Award No. 2253
Docket No. CL-2162

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

H. Nathan Swaim, Referee

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 Eunice, Louisiana by requiring and permitting employes who are not covered by the Clerks' Agreement to perform work that is covered by Clerks' Agreement. Also

(b) Claim that the Carrier be required to assign the work here involved to employes who hold seniority rights and work under the Clerks' Agreement.

EMPLOYES' STATEMENT OF FACTS: At the time this claim was last filed the station force at Eunice, La. consisted of the following, with assigned hours as indicated:

Agent	8:00 A. M. to 5:00 P. M.
Telegrapher	8:00 A. M. to 4:00 P. M.
Porter	7:00 A. M. to 4:00 P. M.
Telegrapher	7:30 P. M. to 3:30 A. M.

The position of Porter is covered by the Clerks' Agreement—the other three positions are not covered by the Clerks' Agreement.

During the period 8:00 A. M. to 4:00 P. M. there is in excess of sixteen hours work covered by the Clerks' Agreement.

This claim originated several years ago and on July 25, 1939 a joint survey was made, with Messrs. Cox and Judd representing the Carrier and Dyer representing the Brotherhood. As a result of this joint survey an agreement was reached for restoration of the Cashier's position. The position was bulletined on July 31, 1939.

On August 8, 1939 the Carrier repudiated the agreement and settlement that had been made and the Asst. Superintendent was instructed to cancel the bulletin advertising the position of Cashier.

The requirements of the service at Eunice, Louisiana, make it necessary for the Carrier to maintain telegraphic service throughout the 24-hour period to facilitate the movement of trains and handle communication service which must be performed by the use of the telegraph or telephone. Employes designated as operator-clerks or telegrapher-clerks have been included in the agreement between this Carrier and the Order of Railroad Telegraphers over a period of many years during all of which time they have performed clerical work in connection with their telegraphic duties. As evidence of that fact, the Carrier shows its Exhibit No. 1 listing rates of pay as covered by agreement between the Gulf Coast Lines and the Order of Railroad Telegraphers effective October 1st, 1918, which includes three operator-clerks at Eunice.

The Agent is classified as a Star Agent under Rule 37 of the agreement dated October 15, 1940, the definition of Star Agent being one which is filled jointly by the Operating and Traffic Departments from the rank of employes covered by the Telegraphers' agreement as provided for in Rule 36 (b) of that agreement. In addition to handling the general run of agency work the Agent consumes approximately four hours per day in writing up the cash book, selling tickets, and making ticket report. He does not perform any telegraphic duties. He has always been required to perform clerical work; in fact, his duties as agent require him to do so.

The first trick telegrapher-clerk, assigned 8:00 A. M. to 4:00 P. M., in addition to his telegraphic duties consumes approximately four hours daily performing clerical work. The second trick telegrapher-clerk, assigned 4:00 P. M. to 12:00 midnight, in addition to his telegraphic duties consumes approximately three to four hours daily performing clerical work. The third trick telegrapher-clerk, assigned 12:00 midnight to 8:00 A. M., in addition to his telegraphic duties consumes approximately four hours daily performing clerical work.

POSITION OF CARRIER: The question involved in the instant case is that the Carrier is violating the Clerks' Agreement by requiring or permitting employes who are not covered by the Clerks' Agreement to perform work covered by the Clerks' Agreement and that the Carrier be required to assign the work involved to employes who hold seniority rights and work under the Clerks' Agreement. The same question was submitted to your Honorable Board by the Clerks' Organization and handled under Dockets Nos. CL-1865 to CL-1871, inclusive, the only difference being as to location. The position of the Carrier was submitted in detail to your Honorable Board in case covered by Docket CL-1869, which was used as a key case, as the principle involved in that case is the same as that involved in Dockets Nos. CL-1865, 1866, 1867, 1868, 1870 and 1871 and case covered by Docket CL-1869, having been heard before your Honorable Board on March 9, 1942, at which hearing the Carrier submitted oral argument in form of a brief in support of its position, subsequent to which time the Carrier filed with your Honorable Board its written answer to employes' rebuttal and surrebuttal briefs, the same bearing date of March 29, 1942, the members of your Honorable Board are fully informed with respect to the position of the Carrier in the case covered by Docket CL-1869 and as the principle involved in this case is the same as that involved in Docket CL-1869, the Carrier hereby requests that your Honorable Board accept the evidence submitted by it in Docket CL-1869 as evidence in the instant case, and deny the claim upon the findings in that docket: "That there has been no violation of the Agreements."

