authority to take such action. The parties thereupon made a joint submission of the dispute to this Division. In the submission, the parties waived the privilege of oral hearing. Neither of the employes was given notice of the submission, or an opportunity to appear and be heard.

The contention is made that the Division cannot render a valid award in the present dispute until the two employes have been accorded an opportunity to be heard. This contention is based primarily on Section 3 (j) of the Railway Labor Act. This provides:

> Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the adjustment board shall give due notice of all hearings to the employe or employes and the carrier or carriers involved in any disputes submitted to them.

This paragraph, however, does not stand alone. It must be read in connection with the immediately preceding paragraph, Section 3 (i). This provides:

> 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, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the adjustment board with a full statement of the facts and all supporting data bearing upon the disputes.

The National Railroad Adjustment Board early in its existence placed an interpretation on the requirements of the provisions just quoted. Section 3 (u) of the Act provides that "the adjustment board shall meet within forty days after the approval of this act and adopt such rules as it deems necessary to control proceedings before the respective divisions and not in conflict with the provisions of this section." In its Circular No. 1, issued October 10, 1934, the Board published the rules of procedure that it had adopted under authority of Section 3 (u). One of these states that "oral hearings will be granted if requested by the parties or either of them and due notice will be given the parties of the time and date of the hearing." This brief statement, when read in connection with other provisions of Circular No. 1 and in connection with Section 3 (i) of the Railway Labor Act, clearly indicates that the Board intended that notice should be given only to the parties to disputes, and to no others. This is evidenced by the fact that, although numerous disputes comparable to the one under consideration have been submitted for adjustment, this Division, both with and without the assistance of referees, has rendered awards without having given notice to individual employes affected by them. What is true under the practice of this Division is equally true under the practice of the other divisions of the Board. In its Award No. 371, involving a dispute closely resembling the one here presented, the Division, with Referee Sharfman sitting as a member, overruled a motion of the carrier to dismiss the claim on the ground that the employe affected had not been given an opportunity to be heard.

The Division is of the opinion that the rules of procedure adopted by the National Railroad Adjustment Board for the guidance of all divisions, as here interpreted, are not inconsistent with the provisions of Section 3 of the Railway Labor Act. The Division, accordingly, concludes that it has jurisdiction to dispose of the present dispute even though the employes affected have not been afforded opportunity to be heard.

Section 3 (i), describing the character of disputes over which the Adjustment Board has jurisdiction, refers to "disputes between an employe or group of employes and a carrier or carriers." The section then proceeds to indicate the manner in which these disputes shall be handled upon the property of the carrier. But, continues this paragraph, "failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the adjustment board." There can be little doubt that the language here employed refers

only to the parties to a dispute—the employe or employes on the one hand, and the carrier or carriers on the other. This paragraph is followed immediately by another which states in part that "the several divisions of the adjustment board shall give due notice of all hearings to the employe or employes and the carrier or carriers involved in any disputes submitted to them." Considering the proximity and relationship of these two paragraphs, it seems that Congress in the use of the terms "employe or employes" in Section 3 (j) was referring to "employe or group of employes" as used in Section 3 (i). In the first paragraph, the terms clearly describe parties to a dispute. It would seem to follow that Congress meant to describe parties to a dispute in the second paragraph.

This language is not as clear as it might be. Support of the construction here adopted, however, is found in the practice of earlier adjustment boards. It is not denied that these earlier adjustment boards gave notice only to the parties to disputes. Congress undoubtedly had this fact in mind in the creation of the National Railroad Adjustment Board. It is clear that in the establishment of the present Adjustment Board on a national basis Congress built on the experience had with the earlier adjustment boards. In these circumstances, it cannot be fairly assumed that Congress intended to change the procedures of these earlier boards by the language employed in Section 3 (i) and (j).

Further support of the construction here adopted is found in the requirement set forth in Section 3 (i). This states, among other things, that disputes shall be handled in a certain manner on the property of the carrier as a condition of their submission to the Adjustment Board. This section does not, however, require that the parties to such negotiations shall notify individual employes affected, and give them opportunity to be heard. It is significant in this connection that it is the usual practice of representatives of employes and representatives of carriers periodically to correct seniority rosters without giving employes affected any opportunity to be heard.

Assuming that Section 3 (i) and (j), fairly construed, do not require that the several divisions of the Board shall give notice to all employes involved, whether or not parties to disputes, it is nevertheless arguable that these provisions are violative of the due process of law clause of the Fifth Amendment to the Constitution. It is a well established tradition of the common law that a person shall have opportunity to be heard in any judicial or quasi-judicial proceeding at which any of his rights may be adjudicated. The due process clause of the Fifth Amendment crystallizes this tradition as a limitation on the legislative power of Congress. It was on this theory that the court proceeded in Nord v. Griffin, 86 Fed. (2d) 481 (1936), enjoining an award of the First Division of the Adjustment Board at the suit of an employe affected who was not given an opportunity to be heard in the proceedings out of which the award had issued. The court said in part:

> The trial below and this appeal do not involve the merits of the controversy. They involve solely the question of whether the appellee is to be bound by an order of an administrative board in a proceeding to which he was not a party, entered at a hearing of which he had no notice. The mere statement of the proposition is conclusive of its unsoundness. The rights of plaintiff are protected by the Fifth Amendment.

