Award No. 902
Docket No. CL-932

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Lloyd K. Garrison, Referee

PARTIES TO DISPUTE:

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

THE CHESAPEAKE AND OHIO RAILWAY COMPANY

STATEMENT OF CLAIM: "(a) Claim of the System Committee of the Brotherhood of Railway Clerks that Mary O. Hunt be placed on position of Stenographer as advertised by Bulletin No. 26 October 12, 1938 in office of Chief Engineer and compensated for all wage loss sustained; and

"(b) That Miss Rose Stupasky be removed from position of Stenographer in office of Chief Engineer and her name removed from the seniority roster; and

"(c) That all other employes affected by the illegal assignment of the position of Stenographer to Miss Rose Stupasky be compensated for any and all wage loss sustained."

STATEMENT OF FACTS: The following statement of facts was jointly certified by the parties: "On October 12, 1938, Bulletin No. 26 was issued by Mr. C. W. Johns, Chief Engineer, advertising position of Stenographer, and said position was by Addendum to Bulletin No. 26, dated October 17, 1938, awarded to Miss Rose Stupasky.

"Rule 18, Section (e), reads in part:

'Employes "cut off" * * * must, within 10 working days (General Office and Accounting Department, Huntington Division, 5 working days) from date actually reduced to the "cut off" list, file their name and address, in writing, with the proper officer, copy to Division Chairman, and renew same during the month of November of each year. * * *

'Employes failing to protect their seniority rights as provided in this Section (e) and those failing to return to service on the roster from which "cut off" within seven (7) days after being notified by mail or telegram sent to the last address given, unless prevented by sickness or other unavoidable cause or giving satisfactory reason for not doing so, forfeit all seniority rights.

'NOTE: The "proper officer" referred to in Sections (b), (c), (d) and (e) of this rule is the officer authorized to bulletin and award positions.'

"Rule 18, Section (c), reads in part:

'When a position is bulletined or when a Group 3 new position or vacancy of more than 30 calendar days duration occurs that is not

5—That the employes have agreed in the Carrier's interpretation set out in No. 3 above by their failure to protest Miss Stupasky's seniority standing on the 1937 and 1938 rosters in the face of their claim that employes failing to send Division Chairman copy of letters filing or renewing their names and addresses lose their seniority."

There is in evidence an agreement between the parties, bearing effective date of November 16, 1936, from which the hereinbefore quoted rules are taken.

OPINION OF BOARD: The issue in this case is whether Miss Stupasky, as the result of an alleged violation of Rule 18 (e) of the agreement, forfeited her seniority rights.

In conformity with its rules the Board did not notify her of the hearing. Carrier members of the Board have objected that the Board cannot render a proper and lawful award without such notice. A similar objection was made under similar circumstances in Docket No. TE-861; it was overruled in Award No. 844 of this Division and is overruled here. A statement by the Referee is appended.

Miss Stupasky was "cut off" on July 15, 1932, prior to the adoption of Rule 18 (e). This rule in substance required that employes "cut off" must, within ten days:

"file their name and address, in writing, with the proper officer, **copy to Division Chairman,** and **renew same** during the month of November of each year.

"Employes failing to protect their seniority rights **as provided in this Section (e)** * * * forfeit all seniority rights." (Bold added.)

Miss Stupasky did not send the Division Chairman a copy of her renewal filed November 23, 1936.

The rule has not been construed before. We think that the requirement is mandatory, not directory; first, because the words "failing to protect their seniority rights **as provided in this Section (e)**" are without limitation or exception; secondly, because the insertion of the requirement of a copy, at the time the rule was substituted for the corresponding old Rule 18 (b), must be presumed to have been intended to accomplish its object, and nothing would be accomplished if the requirement were to be treated as a mere invitation or suggestion.

We think further that the words "renew same" mean that the same procedure must be repeated, and that a copy of each renewal must be sent; first, because this is the reasonable sense of the language; secondly, because the undisputed object is to keep the Division Chairman informed so that rosters may be properly checked, and there is just as much reason for his having a copy of each renewal as of the first filing. It may be noted that on November 12, 1938 the Carrier issued instructions that, when employes who are cut off "file their name and address and renew same," the officer to whom the letter is sent should acknowledge receipt and send a copy thereof to the Division Chairman—thus treating first filings and renewals in the same manner.