OPINION OF BOARD: This claim asserts a violation by the Carrier of the Scope Rule of the Agreement between the Carrier and the Organization.

At the outset of our consideration of the claim, it is contended on behalf of the Carrier that we must first consider and determine the question of the Board's jurisdiction; that there has been no notice of a hearing, nor an opportunity to be heard, given to the employes outside of the agreement who are now performing the work which the Organization contends is covered by the

agreement; that this Board can not legally consider the claim on its merits and render a valid award without such notice and an opportunity to be heard being given to those employes who might be affected by an award rendered on this claim.

We are confronted with this same question in Dockets Nos. CL-2163 to CL-2167, both inclusive, and also in Dockets Nos. DC-2194, CL-2209, CL-2218, CL-2222 and CL-2273. In arriving at our conclusion on this question, we have considered all arguments on behalf of the Carrier and the Organizations on each of the above-named dockets.

It is contended on behalf of the Carrier that such notice is required by Section 3 (j) of The Railway Labor Act, which provides that:

> "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."

It is contended that, "employe or employes * * * involved in any disputes," as used in this section of the Act, includes all employes whose interests might be affected by the action of the Carrier in complying with an award and that it is, therefore, necessary to post an "All Concerned Notice" of a hearing on these claims before a legal hearing can be held and a valid decision made. The Organization on the other hand contends that, as to the dockets under consideration, these words only require a notice of hearing given to the organization submitting the claim and the carrier or carriers involved. While the intent of the language used in this section of the Act is not entirely clear, the Referee agrees with the interpretation contended for by the organization.

The first part of this section provides that, "Parties may be heard," and makes no mention of a hearing for other than parties. The only possible purpose of a notice of hearing would be to afford the person notified an opportunity to be heard. Since only "parties" are to be heard, it would seem reasonable to assume that it is only parties to the dispute or parties involved who are to be notified.

Could third persons whose interests might be indirectly affected by an award in these cases be considered "parties to the dispute" or parties "involved" in the dispute?

The next preceding section of the Act, Section 3 (i), describes how disputes as to the interpretation or application of agreements "between an employe or group of employes and a carrier or carriers" shall be handled in **the usual manner** up to and including the chief operating officer of the carrier and may then be referred by petition of the parties or by either party to the Adjustment Board. It seems clear that such disputes as these were usually handled between the organization involved and the carrier involved, the parties who negotiated and executed the agreement.

It is a long, established practice between carriers and the various employe organizations, both in negotiating agreements and in the settlement of disputes arising under such agreements, that all such negotiations and conferences are conducted by the representatives of the carrier or carriers and the organization directly involved. We must read the language of The Railway Labor Act with this practice in mind.

Surely, the Congress, by the use of the word "involved," did not intend to open the doors of the hearings before this Board to all persons who might in some manner be indirectly affected by an award. Any award made in these cases could have no direct effect upon the third parties. Any such award could only directly affect the parties to the contract who have come before the

Board and are parties to the dispute. No award made in these cases would, or could, order the third parties to do or to refrain from doing anything, or in any other manner directly affect their rights. The claims filed by the employes, in effect, say to the carrier, "You have contracted with us to let us do this work and you have broken your contract by letting others do it. We are asking that **you** be compelled to fulfill your contractual obligation to us." An award could only order the carrier to comply with the contract. The method of compliance is left to the carrier. It might comply in a manner which would not affect the third parties who have been doing work covered by the agreement. On the other hand, the carrier might, in complying with an award, take the work away from the third parties. The carrier, without any award, might take this work away from such third persons at any time unless it has also contracted to let such third parties do it. If the carrier breaches a contractual obligation by taking work away from such third persons, they have their remedy either by a claim filed with this Board or by an action in court.