The court in support of its conclusion relied upon the decision of the Supreme Court in Truax v. Raich, 239 U. S. 32 (1915), involving the constitutionality of a statute of Arizona requiring every employer within the state to employ a stated percentage of American born citizens or qualified electors. The plaintiff, ineligible under the statute to continue his employment, asked that his employer be enjoined from dismissing him under the provisions of this statute on the ground that it was in conflict with the due process of law clause of the Fourteenth Amendment. It appeared that, whereas the employe was working under an arrangement terminable at the

will of the employer, the latter had no intention of dismissing the former other than in compliance with the statute. The court enjoined a dismissal under the statute, holding that it was violative of the due process requirement. "It requires no argument," said the court, "to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure."

Whatever may be said concerning the soundness of this reasoning as applied to the specific situation in Truax v. Raich, this decision does not establish the doctrine that rights in seniority or "the right to work for a living in the common occupations" are absolute. Practically all courts which have had occasion to discuss seniority rights, even when inclined to classify them as property, have described them as something inchoate and intangible. Congress certainly may, as it has done in many situations, limit these rights without violating the due process of law clause of the Constitution, provided the limitations are fair and reasonable. Both the Railway Labor Act and the National Labor Relations Act, in so far as they authorize the making of collective agreements that are binding on all employes within a given bargaining unit, substantially limit the right of an individual to work or to make an individual contract. Whether such legislation is violative of due process depends upon whether in the opinion of courts such limitations are fair and reasonable in all the circumstances.

An illuminating decision of the Supreme Court of the United States in connection with this issue is that rendered in Senn v. Tile Layers Protective Union, Local No. 5, 301 U. S. 468, 1937, Senn, the complainant in the case, was a small tile contractor employing four or five men. During a considerable portion of his time he used the tools of the trade, working on various jobs with his employes. Neither he nor his employes were members of the Tile Layers Protective Union, Local No. 5. As a matter of fact Senn himself was not eligible for membership in the union because he had not served the apprenticeship required by it for membership. Representatives of the union sought to induce Senn to become a union contractor and sign an agreement with it substantially comparable to the agreement which the union had with other employers in Milwaukee. Senn expressed his willingness to sign an agreement with the union provided it would eliminate the provision of the contract (Article III) that "no individual, member of a partnership or corporation engaged in the Tile Contracting Business shall work with tools or act as Helper . . . ." The Union replied that this was impossible since the "inclusion of the provision was essential to the union's interests in maintaining wage standards and spreading work among their members." Senn refused to sign an agreement. The Union thereupon, in a peaceable manner, picketed the various jobs on which Senn and his men were working, declaring him to be unfair to organized labor. Senn brought suit in the courts of Wisconsin, asking that the defendant be enjoined from picketing. The trial court denied the injunction and dismissed the bill. It ruled that the controversy was "a labor dispute" within the meaning of a statute of Wisconsin which legalized peaceful picketing in connection therewith. The Supreme Court of Wisconsin affirmed the action taken, and the case was appealed to the Supreme Court of the United States. Justice Brandeis, who delivered the opinion of the Court, said that the Supreme Court of the United States was bound by the decision of the Supreme Court of Wisconsin as to the construction and application of its statutes. Justice Brandeis continued:

> The question for our decision is whether the statute, as applied to the facts, took Senn's liberty or property or denied him equal protection of the laws in violation of the Fourteenth Amendment. Senn does not claim broadly that the Federal Constitution prohibits a state from authorizing publicity and peaceful picketing. His claim of invalidity is rested on the fact that he refused to unionize his shop solely because the union insisted upon the retention of article III.

> He contends that the right to work in his business with his own hands is a right guaranteed by the Fourteenth Amendment and that the state may not authorize unions to employ publicity and picketing to induce him to refrain from exercising it.

The Supreme Court held that the statute, as interpreted and applied by the highest court of Wisconsin, did not violate the due process clause of the Fourteenth Amendment. It said that the object sought was legitimate, and that the means used were not unreasonable. In support of this conclusion, Mr. Justice Brandeis said, among other things:

> It is true, also, that disclosure of the facts may prevent Senn from securing jobs which he hoped to get. But a hoped-for job is not property guaranteed by the Constitution. And the diversion of it to a competitor is not an invasion of a constitutional right.

Justice Butler—with whom Justices Van Devanter, McReynolds, and Sutherland concurred—dissented. Mr. Justice Butler said that "the judgment of the state court, here affirmed, violates a principle of fundamental law: That no man may be compelled to hold his life or the means of living at the mere will of others." In support of this point of view, the minority relied strongly upon Truax v. Raich, cited above.[1]

This case and others as well clearly establish the doctrine that the "right to work" is not an absolute right, and that it may be limited in proper and reasonable ways in the furtherance of some larger or more general interest with which the "right to work" may conflict.

