Award No. 1193
Docket No. CL-934

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Harris L. Danner, Referee

PARTIES TO DISPUTE:

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

TEXARKANA UNION STATION TRUST

STATEMENT OF CLAIM: "Protest of the System Committee of the Brotherhood, against the establishment of seniority date of November 16, 1926, for Otto Howell on the January, 1939 Mail and Baggage Handlers' Seniority Roster, and further claim that all employes adversely affected by the establishment of said date and assignment of said Otto Howell to work in accordance with said date shall be compensated for all monetary losses suffered."

EMPLOYES' STATEMENT OF FACTS: "Otto Howell was first employed by this carrier on November 16, 1926. He was dismissed from the service on October 18, 1935, after an investigation was conducted and decision thereon was rendered by the employing officer of the carrier.

"The decision that Mr. Howell was guilty as charged and that he was dismissed from the service was accepted, and his record as an employe was accordingly closed.

"On January 5, 1939, the Carrier permitted Mr. Howell to re-enter its service and assigned him to a position of mail handler in preference to some 14 or 15 employes then in the service holding seniority rights.

"Concurrent with aforementioned re-employment of Mr. Howell the Carrier corrected the January, 1939 Seniority Roster by showing Mr. Howell thereon with a seniority date of November 16, 1926, despite the fact that Mr. Howell had been definitely dismissed and removed from service on October 18, 1935.

"The Carrier has since January 5, 1939, continued to permit and assign Mr. Howell to work in preference to employes who were in the service on January 5, 1939, and holding seniority rank below the date of November 16, 1926, causing such employes to suffer wage losses."

EX PARTE STATEMENT OF FACTS—MANAGEMENT: "Otto Howell, a mail handler at Texarkana, was dismissed from the service October 18, 1935 account violation of Rule 'G,' being intoxicated on the station platform and baggage room at Texarkana Union Station night of October 16, 1935.

"Rule 'G' reads:

'The use of intoxicants by employes while on duty is prohibited. Their use, or the frequenting of places where they are sold, is sufficient cause for dismissal.'

OPINION OF BOARD: The important facts in this case are not in dispute. Briefly, they are: Otto Howell began employment with the carrier on November 16, 1926 and continued in carrier's employment until October 18, 1935 on which date he was dismissed from service by carrier's letter of that date, following a proper investigation accorded him under the rules of the current agreement. Such dismissal was accepted by Howell without an appeal being made by him or his representative, also provided for in the agreement. On January 5, 1939, the carrier, without notice to or agreement with the petitioner, restored Howell to the service and arbitrarily accorded him a seniority date as of November 16, 1926, changing the seniority roster accordingly, thereby adversely affecting the seniority rights of all employes then in the service having a seniority date later than November 16, 1926.

Neither party hereto has questioned the right of the Board to hear and decide this dispute under the Rules of the Board, but because of the objections raised by the carrier members of the Division that:

> "* * * a proper and lawful award in this case cannot be issued without notice to the party in interest (Howell) of the pendency of said case and affording him an opportunity to be heard;"

this question will first be considered and decided.

In considering this case we are not unmindful of the decisions rendered by this Division in Awards 371, 844, 902, 1137, and 1138. Due attention will be given later to the opinions of the first three awards mentioned. There is a conflict between the opinions of this Board and the decisions of our courts as to whether or not notice should be given to the employe or employes involved in the dispute.

In the case of Estes, et al. v. Union Terminal Company, 89 Fed 2d 768, the court held:

> "* * * Section 3 (j) of the Act, as amended by the Act of June 21, 1934, 45 USCA Sec. 153 (j), as to hearings before the Board, provides:
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> > '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 dispute submitted to them.'
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> "Under the plain provisions of the Act an employe may conduct his negotiations with his employer and the proceedings before the Board, if necessary, either personally or through a chosen representative, which may or may not be a labor organization.
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> "Apparently, the Board held that Lane was not involved in the dispute and therefore was not entitled to notice under the provisions of section three. In this we think the Board was wrong. Conceding that while Lane was employed as assistant station master he was not covered by the provisions of the contract, when he was given the position of gateman, he became subject to it and was as much involved in the controversy before the Board, as either Estes or Felton. Furthermore, he was materially affected by the order. Section three is rendered somewhat ambiguous by the use of the word 'involved' instead of a more comprehensive term. But in justice and fairness every person who may be adversely affected by an order entered by the Board should be given reasonable notice of the hearing. Lane was occupying the position of gateman. The order of the Board required his dismissal. No man should be deprived of his means of livelihood without a fair opportunity to defend himself. Plainly, that