Intervention by such third persons in these claims filed by the Clerks' Organization could be of no avail. If this Board should find in these cases that the Carrier has breached its agreement with the Clerks, there must be an award in favor of the Clerks; the Board's sole function is the interpretation and application of the agreement. It can not alter an agreement for the relief of either party, even though it might appear that the work was also covered by an agreement with the third parties. If, therefore, the third parties were permitted to intervene and were able to show that the work in question was covered by their contract, that fact could not alter our award, if we found that the work was also covered by the Clerks' contract. We see no way in which this Board, acting within its jurisdiction, could save a carrier who has executed two agreements, the scope rule of which agreements cover the same work; nor do we believe it was the intention of the Congress in such a case to permit the employes covered by one such agreement to intervene and be heard in a claim filed before this Board by the employes covered by the other agreement.

One of the general purposes of The Railway Labor Act was to set up a method and procedure which would, "provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements." Section 2 (5), The Railway Labor Act. It would be difficult to understand how you could possibly have either a **prompt** or an **orderly** settlement of disputes here, if you were required to give notice and hearing to all such third persons. We cannot believe that the Congress by the use of the word "involved" intended to describe such third person employes.

It is also contended on behalf of the Carrier that the failure to give notice and to grant a hearing amounts to a denial of due process to such third persons and that, therefore, even if not required by The Railway Labor Act, it is still necessary to a valid award.

With one exception, the awards cited in favor of this contention, which discussed the question here under consideration, were claims involving seniority. In such claims a different question is involved. There the third person is, in a sense, also a party to the same agreement. His work is covered by the same agreement, the seniority he is claiming accrued under that agreement, and some courts have held that such seniority constitutes a property right which cannot be taken away by a court or an administrative board without complying with the requirements of due process.

An award involving seniority necessarily affects directly all other persons under that contract holding seniority dates later than the one changed by the award. The award principally relied on by the Carrier is Award No. 1193, in which the Organization submitting the claim was protesting the establishment by the Carrier of a seniority date which the Organization contended was some thirteen years earlier than the man was entitled to under the agreement. An

award favorable to the Organization would necessarily take thirteen years off of the man's seniority. Referee Danner held that notice and an opportunity to be heard were necessary in that case. In Awards Nos. 1209 and 1210, written later by Referee Danner, he held that the Carrier had violated the scope rule of the applicable agreements by assigning work covered by the agreement to persons not covered. In neither of those cases was it considered necessary to give the third persons notice of the hearing. It is, therefore, evident that Referee Danner did not consider the reasoning and language used in Award 1193 applicable to claims of the nature of these now under consideration. It is evident that he neither considered that third persons who might be indirectly affected by an award on a claim based on a violation of a scope rule were "involved" employes within the meaning of The Railway Labor Act, nor that the requirements of due process made it necessary to give them notice and afford them a hearing.

Another award relied on to support the contention of the Carrier is Award No. 1400. In the first sentence of the Opinion in that award it was stated:

> "This is not a case * * * of * * * 'removing work from positions or employes covered by one agreement and assigning such work to positions or employes covered by another agreement' without negotiations."

The Opinion states that the operations there in question were "ordinary yard work—all such as are customarily and necessarily done by switchmen and trainmen as an incidental and essential part of their own work." (The claim had been submitted by the Telegraphers.) After considering the merits of the claim, the Opinion proceeds with a discussion of whether the switchmen should have been afforded a hearing in that case. In the course of the Opinion, it is stated, "So, as a matter of propriety rather than jurisdiction, as matter of just plain fairness between craft and craft, to say nothing of due process, * * * no such claim should be sustained without granting a hearing to the craft which will lose as well as the one which will gain by the wanted decision."

If either The Railway Labor Act or the requirements of due process made notice of a hearing to third persons necessary, the failure to give such notice, unless waived, would result in the Board not having jurisdiction of such third persons.

In speaking of a waiver of notice and hearing, the Opinion states, "Ordinarily, if not always, the point of non-joinder of an omitted but interested craft should be made on the property if it is to be made at all." If it be necessary to raise the question during the course of the dispute on the property, then a notice of a hearing before this Board, to give the other craft an opportunity to raise the question, comes too late to be of any avail, the question would then have been waived.

The language and reasoning of the Opinion in Award 1400 on this subject is difficult to follow and understand. In Award 1432, written a month later by the same Referee who wrote the Opinion in Award 1400, it was not considered necessary to give notice to third persons who were doing work covered by the Scope Rule of the Clerks' Agreement.