We need not here determine whether Rule 18 (e) would be deemed satisfied in a case where, though the employe had not sent a copy of his letter to the Division Chairman, the carrier's officer, pursuant to the above instructions, had sent a copy of his acknowledgment of the letter; for that was not done in this case. In any event the Carrier could protect itself against the consequences of oversights on the part of employes by either requiring from

each employe a copy of his filing or renewal, which the carrier could then send to the Division Chairman, or by making and sending such a copy.

It is contended that Miss Stupasky was not furnished a copy of the agreement. This is immaterial. She took the risk of its being changed and of knowing what was in it. As a matter of fact, in her filing she referred to the new rule and she should have made certain that she was following it completely. The evidence is insufficient to establish a definite understanding between the parties that the rule should not apply to employes unless they had been furnished copies of the revised agreement by the Division Chairman.

Miss Stupasky therefore forfeited her seniority rights on December 1, 1936. Her name, however, was carried on the January 1, 1937 roster which, by Rule 26 (b), was subject to protest until March 31, 1937. It was not protested, nor was any protest made until she was awarded her position in October 1938, and by operation of the rule her seniority date "and standing" could not thereafter be changed. It may well be that Rule 26 (b) would not operate to protect a person whose seniority was fictitious, merely by his getting on the list and not being protested in the time allowed, but we think the rule should reasonably be construed to protect a person who had had seniority, and whose seniority could be defeated only by showing a technical non-compliance with the mailing requirements of Rule 18 (e).

Rule 26 (c) requires that "Division Chairmen of employes will be furnished sufficient copies of each roster on each seniority district." We need not determine what effect non-compliance with this provision may have on the length of the protest period provided in Rule 26 (b), since the record fails to show that the Division Chairman in question was not furnished with the January 1937 roster. The record does state that difficulty had been had in getting rosters, and that the General Chairman had been unable to secure a copy of the January 1937 roster with which we are concerned; and copies of letters are shown which reflect the difficulties; but nowhere is it stated that the Division Chairman who should have been furnished with the January 1937 roster was not in fact furnished with it. In the absence of such a showing we are compelled to give effect to Rule 26 (b).

Miss Stupasky, however, was thereafter obligated to send the Division Chairman a copy of her next renewal, which was filed November 4, 1937. Had she failed to do this, she would then have forfeited her seniority and the claim would have to be sustained, but the record does not state that she failed to do this. The only reference is to the failure to send the copy of the first renewal. It may well be that she did not comply the second time, as well as the first, and that the omission in the record was an oversight; but we must take the record as we find it, and we cannot dispose of rights by surmises.

The case should be remanded to the parties to ascertain whether or not in November 1937 Miss Stupasky complied with the requirements of Rule 18 (e). If she did not, the claim is sustained; if she did, the claim is dismissed. If there is dispute as to the fact, the case may be re-submitted.

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 the obligation to mail the Division Chairman a copy of renewals under Rule 18 (e) is mandatory, and if Miss Rose Stupasky failed to do this in November, 1937, she forfeited her seniority rights.

AWARD

Claim to be disposed of in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 24th day of July, 1939.

Referee's Memorandum to be attached to Award No. 902, Docket CL-932

The objection made to hearing this case without notice to Miss Stupasky raises a question not of jurisdiction but of procedural policy. This would be true, I think, even in a case where there had been no joint submission as here, and even in a case where the carrier itself raised the objection. For in such a case, as in the case before us, the union's claim would in fact be against the carrier, seeking to compel compliance with an agreement between the carrier and the union; and the Board, having duly acquired jurisdiction over both parties to the agreement, could proceed to render an award which as between them would be binding, whatever the rights of some unnotified third person might be to enjoin performance of the award as to him. Such seems to have been the view of the court in **Estes v. Union Terminal Co.** (C. C. A. Tex. 1937) 89 F. (2d) 768, 773; and **Nord v. Griffin** (C. C. A. Ill. 1936) 86 F. (2d) 481, implies nothing to the contrary.