Assuming that an individual employe has a property right in his seniority rating, what is the nature and scope of this property? In only a relatively small number of cases have courts been asked to pass judgment on the legal aspects of the seniority rights of an individual employe under a collective employment agreement. The scarcity of court decisions on this issue is due in large part to the fact that arrangements between employes and employers, although commonly described as collective agreements, differ in fundamental respects from commercial contracts. An examination of the decisions on this issue indicates some of the embarrassments which courts encounter when they attempt to apply the common law principles of commercial contracts to collective employment agreements. It is interesting to note that in England, where collective dealings between employes and employers are more highly developed and stabilized than in this country, "while the agreements provide that there shall be no strikes or lockouts until the procedure for negotiating basic changes, or for settling local disputes and grievances, has been completed, these and other provisions of collective agreements rest upon moral force rather than upon legal compulsion." (Report of the Commission on Industrial Relations in Great Britain, page 6.) The fundamental differences between collective employment agreements and commercial contracts must be kept in mind in determining the nature and scope of the seniority rights of an individual employe under a collective employment agreement.

It seems clear that seniority in a technical sense exists only by virtue of a collective or group arrangement between employes and employers. It is

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[1]See also Williams v. Quill, 277 N. Y. 1, 1938, and O'Keefe v. Local No. 463, 277 N. Y. 300, 1938, in which the legal nature of one's right to work is discussed. In the latter case, an employer consistently violated a working agreement between the union and an employer's association by the payment of wages lower than those provided for in the agreement. The union and the association submitted the problem to joint arbitration for settlement. The arbitration board suspended all the employes of the employer in question for one year. The Court of Appeals of New York held that the award was reasonable in the circumstances, and that the innocent employes could not be heard to complain.

true, of course, that in the absence of such an arrangement, an employer will ordinarily accord vacancies and promotions to employes in the order of their length of service, assuming fitness and ability of employes to be equal. This practice is popularly described as seniority. It is to be noted, however, that under this practice an employer is not legally required to respect the right of the individual employe and may arbitrarily disregard the seniority standing of employes. It is believed that no case can be found in which a court has ever protected the seniority right of an individual employe in the sense in which the term is here used.[1] Seniority, in so far as it is a property right, exists only by virtue of a group arrangement or agreement between employes and employers. The very nature of seniority rights in this sense precludes the assumption that they exist at the free will of the employer or by virtue of individual agreements between an employer and employe. "Seniority, if it is a right at all, is a vested interest in a certain specific permutation of individuals. It is a permutation which, barring disciplinary penalties, deaths, and voluntary withdrawals, can change only by promotions from the top or by additions at the bottom. It is an interest in a 'specific orderly arrangement.'" (Christenson, Seniority Rights under Labor Union Working Agreements, Temple Law Review, XI, pp. 335-381 at 371.)

Approximately fifty-seven decisions involving the legal nature of seniority rights have been rendered by the courts of the various states and by the federal courts. The earliest of these was handed down in 1909. More than forty of them have been rendered since 1930. In a memorandum filed with the Division these decisions are classified in terms of (a) the nature of the complaint presented, (b) the true position of the parties involved, (c) the attitude of the courts with respect to the legal nature of a collective agreement, (d) the type of relief sought, and (e) the relief, if any, granted.

While these decisions need not be examined individually, some general comments on them may appropriately be made here. (1) The state courts have not as yet developed a uniform body of principles bearing on the legal nature of collective agreements. (2) In practically all of these decisions, the courts, directly or indirectly, have taken the position that seniority exists only by virtue of some collective agreement or arrangement between employes and employers. In a single case only did the court intimate that property right in seniority existed prior to a collective agreement (Piercy v. L. & N. R. Co., 198 Ky. 477, 248 S. W. 1042, 1923). (3) In the cases in which the issue was passed upon, most of the courts agreed that the labor organization or its officials are merely a bargaining agency for the class of employes involved, that the collective agreement, in so far as it has legal status, exists between the employes as a group and the employers, and that the collective agreement becomes the basis of the work arrangement of each individual employe. (4) In the cases in which the issue was passed upon, a majority of the courts agreed that the collective agreement is binding upon the members of the organization negotiating it; and that changes in the agreement when made in the interest of a majority of the employes are binding upon the individual members. (5) In only a small number of cases were the rights of non-member employes involved. In these cases the courts agreed that the terms of the collective agreement are as binding upon them as upon members. (6) In the cases where the issue was involved, practically all of the courts agreed that the individual member has no standing in court under the collective agreement until he has exhausted his remedies within the organization to which he belongs. (7) In only eight or nine of the decisions did the courts grant the relief sought. In the remaining cases, the courts denied the relief sought for a variety of

