Award No. 1873
Docket No. CL-1870

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

PARTIES TO DISPUTE:

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

GULF COAST LINES
INTERNATIONAL-GREAT NORTHERN RAILROAD COMPANY
SAN ANTONIO, UVALDE & GULF RAILROAD COMPANY
SUGARLAND RAILWAY COMPANY
ASHERTON & GULF RAILWAY COMPANY

(Guy A. Thompson, Trustee)

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(a) The carrier is violating the Clerks' Agreement at San Benito, Texas by refusing to assign clerical work to employes holding seniority rights and working under the Clerks' Agreement, Also

(b) Claim that all employes involved in or affected by the agreement violation be compensated for all losses sustained.

EMPLOYES' STATEMENT OF FACTS: This claim was filed on November 25, 1940, at which time the station force at San Benito consisted of the following, with hours assigned as indicated.

Agent	8:00 A. M. to 5:00 P. M.
Telegrapher	8:00 A. M. to 4:00 P. M.
Telegrapher	8:00 P. M. to 4:00 A. M.
Cashier	8:00 A. M. to 5:00 P. M.
General Clerk	1:00 P. M. to 10:00 P. M.
Trucker	7:00 A. M. to 4:00 P. M.

The Agent's position is not covered by any agreement. The two Telegraph positions are covered by the O. R. T. Agreement, and the last three positions are covered by the Clerks' Agreement.

The three positions first listed, which are not covered by the Clerks' Agreement, perform clerical work that is covered by the Clerks' Agreement as shown below:

Agent	1 hour per day
Telegrapher (1st)	2 hours—55 minutes per day
Telegrapher (2nd)	2 to 3 hours per day

POSITION OF EMPLOYES: The following rules of the Clerks' Agreement are applicable in this case:

ment, even though there might be an employe covered by the Clerks' Agreement qualified to fill the position, it would constitute a violation of the Agreement which the Carrier has with the Order of Railroad Telegraphers.

Your Honorable Board has already given consideration to cases similar to the one covered by this docket and for ready reference, your attention is directed to Awards Nos. 615 and 635. Award 615 covers a similar case having arisen on the Southern Pacific Company (Pacific Lines) at Bisbee, Arizona. By referring to the scope rule as quoted in Docket No. CL-550, Award No. 615 in effect on the Southern Pacific, it will be noted that it is similar to the one in the current Agreement with the Telegraphers' Organization with this Carrier. The opinion of your Honorable Board in Award No. 615 is a matter of record and to save burdening the record in this docket, the quoting of same is being omitted, but request is made by this Carrier that your Honorable Board review that opinion as well as the conclusion reached, inasmuch as it applies in the instant case, as the same principles are involved.

Award No. 635 covers a claim submitted to your Honorable Board by the employes on the Missouri Pacific Railroad Company in connection with a similar case to the one covered by this docket at Dumas, Arkansas, and the opinion of your Honorable Board in that case reaffirms the opinion as contained in Award No. 615.

It is the contention of the Carrier that the evidence herein submitted, proves conclusively that the work being performed by employes other than those covered by the Clerks' Agreement is not in violation of that agreement, and your Honorable Board is respectfully petitioned to so rule.

OPINION OF BOARD: The principle involved in this case is the same as involved in Docket CL-1869, Award No. 1868, and the same conclusion must be reached and for the reasons stated claim denied.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the carrier and the 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 there has been no violation of the agreements.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 7th day of July, 1942.

DISSENT TO AWARD NOS. 1868, 1869, 1870, 1871, 1872, 1873 and 1874, DOCKET NOS. CL-1869, CL-1865, CL-1866, CL-1867, CL-1868, CL-1870 and CL-1871, RESPECTIVELY.

The undersigned dissents from and protests against the action taken by the five Carrier Members of the Third Division through the connivance and support of H. C. Kearby, the latter appointed as a Labor representative, in

Award Nos. 1868, 1869, 1870, 1871, 1872, 1873 and 1874, Docket Nos. CL-1869, CL-1865, CL-1866, CL-1867, CL-1868, CL-1870 and CL-1871, respectively. These cases were not handled by the Third Division in the usual manner, nor were they given proper consideration as contemplated by the Railway Labor Act. They were not considered on their merits by the Board Members before H. C. Kearby, in collusion with Carrier Member Jones, the latter acting for all five Carrier Members, agreed to vote with the Carrier Members on the awards prepared by them, and which were finally adopted in the late afternoon of July 7, 1942, denying the claims.