The last time this question of notice and hearing to third parties in a Scope Rule case was before this Board, it was decided against the contention of the Carrier by Award No. 181 of the Fourth Division, with Referee Wolfe writing the Opinion. In that Opinion he said, "It is better that a Division take jurisdiction of a dispute when it finds it has jurisdiction of the subject matter even though its award may not be binding on parties not before it than to refuse jurisdiction."

There can be no serious question but that the Third Division has jurisdiction of the subject matter of these eleven claims now under consideration. Nor can there be any question that we have jurisdiction of the person both of the

claimant and the Carrier. It is equally clear that we do not have jurisdiction of the person of the third parties who may be indirectly affected by an award in these claims. It follows that no award made in these claims could be binding on such third parties. It does not follow from that, however, that an award against the Carrier over the person of which we do have jurisdiction, would not be valid and binding on the Carrier.

This Division has considered and made awards on many hundreds of claims involving an alleged violation of the Scope Rule of the various applicable agreements. In not more than twenty-nine such cases have third persons been notified by the posting of "All Concerned Notices." If such notices were necessary to the validity of awards against the Carrier, the awards in all of the remainder of such cases were invalid. It was not made clear what, if any, rule was followed in the choice of those twenty-nine cases. If notice and hearing to third parties in any such cases are necessary to the validity of an award against the Carrier, we can see no possible dividing line in the cases. If such notice and hearing be necessary, either by reason of the provisions of The Railway Labor Act or the requirements of due process, such notice could not be dispensed with either because the number of such third parties was small or because the amount of work involved was not large. The requirements of due process protect the property of the individual. No part of his property may be taken from him without due process. But as we have pointed out above, the award in cases of this type are directed only to the Carrier and do not purport to bind such third parties or to take any property or rights away from them. If by reason of such award the Carrier attempts to take away from such third persons any rights or property to which they are legally entitled, the third parties have their remedies against the Carrier.

The last contention on this question advanced on behalf of the Carriers is that a hearing of the contentions and evidence of the third parties is necessary in order that the Division may have a complete picture and understanding of the question involved in the dispute; that such a hearing of all parties is essential to a fair determination of the question. If this were true, notice to such third parties would not suffice. If it is the hearing of the third parties which is essential to a fair and valid award, they should be ordered to appear at the hearing and present their evidence and contentions.

No such procedure was apparently contemplated by the Rules of Procedure adopted by the National Railroad Adjustment Board, which provided that in the submissions all data submitted in support of the party's position must affirmatively show the same to have been presented to the other party and made a part of the particular question in dispute. These Rules further provide that the parties are charged with the duty and responsibility of including in their original submissions all known relevant, argumentative facts and documentary evidence. These provisions undoubtedly had as their object the **prompt** and **orderly** settlement of disputes, as required by The Railway Labor Act. To permit third parties to intervene at the time of hearing and to then raise new issues and present new argumentative facts and documentary evidence which had not been presented to the original parties and made a part of the particular question in dispute, would not only be unfair to the original parties but would also tend to confuse, rather than to assist, the Board in its consideration of the claim. If such third parties were limited to the presentation of material included in the original submissions of the parties to the dispute, the intervention of the third parties could throw no new light on the question.

The representatives of the original parties are invariably thoroughly familiar with every phase and angle of the question involved in the disputes coming before this Board. The Board may safely rely on those representatives to properly present in an orderly manner all relevant material and arguments properly tending to support the position of the party they are representing. It would be unfair to those representatives and the parties they represent to have the issues confused by intervening outsiders who are not directly involved in the dispute.

Another preliminary question has arisen with respect to Dockets CL-2162 to CL-2167, both inclusive, the question of an oral hearing to the original parties to those disputes. In the original submission of the organization it requested the opportunity for oral hearing. In the Carrier's original submission it stated that these dockets raised the same question which was submitted to this Division of the Board under Dockets Nos. CL-1865 to 1871, inclusive, the only difference being as to location; that the position of the Carrier was submitted in detail in the case covered by Docket CL-1869; that in that case a hearing was held before this Division, at which hearing the Carrier submitted oral argument in the form of a brief in support of its position; that subsequently the Carrier filed its written answer to employes' rebuttal and surrebuttal briefs; that the members of the Board are fully informed with respect to the position of the Carrier; and that it requested the Board to accept the evidence submitted by it in Docket CL-1869 as evidence in the instant claims, and that the Board act on the instant claims.

