Award No. 903
Docket No. CL-933

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 Andrew H. Anthony be placed on position of Office Boy in office of Chief Engineer and compensated for all wage loss sustained; and

"(b) That the name of John G. Richardson, Jr. be removed from the Chief Engineer's seniority roster; and

"(c) That all other employes be compensated for wage loss sustained."

STATEMENT OF FACTS: The following statement of facts was jointly certified by the parties: "On July 5, 1938, Bulletin No. 25 was issued by Mr. C. W. Johns, Chief Engineer, advertising position of Office Boy and said position was by Addendum to Bulletin No. 25 awarded to John G. Richardson, Jr.

"Rule 18 (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 filled by an employe in service senior to a "cut off" employe on that roster who has protected his seniority as provided in Section (e) of this rule, "cut off" employes on that roster shall be returned to the service in the order of their seniority rights, except: * * * * *'

employes affected, so that such employes could familiarize themselves with the rules and their rights under the rules. After the employes' representative assumed the obligation of furnishing a copy of the agreement to all employes affected, it is certainly improper for him to now claim an alleged violation of the agreement by an employe to whom he failed to furnish a copy of the agreement, and as a result of such failure the employe had not had the opportunity to familiarize himself with the agreement rules.

"It is the Carrier's position—

1—That Mr. Richardson filed his name and address in accordance with Rule 18 (e) by filing letter with the proper officer of the Railway, as is shown by Carrier's Exhibit 'A.'

2—That Mr. Richardson was properly awarded position as office boy under Rules 3 (c) and 18 (c) of Clerks' Agreement No. 6.

3—That the provisions in Rule 18 (e) that a copy of such communication should be sent to the Division Chairman is merely for the information of the Division Chairman and the employe's failure to send a copy to the Division Chairman does not in any manner affect his seniority rights.

4—That it is improper for the representative of the employes, after agreeing to furnish copies of the agreement to all employes affected, to now protest an alleged violation of a rule with which the employe concerned was not familiar, by reason of the employes' representative's failure to furnish him a copy of the agreement."

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 same objection to proceeding with this case was made here as in Docket No. CL-932, Award No. 902, and is disposed of as in that case. The statement of the Referee in that case is appended to Award 903.

The same rules are involved here as in that case; the facts are sufficient in the light of said award, to sustain the claim.

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 carrier and employe John G. Richardson, Jr., did not comply with the provisions of the current agreement.

AWARD

Claims (a), (b) and (c) sustained.

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