[1] In this connection see particularly Bottle v. Atlantic Coast Line R. Co. 64 S. E. (Ga.) 463 (1909) in which the court denied the employe any relief for an alleged violation of his seniority which the carrier had previously accorded him as an individual.

reasons as indicated by the memorandum filed with the Division. (8) Aside from the cases in the federal courts, in one case only was the issue raised whether an award of an adjustment board is binding upon an employe not made a party to the proceedings. In this case the court held that the award was not binding. The court, however, had already ruled that the adjustment board, which was set up under the period of federal control, had no jurisdiction over the dispute, and could in no event have rendered a valid award. (Gregg v. Stark, 224 S. W. (Ky.) 459, 1920)

In determining the legal status of the collective agreement involved in this dispute and the rights of individual employes under it, it is next appropriate to examine certain of the provisions of the Railway Labor Act of 1926 as amended in 1934. Section 2 (First) provides that it shall be the duty of carriers and their employes "to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise. . ." Section 2 (Second) states that "all disputes between a carrier or carriers and its or their employes shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively by the carrier or carriers and by the employes thereof interested in the dispute." Section 2 (Sixth) specifies the conditions under which conferences between the representatives of the employes and carriers shall be held for the purpose of attempting to settle disputes concerning rates of pay, rules or working conditions. Section 2 (Seventh) provides that "no carrier, its officers or agents shall change the rates of pay, rules or working conditions of its employes, as a class as embodied in agreements, except in the manner prescribed in such agreements or in Section 6 of this Act." Section 6 prescribes the manner in which "carriers and representatives of the employes" shall proceed to negotiate changes in agreements. These provisions clearly contemplate that employment relations covered by the Act shall be established by collective agreements negotiated by the representatives of employes and carriers, that changes in the agreements shall be negotiated in a similar manner, and that disputes, whether arising under the agreements or otherwise, shall, if possible, be settled by the representatives of the parties on the property of the carrier involved.

Section 2 (Ninth) states how the representatives of the employes shall be selected and accredited to the carrier concerned. Section 2 (Fourth) provides that "the majority of any craft or class shall have the right to determine who shall be the representative of the craft or class for the purposes of this act." These provisions clearly make the properly selected and accredited representative the exclusive bargaining agency of all the employes of the class or craft involved in the negotiation of collective agreements, in the negotiation of changes in such agreements, and in the settlement of disputes whether arising under the agreements or otherwise. The authority of a bargaining agency, when it has once been established under the Act, cannot be revoked except in the manner in which it was granted.

From the foregoing analysis it would seem to follow that the property right in seniority of an individual employe under a collective agreement made, or existing, under authority of the Railway Labor Act is of limited character. It exists only by virtue of an agreement between a properly accredited representative of the employes and the carrier. Its nature and scope are determined by the provisions of the Railway Labor Act under which the agreement exists. Under these provisions the Order of Railroad Telegraphers is the exclusive representative of all employes of the class or craft involved in the present dispute. It possesses authority, authority which can only be revoked in the manner in which it was granted, to negotiate changes in the existing agreement and to make settlements of disputes arising under it. In the negotiation of changes and in the making of settlements on the property of the carrier, the Act does not require the representatives of employes and the carrier to consult individual employes who may be

affected. In the opinion of the Division, this agency has the same authority to represent the employes in disputes submitted to this Division that it has to represent them on the property of the carrier.

In view of the nature of seniority rights under collective agreements, the Division is of the opinion that the Congress has the power, without violating the due process clause of the Fifth Amendment to the Constitution, to authorize the National Railroad Adjustment Board to render valid awards in proceedings before it upon giving proper notice to the parties to the disputes, and that it has so authorized the Board in Section 3 (i) and (j) of the Railway Labor Act.

A danger in the plan which Congress has here set up for the adjustment of disputes is that the bargaining agency may not always act in the best interests of a majority of the employes whom it represents. If, however, it should appear in a given situation that the bargaining agency has abused its authority, or has been guilty of fraud or collusion, the individual employes are not without remedy. Members of a given organization have the privilege of selecting new officials. Members and non-members alike have the privilege of selecting a new bargaining agency, or, indeed, of returning to the practice of individual bargaining. Moreover, the doors of the courts are always open to individual employes to challenge the validity of adjustments made by the various divisions of the National Railroad Adjustment Board in cases in which fraud, collusion, or abuse of authority is charged. The Division is, however, of the opinion that Congress has not imposed upon the Adjustment Board the duty of notifying parties or persons other than the parties to disputes as a condition of the exercise of its authority to render awards.

On the merits of the controversy, the Division is of the opinion that the position of the petitioner must be sustained. It seems clear that Rule 9, the seniority rule, relates only to seniority of employes within the class of service covered by the Telegraphers' Agreement. Paragraph (k) provides that "an employe voluntarily leaving the service will rank as a new man, if reemployed." The clear implication of this provision is that when an employe leaves the service covered by the Telegraphers' Agreement, he loses his seniority under the Agreement except as otherwise provided in Rule 9.