These seven cases were not considered on their merits by the Third Division at any time; they likewise were not decided on their merits on July 7, 1942. These awards are the result of collusion by H. C. Kearby and the five Carrier Members. The best evidence of this will be found in a recitation of the handling of these cases by this Board.

The parties to those disputes had completed their arguments and the files on all of these cases were closed on May 18, 1942; they thereafter were ready for consideration by the Board Members. On May 20, 1942, the undersigned contacted Carrier Member Jones, to whom the cases were assigned by the Carrier Members, and requested conference at an early date to commence the handling of these disputes. On May 21, 1942, Mr. Jones addressed the following memorandum to Mr. Kearby, with copy to the undersigned:

> "Mr. Sylvester called me yesterday with reference to discussing Dockets CL-1865 to 1871, inclusive, and I stated to him that I also proposed to discuss these dockets with you and present Proposed Awards, as the Telegraphers were also involved. He stated that he was anxious to have these Dockets handled promptly, and I promised him I would do so. As you know, the main argument of both parties is contained in Docket CL-1869, and as soon as you have had opportunity to review them will discuss with you at your earliest opportunity."

On May 25, 1942, Carrier Member Jones addressed a memorandum to the Chairman of the Division, with copy to all Members, reading:

> "Am enclosing copies of Proposed Awards in Dockets CL-1869, 1865, 1866, 1867, 1868, 1870 and 1871, which I will present at convenient meeting of the Board Tuesday or Wednesday this week."

On that same day (May 25th), Mr. Kearby addressed the following memorandum to the undersigned, with copy to all Labor Members:

> "I have reviewed the proposed awards in Dockets CL-1869, CL-1865, CL-1866, CL-1867, CL-1868, CL-1870 and CL-1871. I expect to vote for the adoption of these awards when they come before the Board."

This was the first information the undersigned or the other Labor Members had that Mr. Kearby had connived with Carrier Member Jones in the preparation of these awards and had agreed to vote with him for their adoption. This in effect was confirmed in a statement by Mr. Kearby to all Labor Members at a conference of these Members held on the morning of May 26th. At the request of the other four Labor Member at this conference, Kearby agreed not to vote on these awards until such time as the situation created by Kearby's promise to Jones to vote with him thereon, had been considered and acted upon at the first meeting of the Chief Executives of the Labor Organizations submitting cases to the Third Division.

Because of the then forthcoming convention of the Order of Railroad Telegraphers, to be held early in June, on June 3rd, Mr. Kearby secured the following understanding from the other Labor Members, including the undersigned:

"With reference to Dockets CL-1869, CL-1865, CL-1866, CL-1867, CL-1868, CL-1869, CL-1870 and CL-1871, I-G-N cases: I have discussed this matter with Carrier Member Jones and also with Brother Sylvester and requested that no action be taken on the cases until after our Convention closes. I understand this is agreeable to all concerned."

On July 2nd, because of the fact that the Chief Executives of the Labor Organizations concerned, could not get together in a meeting as early as expected, the following further memorandum was agreed to by the Labor Members, including H. C. Kearby:

"This is in confirmation of understanding had at meeting of the Labor Members of the Third Division today, relative to Gulf Coast Lines cases CL-1864 to CL-1871, both inclusive, that all matters pertaining to these eight cases will be held in abeyance by the Labor Members until questions pertaining thereto have been handled to a conclusion by the Chief Executives of the Railroad Brotherhoods submitting cases to the Third Division, and which Brotherhoods are part of the national labor organizations referred to in Section 3 (c) of the Railway Labor Act as being authorized to select the Labor Members of the National Railroad Adjustment Board."

At about 1:45 P. M. on July 7, 1942, a meeting of the Third Division was called by the Chairman (a Carrier Member) for 3:00 o'clock P. M. on that same day, to give consideration to the awards prepared by Carrier Member Jones in collusion with Kearby on about May 25th. It was then that the Labor Members learned that Kearby had broken faith with them and had notified the Carrier Members that he would, at the meeting called for 3:00 P. M., July 7th, vote with the latter that day on the awards they had prepared.