is the intent of the law. The case at bar illustrates how a single employe may be caught between the upper and nether millstones in a controversy to which only a labor organization and a carrier are parties before the Board. It is not necessary for an employe to be named as a party to the proceeding before the Board to be involved in the controversy within the meaning of the law.

"It is urged that in some cases such a great number of employes may be affected that it would be impossible to give them all notice. This argument unnecessarily magnifies the difficulty. The solution of the problem is practical and neither technical nor theoretical. The notice may be informal and delivered by mail. If two organized groups of employes are involved in the controversy, of course, it would not be necessary to give notice to every individual member of those organizations. Parties to a law suit are bound by notice to their counsel. In such case notice to the duly constituted officers of the organization would generally be sufficient to bind its members. It may be assumed that in most controversies before the Board only a few individuals not connected with an organization will be involved. There should be no difficulty in notifying them by mail. Notice may be brought to the attention of large groups of interested parties by posting it in appropriate places, the same as is usually done when an injunction is issued against a large class of persons. The difficulty of giving notice, or rather the inconvenience occasioned to the Board by doing so, would not excuse compliance with the law. Notice should be given in some adequate way to all persons who will be substantially affected by the order that may be entered by the Board, unless notice is waived."

It will be noted that in this particular case the court held that while Lane did not receive formal notice of the hearing, he had actual knowledge and was well aware that a meeting would be held that might adversely affect his status as an employe of the Terminal Company. However, this state of facts does not appear in the record before us.

This matter was again before the U. S. Circuit Court of Appeals in the case of Nord, et al. v. Griffin, 86 Fed 2d 431, and the court there held:

"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.

"**In Ochoa v. Hermandez**, 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 of an opportunity for a hearing.'

"Clearly the award, so far as appellee was concerned, was in violation of his rights under the Fifth Amendment to the Constitution, and it was the court's duty, with jurisdiction of the subject matter and of the parties, to award the injunction. The decree is

Affirmed."

The District Court of the U. S. for the Eastern District of Pennsylvania also considered this matter in Case No. 9913, decided Nov. 13, 1939, in J. L. Brand, et al. v. Pennsylvania Railroad Company.

"The complainants' contention that they have been deprived of seniority rights without due process of law required some consideration of the proceedings before the railroad Board of Adjustment. Although we approach this issue with a full appreciation of the merits of the system which recognizes seniority, and great sympathy for those of the complainants who feel that they have improperly lost a right to continued employment in their advancing age, we must confine the discussion to the question of whether the rights of the complainants have in fact been protected within the contemplation of the law. It is wholly unnecessary to determine whether those rights are property or mere personal privileges.

"* * * *

"The defendants' contention that the complainants were not interested parties within the meaning of the Act, and that they were actually represented by the Brotherhood, is not supported by the circumstances shown. As a representative of the employes, the Brotherhood was entitled to act for them under Section 1, 6th of the Act, and as such it was authorized to deal with all disputes between a carrier and its employes, and we agree that all the employes must accept the rulings of the union in ordinary disputes concluded by the final negotiations with the employer. (McMURRAY ET AL. VS. BROTHERHOOD OF RAILROAD TRAINMEN ET AL., 50 Fed. 2nd, 968) We note, however, that the present controversy is in reality between the complainants on one side and certain other members of the Brotherhood on the other. The railroad is merely a nominal party. The Brotherhood may not be deemed the agent of a group of employes for the purpose of bartering away individual rights granted to individual employes. While it is true that the union may represent employes in negotiating agreements with employers and in settling disputes arising out of such agreements, it does not follow that by reason of such representation the union may also determine who has or has not an interest involved in a dispute, nor can it be permitted to take a position favoring one group of employes as against another and still claim to represent all. In the present suit the union presented the issue to the board of adjustment on behalf of the employes who were reduced in seniority by the return of the complainants to the department. It was also shown that one of those employes was a member of the adjustment board which considered the dispute and decided the case in favor of his group. The fact that the complainants had no proper and adequate notice of the alleged representation of their interests in the dispute until after the decision was rendered, and complied with by the railroad is not controverted, and in the argument the railroad conceded that whether or not the complainants are entitled to relief depends upon whether or not they received any notice of the proceedings, and whether or not any notice to them of such proceedings was required. We have ruled that notice of the proceedings to the complainants was required under the Act and, it being conceded that no such notice was given inasmuch as notice to the Brotherhood was not notice to them, we must decide that the complainants are entitled to relief.