On October 13, 1942, notices of hearings to be held on said claims on November 12, 1942, were mailed to the parties. On November 3, 1942, the hearing, at the request of the Carrier was postponed. Thereafter The Order of Railroad Telegraphers, representing employes alleged to be affected by these claims, transmitted a letter to this Division signifying "a desire to intervene when hearings are held on these dockets," and requesting prompt notification "of any proposed action on these dockets." The members of this Division were unable to agree on giving such notice of hearing to The Order of Railroad Telegraphers or on holding a hearing without giving such notice and granting the right to intervene.

After various moves to determine these differences had been made, the Clerks' Organization withdrew its request for an oral hearing. Later a proposed award was offered and failed to secure a majority vote, and the Mediation Board was then requested by the Labor Members of the Division for the appointment of a Referee.

On May 12, 1943, the Mediation Board advised that it considered these cases deadlocked on the merits and would appoint a Referee. Thereafter, on May 19, 1943, the Carrier, in a letter to the Division, stated that a request for oral hearing had been "inadvertently omitted" from its original submission and asked that the submission be amended to show such request. On these facts it is insisted on behalf of the Carrier that it is entitled to an oral hearing.

The Rules of Procedure of the National Railroad Adjustment Board, under the topic "Hearings," provide that, "Oral hearings will be granted if requested by the parties or either of them * * *." Under the preceding heading of said Rules it is provided, "Parties to a dispute are required to state in all submissions whether or not an oral hearing is desired."

Under these Rules we must hold that the failure of a party to request an oral hearing in the original submission waives its right to such a hearing. While the Carrier now says that a request for oral hearing was inadvertently omitted from its submission, it might well be understood from the language of its submission that since it felt that it could add nothing by an oral hearing, it desired the Board to proceed to render an award without such hearing.

It is insisted on behalf of the Carrier that since the Organization requested an oral hearing and notices for a hearing were sent out, the Division must hold such a hearing before it can render an award.

We see no reason why the Organization could not withdraw its request and thereby dispense with the necessity of the hearing. Having once waived an oral hearing, the Carrier can not later insist on the hearing as a matter of right. To permit the Carrier, at this late date, to request and obtain a hearing over the objection of the Organization would result in nullifying the rule requiring that hearings be requested in the submission.

Since this Division has jurisdiction to consider and determine this claim on the merits, and since both parties to the dispute have waived oral hearing thereon, we shall proceed to the consideration of the merits of the dispute.

On the merits of this case there seems to be no dispute on the essential facts. At the station in question, Eunice, Louisiana, the Carrier maintains a force of five men. Four of the five, the agent and three telegrapher-clerks, are under the Carrier's Agreement with the Telegraphers' Organization. One, a porter, is under the Clerks' Agreement. The four covered by the Telegraphers' Agreement do clerical work, according to the statement of the Carrier in its original submission, as follows: The agent, hours 8:00 A. M. to 5:00 P. M., "consumes approximately four hours per day" in clerical work. The first trick telegrapher, hours 8:00 A. M. to 4:00 P. M., "consumes approximately four hours daily performing clerical work." The second trick telegrapher, hours 4:00 P. M. to 12 midnight, "in addition to his telegraphic duties consumes approximately three to four hours daily performing clerical work." The third trick telegrapher-clerk, assigned 12:00 midnight to 8:00 A. M., "consumes approximately four hours daily performing clerical work." The porter's hours were 7:00 A. M. to 4:00 P. M.

The petitioner contends that the above facts show a violation of the applicable agreement.

In determining this question the Referee has considered that the Carrier, by the statements in its original submission, has made all of the papers filed by it in Docket No. CL-1869 a part of the record in this claim. The Referee has therefore studied all those papers, as well as the Carrier's original submission and its rebuttal statement filed in this docket.

The Carrier insists that the Organization in this docket has given consideration only to the employes covered by its agreement with the Carrier; that in determining the merits of this claim we must also give due consideration to "the rights of employes, exercised over a period of many years and who are included in the scope of an agreement with another organization."