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

That both parties to this dispute waived hearing thereon.

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, under Rule 9 of the Agreement between the parties, the employes involved, when they left the service covered by the Telegraphers' Agreement, lost their seniority under that Agreement.

AWARD

The claim is sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois this 14th day of April, 1939.

Dissent on Award 844

The dissent in this case deals only with the procedure in denying employes Willis and Kinkead, whose seniorty was challenged, an opportunity to be heard in their own defense. Since the procedure by which the award on the merits of the case was arrived at was wanting in due process, it should be regarded as a nullity and is so treated here.

This Board has been described as a unique administrative agency; a quasi-judicial body set up for the purpose of "rendering judicially enforcible decisions in controversies"[1] arising under labor agreements. If that is an apt description, then it may be presumed as the intent of the Congress, by the act creating it, to establish a tribunal whose procedure would be such as to afford all, whose interests might be involved, a fair hearing; that it did not intend to prescribe or to authorize a procedure contravening constitutional requirements or denying to parties in interest their constitutional rights.

As stated in the Opinion this case came to the Board as a joint submission by the General Committee of the Order of Railroad Telegraphers and the Railroad, in which those two parties waived an oral hearing before the Board.

The carrier members, by appropriate action, undertook to have formal notice given Messrs. Willis and Kinkead of the pendency of the case, in order that they might have opportunity to be heard either orally or by petition. This effort was defeated. The carrier members declined to participate in a consideration of the merits of the case unless and until such notice was given.

In due season the labor representatives, contending that the case was deadlocked, certified to the Mediation Board, under Section 3, First (1) of the act,

> Upon failure of any division to agree upon an award because of deadlock or inability to secure a majority vote of the Division members * * * then such division shall forthwith agree upon and select a neutral person to be known as "referee," to sit with the division as a member thereof and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock * * * then the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award.

that the division had failed to agree upon and select a referee, and asking the Mediation Board to "select and name the referee" in this and thirteen other cases identified by docket numbers.

The carrier members of the Division, thereupon, addressed a letter to the Mediation Board, stating that the merits of this case had not been considered by the Division and setting forth in detail the action taken to that moment, protesting that a lawful award could not be rendered without notice to necessary parties in interest affording them an opportunity to be heard, and therefore the selection of a referee at that stage of the proceedings was inappropriate.

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[1]THE NATIONAL RAILROAD ADJUSTMENT BOARD, A UNIQUE ADMINISTRATIVE AGENCY, by Lloyd K. Garrison, Dean of Law Schools, University of Wisconsin, The Yale Law Journal, Vol. 46, No. 4. See also pronouncement of Sup. Ct. Mississippi in Stephenson v. N. O. & N. E. Ry. Co., 177 So. 509.

The Mediation Board selected Dr. Wm. H. Spencer as referee in the other thirteen cases, and with respect to this case asked him to inquire into the handling of the case by the Division and advise the Mediation Board as to the status of the case, at the same time informing the carrier and labor members that it had done so.

Dr. Spencer inquired into the matter and reported to the Mediation Board. In due time the Mediation Board informed the Division that in its opinion it is not authorized to decide disputes between management and labor members; the only duty imposed upon it by the act being the appointment of a referee, and that it had designated Dr. Spencer as referee in this case as well as in the others previously assigned to him. There were thus two issues before the referee; one a question of procedure, should Willis and Kinkead be given notice and an opportunity to be heard; the other, the merits of the case. On the procedural matter Dr. Spencer has previously spoken.[2] Dealing with claims filed by individuals before the Division, on the vote for hearing of which the carrier members vote in favor of hearing and the labor members against, creating the same condition that existed in this case with respect to affording an opportunity for hearing to Willis and Kinkead, he said, "This, being a question of procedure, cannot be deadlocked and submitted to a referee for decision. The result so far has been that individual claimants have been denied the privilege of presenting their claims in person." And again, "It is important to note that the Railway Labor Act does not authorize a referee to assist a division in settling a deadlock on an issue of the Board's procedures. Under the Act the referee's sole function is to assist a division in the decision of deadlocked cases involving disputes arising out of the interpretation or application of the rules of collective agreements." It may be noted, for such significance as it has, that individual claimants are non-members of the so-called standard railroad labor organizations, with possibly a score of exceptions among several hundred individual petitions. In the instant case the record is silent as to the membership or non-membership of Willis and Kinkead, but the assumption that they are non-members will strain no one's imagination.

Dr. Spencer again expressed himself on the limitation, under the law, of a referee's functions to that of assisting a division in the decision of deadlocked cases, when, as referee on the First Division, he responded to the application of a carrier for an opportunity to appear before the division with him sitting as referee for the purpose of arguing its cases, that he had no authority to participate with the Division in its decision on procedural matters.

Thus, at the threshold, Dr. Spencer became the referee in this case by an about face from a stand he had publicly taken that the act "does not authorize a referee to assist a division in settling a deadlock on an issue of the Board's procedures."