The undersigned immediately contacted the Chief Executives of the Labor Organizations involved, who were then in session at the Morrison Hotel, Chicago, and advised them of Kearby's intention and declaration. At the request of the undersigned, the Board meeting was delayed for about 45 minutes and did not convene until 3:45 P. M. At this meeting, the undersigned presented the following memorandum addressed to the Chairman and Vice Chairman, with copy to all Members of the Division:

"July 7, 1942

Memorandum:

To Mr. R. F. Ray, Chairman
Mr. R. A. Davis, Vice Chairman

The undersigned protests consideration by the Third Division today of Docket Nos. CL-1865, to CL-1871, inclusive, Gulf Coast-IGN cases, for several reasons, principally because of an understanding among the Labor Members to which Board Member H. C. Kearby is a party, reading:

'This is in confirmation of understanding had at meeting of the Labor Members of the Third Division today, relative to Gulf Coast Lines cases CL-1864 to CL-1871, both inclusive, that all matters pertaining to these eight cases will be held in abeyance by the Labor Members until questions pertaining thereto have been handled to a conclusion by the Chief Executives of the Railroad Brotherhoods submitting cases to the Third Division, and which Brotherhoods are part of the national labor organizations referred to in Section 3 (c) of the Railway Labor Act as being authorized to select the Labor Members of the National Railroad Adjustment Board.'

It was definitely understood at a meeting of the Labor Members on July 2nd that consideration of the above cases would not be given by the Labor Members of the Board until all matters pertaining thereto

had been handled to a conclusion by the Chief Executives of the Railway Labor Organizations of which the Order of Railroad Telegraphers and the Brotherhood of Railway Clerks are a part.

I am sure that the Carrier Members, in their own individual behalf, and in the interest of railroad management, will want to preserve understandings had in good faith such as the one above quoted. I therefore request the Carrier Members to hold up consideration of these eight cases at this time in line with Board Member Kearby's agreement with the other Labor Members to do so."

The following resolution which had been adopted by the Chief Executives of the Labor Organizations at 2:25 P. M. (C. W. T.) then in session at the Morrison Hotel, Chicago, was also distributed to all Members of the Third Division in meeting assembled:

"In view of the present unsatisfactory conditions existing among Labor Members, Third Division, National Railroad Adjustment Board, and a desire of the Labor Executives of Organizations submitting disputes to said Division to have such disputes disposed of in accordance with the plain purpose and intent and requirements of the Railway Labor Act, as amended,

NOW, THEREFORE, we, the Labor Executives in meeting assembled at Chicago, Illinois, this 7th day of July, 1942, duly authorized and qualified under rules agreed upon by representatives of nationally organized and qualified Railway Labor Organizations, do hereby resolve that, in the interest of said orderly and efficient functioning of said Division Three, National Railroad Adjustment Board, the services of Mr. H. C. Kearby, Labor Member of said Division, are hereby terminated as of 2:25 P. M. (C. W. T.) July 7, 1942.

BE IT FURTHER RESOLVED, that this vacancy be filled by a person holding membership in the Hotel and Restaurant Employes' International Alliance and Bartenders' International League of America, to be named by the International President of said Union, and said appointee to be competent and qualified to discharge these duties upon his appointment being ratified by the heretofore recited qualified organizations, all pursuant to established rules governing the selection of said Labor Member."

This protest and resolution were not entertained by the five Carrier Members and H. C. Kearby of the Third Division, all of them acting and voting thereon in collusion.

The undersigned again protested action by the Third Division on these seven proposed awards agreed to on or about May 25th by the Carrier Members and H. C. Kearby, on the grounds that they were prepared and agreed to through collusion, and that the Division would be proceeding improperly, perhaps illegally, by permitting Kearby to participate in their adoption; for the further reason that at least morally, Kearby had been removed from the Third Division at 2:25 P. M. by the same power that had selected and caused him to be certified to the National Railroad Adjustment Board as a Labor Member of the Third Division. This protest was also overruled by the Chairman.

The undersigned then attempted to discuss these cases on their merits, but the five Carrier Members and H. C. Kearby refused to participate in such discussion. When it became definitely apparent that these awards would not be considered and acted upon on the merits of the claims contained in these dockets, the undersigned then requested permission to withdraw all of the seven disputes from further consideration by the Third Division. The withdrawal of these disputes from the Board was not permitted by the five Carrier

Members and H. C. Kearby voting in unison in opposition thereto, although the undersigned agreed to make such withdrawal request contingent upon concurrence therein by the Carrier involved.

The undersigned also made a personal appeal to H. C. Kearby that he withhold his support to the Carrier Members on these cases, at least temporarily, thereby permitting the undersigned to contact the Carrier and endeavor to secure agreement upon their withdrawal from the Board. This would have obviated the necessity for Kearby voting thereon, but he declined such request.

Award Nos. 1868, 1869, 1870, 1871, 1872, 1873 and 1874 were thereupon put to a vote, each being acted upon separately, and were declared adopted by the Chairman, the five Carrier Members and H. C. Kearby voting in the affirmative in each of them.