"The circumstances of this case are very similar to those of NORD VS. GRIFFIN, 86 Fed. 2nd 431, C. C. A. 7, 1936, cert. den. 300 U. S. 623, 1937, in which similar representation by a union did not prevent the complainant from being heard in a dispute between employes, and in which it was held that the complainant was entitled to notice of the proceedings before the National Railroad Adjustment Board. The case is distinguished by the fact that the proceedings there were before the Board established directly under the Act, whereas the proceedings in the present case were before a system board of adjustment which we have held was founded upon the provi-

sions of that Act. The same principle however, should apply, and the failure to give proper notice in the present case was fatal to the validity of the decree of the Pennsylvania Railroad Board of Adjustment so far as the complainants are concerned.

"We are not inclined to take the same view as the Illinois District Court in the Griffin case in the matter of the remedy to be applied. We do not think it is the purposes or function of this Court to assume the burden of deciding the issue in the labor dispute presented to the board of adjustment. Our duty is performed when we pass upon the applicability of the Railway Labor Act to the dispute submitted to the adjustment board, and the validity of its proceedings in reaching and rendering its decision. The failure of that board to give proper notice to the complainants rendered their decision void and of no effect insofar as it applies to the complainants. It follows that the railroad, which admittedly changed its ruling because of the decision, must be restrained from complying with the void order of the board in determining the seniority rights of the complainants. This leaves the issue of the complainants' seniority rights undetermined except as they may be established by the regulations or agreements existing prior to the adjustment board's order of December, 1937, and permits the parties to proceed with an adjustment of their dispute as prescribed by the Act."

Referee Sharfman in Award 371 recognized that the failure to give notice did not affect the legal right of the party involved to go into a proper forum to have his rights adjudicated. Referee Sharfman said, "The Board has assumed jurisdiction to dispose of the issue on the merits, as in all similar cases in the past, without in any way 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." (Caps ours.)

Referee Spencer, in Award 844, called the attention of the Division to the failure to give notice rather forcibly. He stated:

"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."

Referee Garrison called this matter to the attention of the Division in his Memorandum Attached to Award 902:

"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 wish, 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 validty 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."

It will be noted that Referee Garrison stated: "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."

It will be seen from the foregoing that the Division and the referees have realized how serious it was to pass on the rights of a party who was not before the Division.

The before quoted statute states that notice shall be given to the employe or employes involved. The Division is without power to make a rule not in accord with the provisions of the law.

The courts have held that the rights of an individual cannot be affected unless he has been given notice and an opportunity to be heard. The Board and referees have heretofore recognized that the involved employe is not bound by the award unless he be given notice and an opportunity to be heard.

Consequently, in order that there might be some semblance of finality to the award, we deem it proper at this time to hold that the employe or employes involved by the award of the Board be given notice of the hearing and an opportunity to be heard if he or they desire.

We hold, therefore, that the Adjustment Board shall give due notice of all hearings to the employe or employes involved in this dispute.

FINDINGS: The Third Division of the Adjustment Board, 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 notice should be given to Otto Howell and all other employes involved of the pendency of this matter and the matter should be set for hearing on the merits of the controversy and that Howell and all other employes involved be given an opportunity to appear and be heard.

AWARD

That notice should be given to Otto Howell and all other employes involved of the pendency of this matter and the matter should be set for hearing on the merits of the controversy and that Howell and all other employes involved be given an opportunity to appear and be heard.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 4th day of October, 1940.