If this contention be on the theory that in this case we cannot enter a valid award without at the same time considering the contentions and claims of the Telegraphers, we have answered the contention above in this Opinion. If it be based on the theory that the claims and contentions of the Telegraphers would throw light on an ambiguous provision of the Clerks' Agreement, we have been furnished by the Carrier in Docket CL-1869 and in its rebuttal statement in this docket a complete historical picture of the background of this dispute. By this picture, together with a recital of the rules of the applicable Telegraphers' Agreement, the Carrier has attempted to show that the work here in question is covered by the Carrier's Agreement with the Telegraphers.

The contention of the Carrier seems to be that if this work is covered by the Telegraphers' Agreement and is work which has always been done by telegraphers, it could not be covered by the Clerks' Agreement. This does not necessarily follow. While the evidence is not entirely clear, it seems to be true that Clerk's positions had been abolished at this station during the depression and thereupon telegraphers were renamed "Telegrapher-Clerks" and absorbed the clerical work theretofore done by the Clerk.

It is contended by the Carrier that the Scope Rule of the Agreement applies only to positions and that unless the work in question belongs to a position covered by the Clerks' Agreement, there can be no violation of the rule. With this contention we can not agree.

Rule 1 provides that the agreement shall govern the hours of service and working conditions of "Clerks," and that "positions" referred to in this agreement belong to the employes covered thereby and no position shall be removed from this agreement except by agreement. "Clerks" are defined by Rule

2 (a) as "Employes who are used three (3) hours or more for the majority of the working days of the month in the compiling, writing and/or calculating incident to keeping records and accounts, transcribing and writing letters, bills, reports, statements and similar work * * *."

Rule 2 (b) provides that "Clerical work in excess of three (3) hours shall not be assigned to more than one position on the same shift not classified as a clerk." This agreement became effective November 1, 1940.

Under the preceding agreement a dispute had arisen in regard to the removal of clerical work from the agreement. On July 26, 1939, it was agreed between representatives of the Carrier and the Organization, after they had made a joint check of the work at Eunice, that telegraphers were doing work covered by the Clerks' Agreement and that the position of Cashier would be reestablished immediately. The position was accordingly bulletined but before it was filled the bulletin was withdrawn and the Carrier refused to correct the situation. Thereafter claims were filed by the Clerks' Organization for violation at this station and at several other stations where the situation was the same. Finally, on October 18, 1940, the Clerks agreed to withdraw these claims on the understanding, "that the situation existing at all of the above points (including Eunice) would be corrected in line with the provisions of the Memorandum Agreement signed on October 14, 1940, and which becomes effective November 1, 1940."

By this Memorandum Agreement the parties, "Due to the peculiar conditions existing in station service," agreed that, "all of the **work** referred to in Rule 1 of the Agreement dated November 1, 1940, * * * belongs to and will be assigned to employes holding seniority rights and working under the Clerks' Agreement, except as provided below." The work here involved does not come within the exceptions.

By this Memorandum Agreement the parties have removed any possible ambiguity which may have existed in the original agreement and have determined all of the questions raised by the Carrier in this docket. They have agreed that Rule 1 of the Agreement does refer to work, rather than positions. They have agreed that **that work** "belongs to and will be assigned to" clerks.

The facts admitted by the Carrier in its submission clearly show a violation of the agreement as interpreted and affirmed in the Memorandum Agreement. The contentions now advanced by the Carrier would make meaningless and entirely nullify the Memorandum Agreement. It is not a mere "gentlemen's agreement" which may be thus lightly disposed of and thrown aside by one of the parties feeling the pinch of its provisions. It was negotiated while the principal agreement was being negotiated. By its execution the Carrier secured the withdrawal of numerous claims. It became and is the solemn contract of the parties which must be complied with until changed or amended in the manner provided by law. It is not the function nor within the power of this Board to amend the agreement to avoid a seeming hardship to one of the parties. Award 450.

The Carrier has relied principally on Awards 615, 1694 and 1868. Some of the language in the Opinion in Award 615 seems to support the contentions of the Carrier in this docket but in neither Award 615 nor Award 1694 was there a Memorandum Agreement such as we are here considering. A majority vote for Award 1868 was obtained, without a referee, by one of the Labor Members of the Division, who was a member of the Telegraphers' Organization, voting with the Carrier Members of the Division.