The undersigned again protested the action taken by the Division and reserved the right to file this dissent, which is in the nature of a further protest against what he believes to be an improper action by the Carrier Members and Kearby. Kearby's action in the handling of these seven disputes had the effect of giving the Carriers six members of the Third Division as against four representing the National Labor Organizations. These awards, therefore, are without force and effect, as they were not considered and adopted as contemplated by the spirit and plain provisions of the Railway Labor Act.

/s/ J. H. Sylvester

REPLY TO THE DISSENT AND PROTESTS TO AWARD NOS. 1868, 1869, 1870, 1871, 1872, 1873 AND 1874.

The dissent and protest by Member Sylvester exhibits his misconception that the purposes of this Board are to advance the interests of but one party,—Labor, and that when there is disagreement in the Labor membership, to advance the interests espoused by a majority of that membership as against a minority thereof,—all in utter disregard of the interests of the other party, Management, and its equally constituted number of representatives, and of the avowed and defined purposes of the Railway Labor Act itself.

With the inner workings of the Labor Members and of their Executives and the Organizations which they represent this Division has no concern, and this reply will not further deal with that obvious situation. This reply will refute that which is mistakenly asserted in the protest and dissent which relates to functions which are within the purposes of the Division as it is constituted by law.

Contrary to the assertions contained in the dissent, these dockets were handled in the usual manner. In the initial discussions with Member Jones, Member Sylvester agreed there was no hope of reaching a decision, whereupon he was informed the dockets would also be discussed with Board Member Kearby, as the Telegraphers were involved. Member Sylvester stated he had no objection to such procedure, but his whole concern was that they be handled promptly because he was anxious to get them assigned to a Referee before the Board's allotment of Referee money expired June 30, 1942. During the ensuing period, May 20 to July 7, when the presentation of Proposed Awards was held up at request of both Members Sylvester and Kearby, no contention whatever was made as to their not being handled in usual manner, and such belated contention on July 7, prior to discussion of the Proposed Awards, was another action reminiscent of others transpiring that day to circumvent action by the Board.

It is not necessary to comment in detail on what transpired at Board meeting July 7, as the Board's minutes are self explanatory. However, the assertion is made that Member Sylvester attempted to discuss these cases on their merits, but the five Carrier Members and H. C. Kearby refused to par-

ticipate in such discussion. We do not attempt to speak for Board Member Kearby. Member Sylvester stated he proposed to discuss each docket in detail and he was informed that was his privilege and the Board prepared to remain in session for such purpose. His discussion proceeded to the point of his stating he had no further comments, whereupon each of the Awards was adopted and the Board adjourned at 5:45 P. M. Contrast his belated action, his implied purity of purpose, and his other moves on that date, with his initial agreement that no decision could be reached and his avowed purpose to get them before a Referee at the earliest possible moment.

The Carrier Members consider the references throughout the dissent to personalities and to the conflict and disagreements involving the Labor Members, their Executives and their Organizations, to be matters the discussion of which is not within the jurisdiction of the Division, unwarranted and distasteful.

/s/ A. H. Jones
/s/ C. C. Cook
/s/ R. H. Allison
/s/ R. F. Ray
/s/ C. P. Dugan

REPLY TO THE DISSENT AND PROTEST TO AWARD NOS. 1868, 1869, 1870, 1871, 1872, 1873 and 1874.

This claim has no merit and is merely an attempt to invade the jurisdiction of a Standard Railroad Labor Organization. I could not give it support without violating my obligation as a Labor Representative of the National Railroad Adjustment Board.

/s/ H. C. Kearby

ANSWER TO REPLY TO THE DISSENT AND PROTEST IN AWARDS NOS. 1868, 1869, 1870, 1871, 1872, 1873 AND 1874.

The undersigned Labor Members of the Third Division, National Railroad Adjustment Board have heretofore refrained from entering into letter writing contests in the form of Dissents or otherwise. But a so-called Labor Member has seen fit to question the integrity of the Members whose names are signatory hereto in that we supported the claims contained in the above referred to awards; that if they were not withdrawn by the parties they be given to a Referee to be decided on their merits in accordance with the Railway Labor Act and the Clerks' Agreement.

H. C. Kearby admits in his "Reply to the Dissent and Protest" that the disputes were disposed of as jurisdictional questions and not in accordance with the Rules of the Clerks' Agreement. The Railway Labor Act in establishing this Board made no provision for the settling of jurisdictional disputes between the parties and/or two or more Organizations representing Employes; it provides only for deciding disputes between Employes and Carriers under the Rules of the Agreement under which the case is brought to the Board.

We concur in the Dissent of Member Sylvester as a protest against the manner in which these cases were handled and disposed of.

/s/ R. A. Davis
/s/ D. W. Helt
/s/ H. Hemenway