Approximately two pages of the Opinion are devoted to a dissertation on the rules of the Board and the requirements of the Act with respect to notice of hearings to parties in interest as well as to petitioner and respondent, all of which is beside the point, because:

1. If the Act requires notice and the rules forbid it, they are ultra vires under Section 3, First (u);

2. If the Act does not require, but on the other hand does not forbid notice, and such notice is necessary to preserve to parties in interest their constitutional rights, then the rules are deficient if they do not provide for such notice;

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[2]THE NATIONAL RAILROAD ADJUSTMENT BOARD, by William H. Spencer, Professor of Business Law and Dean of the School of Business, The University of Chicago, pp. 39, 40 and footnote No. 15, p. 47.

3. If the Act forbids such notice, then it is to that extent void as denying rights guaranteed by the Constitution.

The Opinion recognizes that it is at least "arguable" that a denial of notice may be violative of the due process clause, and to lay that ghost, once for all apparently, the referee explores Nord v. Griffin, in which, says he, the court "relied upon the decision of the Supreme Court in Truax v. Raich, 239 U. S. 32" in support of its conclusion. Let's test the soundness of that statement. As the Opinion points out, Truax v. Raich was a suit to test the validity of an Arizona Statute under the 14th Amendement. The only reference to that case in Nord v. Griffin is in these words:

> The right to earn a livelihood and to continue in employment unmolested by efforts to enforce void enactments or adjudications is entitled to protection, in the absence of an adequate remedy at law. Truax v. Raich, 239 U. S. 33. Obviously the District Court was correct in concluding that the award deprived appellee of his property rights.

Not a word in that reference to the point in issue in the instant case—opportunity to be heard. But in the court's decision in Nord v. Griffin, immediately following some language from that decision quoted in the Opinion in this award, we find this:

In Ochoa v. Hernandez, 230 U. S. 139 the Supreme Court said:

> "Whatever else may be uncertain about the definition of the term 'due process of law,' all authority agree that it inhibits the taking of one man's property and giving it to another, contrary to settled usages, modes of procedure, and without notice and an opportunity for hearing."

From this point the Opinion digresses on another tangent exploring the power of the Congress to limit seniority rights; to limit the right of an individual to work; the nature and scope of the property involved in seniority, which, it says, "practically all courts" even when inclined to classify seniority rights as property, "have described them as something inchoate and intangible."

The Opinion next explores "fifty-seven" court decisions which, says the referee, involve the legal nature of seniority rights. These were charted in the memorandum filed with the Division under fifteen column heads which are not readily identifiable with the five classifications stated in the Opinion. All of the "fifty-seven" have not been examined but samples were taken here and there to evaluate the memorandum.

The form of the memorandum is reproduced as an appendix to this dissent. The three cases, selected for comment from among those examined, are shown thereon as charted on the original memorandum.

It cites McMurray v. B. of R. T. 50 F. (2d) 968 (D. C. Pa. 1931), of which the referee says in a footnote, that in this case a subordinate lodge took action against the central body of the union. Under the column head "Comments of the Courts" he says "Essential parties not named. (General) claim fraud not enough for Federal Court acceptance." In affirming the judgment of the District Court, the Circuit Court of Appeals said, 54 Fed. (2nd) 923 (1931):

> On final hearing the court below held: "Plaintiffs have claimed, and their suit is founded thereon, that seniority rights upon the through runs are property rights. If so, this court cannot well make a decree which will wipe out the claimed property rights of the members of Lodge No. 421 (the Ohio Lodge) without giving them an

> opportunity to be heard. The Dennison trainmen are probably not resident within this district, and so cannot be made parties in the instant action. It seems quite possible that they with the present defendants, could be joined in another district; but whether this be correct or not, they are essential parties, and a court of equity can properly make no effective order unless they be joined as defendants. Ex parte Equitable Trust Co. (CCA) 231 F. 571, 592; California v. Southern Pacific Co., 157 U. S. 229, 15 S. Ct. 591, 39 L. Ed. 683." We agree with that view and, therefore, affirm the judgment below.

I find nothing in this decision upon which the referee's comments may be based in respect to claim of fraud being insufficient for Federal court acceptance. What the court did say, plainly enough for those willing to hear, was that it could not make a decree wiping out the claimed property rights (seniority) of a group of men without giving them an opportunity to be heard.

Another of the charted cases is Piercy v. L. & N. 248 S. W. 1042 (Ky. 1923), of which the referee says under "Comments of the Court": "Union cannot alter contracts existing prior to agreement. Union changes must be general." Here the referee was confused. Whatever he means by "contract existing prior to agreement," there was no attempt to change the "contract" or "agreement."