Since, in my opinion, the Board has jurisdiction over the parties and power to make an award which will bind them, the question is not whether the Board may lawfully proceed to dispose of the case, but whether it ought to do so. While the rules of the Board provide for notice only to the parties, the Board could, if it wished, provide for notice to other persons who might be affected by awards. But whether the Board should do so or not is a question beyond the province of a referee. The Amended Railway Labor Act provides (U. S. C. A. Title 45, Sec. 153, First) that the **Board** shall "adopt such rules as it deems necessary to control proceedings before the respective divisions * * * *," while a referee's function is "to sit with the division as a member thereof and make an award."

Consequently, as the referee in this case, believing myself governed by the rules of the Board and finding no jurisdictional impediment in the way of an award, I concluded that I must make an award if I was to sit in the case. I next considered whether, in the light of **Nord v. Griffin** and **Estes v. Union Terminal Co.**, supra, the Board's rules regarding notice were so clearly improper that I ought not, as a matter of good conscience, to sit in the case. The **Nord** case held that an employe situated like Miss Stupasky, who is given no notice of the hearing, may enjoin an award adversely affecting seniority rights, on the ground of want of due process. The **Estes** case, decided a year later, did not pass on the due process question, but the majority of the Court (in what appears to have been a dictum only) said that the Amended Railway Labor Act, fairly construed, requires the Board to give notice to all affected employes. Judge Hutcheson, in a persuasive concurring opinion, took issue with that view upon grounds similar to those in Award No. 844 of this Division.

After studying these decisions, which are the only ones squarely in point, I concluded that their validity and finality are sufficiently doubtful, and the probable consequences of following them sufficiently serious from an administrative point of view, as to leave the Board a justified choice whether to amend its rules or not. That choice is not mine to make or to influence. Therefore I felt it my duty to proceed to an award without further expression of my own opinions.

Lloyd K. Garrison

Dissent on Awards 902 and 903

The dissent in these cases deals only with the procedure in denying Stupasky, in the case covered by Award 902, and Richardson, in the case covered by Award 903, whom the petitioners sought to deprive of their positions and their seniority, of an opportunity to be heard in their own defense.

In this case, as in the case covered by Award 844, the petitioner and respondent railroad waived oral hearing.

The course followed by the carrier members of the Third Division in an effort to secure for Stupasky and Richardson an opportunity to be heard was the same in these cases in all essential particulars, including a protest to the National Mediation Board against the appointment of a referee to sit with the Division and make awards in these cases, unless and until Stupasky and Richardson were given notice of hearing, on the grounds that a lawful award could not be rendered without such notice, as in the case covered by Award 844, and with the same ultimate results.

The procedure in these cases, therefore, is wanting in due process for the same reasons stated in the dissent on Award 844 and the decisions on the merits are treated here, as in the dissent on Award 844, as being of no effect.

The referee has appended to Awards 902 and 903 a memorandum stating his views and the justification he found for sitting as referee in these cases and making an award. It scarcely seems necessary to retrace the ground covered by the dissent on Award 844 merely to point out in detail wherein I am in disagreement with him.

Suffice it to say, with respect to the first paragraph of his memorandum, that even if there is accomplished the making of an award that is binding as between the carrier and the representative of the majority of the employes, the only parties involved in the dispute who have been accorded a hearing by the Board, but which will fall under attack in the courts by other parties in interest who have not had their day in court, it is a vain thing. If the enforcement of such an award is enjoined, upon petition of the unnotified third person, its binding effect on the other parties is destroyed and the net accomplishment is nil.

Such a procedure finds no justification in the fact that often the unnotified third party is unable to support the expense of litigation and must suffer the injustice we impose upon him.

The referee concludes that we have the power and can lawfully dispose of the dispute as between the two parties before the Board, even though the third party can enjoin its enforcement. Whether the Board should do so, he thinks, is not a question for a referee to decide. Yet he has decided that very question. The regular members were equally divided on the question—the carrier members holding we should not; the labor members that we should. The referee made an award; his was the vote that made it the act of the Division.

Many awards are made, by referees, that do not decide the merits of the disputes. Some are remanded because of deficiencies in the record; some are dismissed for want of jurisdiction or for other causes. This case could have been dismissed by the referee because necessary parties were not joined.

Geo. H. Dugan

The undersigned concur in the above dissent:

A. H. Jones

J. G. Torian

R. H. Allison

C. C. Cook