The court said in part (and it might have been helpful to the referee in an appropriate disposition of the instant case):

> The officers of such organizations are, as to the individual rights of its members, not to be deemed as their agents. Here there was no general change of the contract, nor was there an attempt to make a general or any change. The order, in fact, did not attempt even to change the individual rights of Stanfill as to this run; but merely requested the company to ignore those rights, and the company for the sole purpose of pleasing the organization, undertook to do so.
>
> The primary purpose in the organization of labor unions and kindred organizations is to protect their individual members and to secure for them a fair and just remuneration for their labor and favorable conditions under which to perform it. Their agreements with employers look always to the securing of some right or privilege for their individual members, and the right or privilege so secured by agreement is the individual right of the individual, and such organization can no more by its arbitrary act deprive that individual member of his right so secured than can any other person. The organization is not the agent of the member for the purpose of waiving any personal right he may have, but is only his representative for the limited purpose of securing for him, together with all other members, fair and just wages and good working conditions. (Hudson v. C. N. O. & T. P. 152 Ky. 711, 154, S. W. 47, 45, LRA (N. S.) 184).
>
> If the right of seniority may be changed or waived or otherwise dispensed with by the act of a bare majority of an organization, of which the one entitled thereto is a member, it would be builded upon a flimsy foundation of sand, which might slip from under him at any time by the arbitrary action of the members, possibly to serve their own selfish ends in displacing him.

To mention but one more of the "charted" cases (see appendix), McClure v. L. & N., 64 S. W. (2d) 538 (Tenn. 1933); under "Comments of the Court" we find "Seniority right held not to have existed prior to Union agreement." In that case the bill was dismissed with this pertinent comment by the court:

> If the complainant is successful, he displaces thirty-three employes who have been accumulating seniority since before his last employment in 1919, and no one of these employes is before the court to protect his, and the interest of his class. They have been permitted to accumulate seniority for twelve years before the filing of the bill, perhaps in ignorance of complainant's claim, and they may have followed a different course to protect themselves against the loss of their jobs had the complainant promptly established his superior seniority. We think it proper to give the men who would be displaced an opportunity to be heard before his seniority is destroyed.

Here, again, it was the right to be heard that was controlling in the court's decision.

In the samples taken among cases charted on the memorandum the summarization under "Comments of the Court" is found to be more misleading than informative.

With respect to Award 371 of this Division, mentioned earlier in the Opinion, of which the referee says that motion of the carrier to dismiss, on the ground that the employe affected had not been given an opportunity to be heard, was overruled, it is pertinent to notice what the referee said in overruling the motion to dismiss. He said that he did so "without in anyway foreclosing such legal rights as either party to the dispute or those affected by its disposition may possess under the provisions of the Railway Labor Act or the due process clause of the Constitution," and he denied in all things the contentions of the representatives of the organization, thus preserving for the two employes, whose rights were challenged, their places on the seniority roster and the right to make displacements to which they were thereby entitled. In that, as in the instant case, the employes, whose rights were challenged, were carried on the seniority rosters of two different classes or crafts under separate collective agreements.

From an analysis of the fifty-seven cases, covered by the memorandum filed with the Division, the Opinion passes to the point of the right of the union representatives to speak for all persons included within a class or craft covered by a collective agreement, on all matters, whether beneficently or maleficently with respect to the individual's interest, and this I conceive to be the Q. E. D. of this lengthy dissertation and the real reason for going against the weight of legal authority on all the points raised, since it is the contention upon which the unions base their denial to individuals of the right to be heard.

If the desideratum, at which the referee aimed, were not the establishment of the supremacy of the union representation in all questions arising under a collective agreement, or within the craft or class covered by such agreements, why was it necessary to go to such lengths of research and analysis to deny to Willis and Kinkead an opportunity to speak in their own behalf?

The referee's conclusion in this respect is counter to that of Referee John P. Devaney, in Award 18 of the Second Division; counter to pronouncement of the court in Piercy v. L. & N., supra, Y. & M. V. v. Sideboard; Y. & M. V. v. Webb; and others that might be cited.

The number of cases before this Board, in which seniority forms the basis for the claim, attest to the value set upon it by the employes. The abstract legal nature and quality of seniority rights is not of so great importance that it is necessary we should undertake to define it. As the court said in Gregg v. Stark, 224 S. W. 459 (Ky. 1920), "The very fact that the contract itself provides rights of seniority where the pay is the same is evidence that such rights were considered by the contracting parties as of sufficient value to demand protection." They are of sufficient value that the union sought to wrest them from Willis and Kinkead. What harm could come of letting these men say what they might as to why they should not be divested of them?

In the whole lengthy Opinion there is not anywhere the slightest consideration of what fairness and good conscience demand. Such pronouncements as that of the court in California v. Southern Pacific, 157 U. S. 229 (1894):

> Mr. Daniel thus lays down the general rule: "It is the constant aim of a court of equity to do complete justice by deciding upon and settling the rights of all persons interested in the subject of the suit, so as to make the performance of the order of the court perfectly safe to those who are compelled to obey it, and to prevent future litigation. For this purpose all persons materially interested in the subject ought generally, either as plaintiffs or defendants, to be made parties to the suit, or ought by service upon them of a copy of the bill, or notice of the decree to have an opportunity afforded of making themselves active parties in the cause, if they should think fit.

received no consideration, or was cast aside as carrying no weight.

With respect to the effect of the decision in Nord v. Griffin, supra, on the procedure of this Board, we find in the referee's monograph on this Board, at page 42 (see note 2 supra) in the text:

> The Act provides that "the several divisions of the Adjustment Board shall give due notice of all hearings to the employe or employes and the carrier or carriers involved in any disputes submitted to them."

and in Note 9.

> Question has been raised in the federal courts whether a division must notify all employes who may be affected by an award as well as the employe or employes making a claim. In Nord et al v. Griffin, the United States Circuit Court of Appeals for the Seventh Circuit (November 13, 1936) held that all employes who will be affected by an award are entitled to notice of a hearing by a division. Griffin had at one time had seniority as a switchtender as of 1906. For many years he worked as a car recorder and was not carried on seniority roster of switchtenders. The Chicago Union Station Company, abolishing his position as car recorder, returned Griffin to switchtending, giving him seniority as of 1906, displacing an employe of alleged junior seniority. The Brotherhood of Railroad Trainmen filled a protest with the First Division of the Adjustment Board against this action of the carrier. The division sustained the protest, holding that Griffin's seniority should be as of 1931 when he was returned to switchtending. Griffin was not made a party to the proceedings before the division and had no notice of them. He asked that the enforcement of the award be enjoined. "Clearly the award," said the Circuit Court of Appeals, "so far as appellee was concerned, was in violation of his rights under the Fifth Amendment of the Constitution, and it was the court's duty, with jurisdiction of the subject matter and of the parties, to award the injunction." The Supreme Court of the United States refused to review this decision. The decision accordingly stands as law on the issue.

Comparing the referee's pronouncement then (March, 1938) that the decision in Nord v. Griffin "stands as law on the issue" with his action in this award disregarding or ignoring it, the question is pertinent; does this award represent an impartial and unbiased expression or was his pronouncement then representative of a judicial concept?

/s/ GEO. H. DUGAN

The undersigned concur in
the above Dissent:

/s/ R. H. ALLISON /s/ A. H. JONES

/s/ J. G. TORIAN /s/ C. C. COOK

Table 2
COURT CASES IN WHICH SENIORITY WAS THE PRINCIPAL POINT AT ISSUE

Names and Citations of the Cases	Cause of Trouble or Claim of Plaintiff	Defendants Formally Named		Adjustment to Formal Status		True Employer & Union Attitude to Plaintiff		Relief Requested (G=Granted)			Remarks Indicating Agreement is Held As Work-Contract of Employee			Comments of the Courts (1) (Sometimes in addition to those indicated by Columns 12,13,14)
		Employer	Union or its Officers	Employer a Defendant in Form Only	Union Ruling Caused Suit, but U. not a Defendant	Employer Opposed in Principle	Union Opposed in Principle	Damages	Declaratory Judgment	Injunction	Belonging to Union is Ratification of its Acts	Non-union Man Ratifies U. Acts by Working	U. Contract not Breached if U. Remedy Unexhausted	
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	(12)	(13)	(14)	(15)
McMurray v. B.of R.T.(2) 50 F. (2d) 968 (D. C. Pa. 1931)	A change in seniority rules or extent of seniority district.		x				x			x			x	Essential parties not named. (General) claim fraud not enough for Fed. Ct acceptance
Piercy v. L.&N. Ry. 248 S.W. 1042 (Ky. 1923)	Miscellaneous	x		x	x		x		G		x			Union cannot alter contracts existing prior to agreement. Union changes must be general.
McClure v. L.&N. R. Co. 64 S.W. (2d) 536 (Tenn. 1933)		x	x	x			x			x		x		Seniority right held not to have existed prior to U. agreement with employer.

(1) Comments which led the author to enter an "x" in columns 12, 13, or 14 are given only when the court made no additional comments.
(2) (3) (4) A subordinate lodge in these cases, took action against the central body of the union.

SUPPLEMENTAL STATEMENT OF REFEREE

There is doubt whether the controversy over notice is a dispute within the meaning of Section 3 of the Railway Labor Act in the adjustment of which a referee has a voice. If the carrier had raised the question of notice, a dispute of this character would have been presented. The question of notice, however, was raised by a member of the Division. From this point of view it is arguable that the dispute is one between members of the Division as to its procedure, in the settlement of which a referee has no voice under his appointment. To the referee, however, it seemed that, unlike some procedural questions with which the Board is faced from time to time, whether proper parties were joined was a jurisdictional fact which he had to decide before passing to the merits of the controversy, whether the question was raised by the carrier, by a member of the Division, or, indeed, by the referee himself. If, however, the question of notice is a procedural question for the Board to decide, the referee would have felt himself bound by its rules as set forth in its Circular No. 1 and would have proceeded to render an award, as he has done, on the merits of the controversy. (See Award No. 371.)

/s/ WILLIAM H. SPENCER

May 3, 1939