FINDINGS: The Third Division of the Adjustment Board, 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 the carrier violated the agreement as contended by the petitioner.

AWARD

The claim is sustained as to (a) and (b).

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 10th day of August, 1943.

DISSENT TO AWARD NO. 2253, DOCKET CL-2162

The primary error of this Award lies in its disregard and abuse of the normal and legal procedures of the Third Division of this Board, arising from the refusal of the referee rendering the decision to afford essential parties, including the respondent Carrier, the facility of a hearing, thus foreclosing the Carrier from the opportunity customarily and legally afforded by this Division to all parties for complete presentation of their case. That error continued in the refusal to consider presentations by other involved parties essential to the determination of the elemental issue which the petitioners' claim presented, i. e., whether or not the petitioners had the exclusive right claimed by them.

The denial of a hearing to the respondent Carrier in this case is dealt with in the 27th paragraph of the Opinion of Board. The history of the interchanges of letters between this Third Division and the parties involved there given is incomplete, particularly in respect to the decision by this Award to deny the Carrier a right to hearing.

As stated in that 27th paragraph, "on November 3, 1942, the hearing, at the request of the Carrier was postponed." The exact advice contained in that letter of November 3rd from this Division to the Carrier, with copy to the representatives of the Clerks' Organization, was as follows:

> "Please be advised that the hearing scheduled for the 12th of November is postponed. When a new date is arranged, prompt notification will go forward to all concerned."

That advice from this Division to the Carrier was essential notice to it, as well as to the Organization, that when a new date was arranged prompt notification of such hearing would be given them and was direct advice of the intention of this Division that a hearing in this case would be held,—the letter constituting affirmative statement to the parties receiving it to that effect.

Further, inasmuch as the original notice of hearings to be held on November 12, 1942, had carried with it notices of such proposed hearings "for the purpose of posting in such places as shall make them accessible to all employes involved in these disputes," in all justice it could only be inferred that this Division intended to not only afford the Carrier a hearing when a new date was arranged by the Division, but the letter of November 3, 1942, carried the plain advice, by reason of its omission of any reference to or suggestion of cancellation of the notices to "all employes involved" included in the original

letter setting these cases for hearing, that such was the continued intention of the Division. In fact, there had not been prior to or at the time of the advice by the Division to the Carrier on November 3rd any question raised in respect to that normal and complete procedure theretofore followed in similar disputes.

To proceed, as this Award thereafter does, to decide this case in denial of a hearing to the Carrier and to an effective cancellation of the original stated purpose of this Division to afford "all employes involved" an opportunity to be heard, as provided by the original posting of notices to that effect, is to arbitrarily destroy procedure that until this decision was written to that effect had been followed in this individual dispute as it customarily had been followed in similar preceding disputes.

Incident to the "various moves" referred to in the 28th paragraph of the Opinion, which related to the incompleteness and inadequacy of the procedures by this Division resulting in the denial of normal and essential rights of the parties, the Carrier, under date of May 19, 1943, as the 29th paragraph of the Opinion shows, did formally request an oral hearing. The disposal of that request by the 31st paragraph of this Opinion is wholly unrealistic in the light of the history of the handling of the matter which was before this whole Division with the referee sitting as a member.

Primary error, still relating to procedure, is pyramided by the decision, supplementary to the Award's denial of a hearing to the Carrier, in the superficial consideration given to the Carrier's rebuttal, which it had forwarded June 2, 1943, as an alternative and necessarily limited endeavor to have its case placed before the Division after its request of May 19, 1943 to be granted a hearing had been ignored by the Division. The Opinion of Board, after introducing reference in its 37th paragraph to the Carrier's rebuttal, shows its limited consideration of it in the 39th paragraph of the Opinion by saying that "we have been furnished by the Carrier in Docket CL-1869 and its rebuttal statement in this docket a complete historical picture of the background of this dispute," and then observes in the 40th paragraph that "The contention of the Carrier seems to be that if this work is covered by the Telegraphers' Agreement and is work which has always been done by telegraphers, it could not be covered by the Clerks' Agreement," declaring that "This does not necessarily follow."

While it may be true that such alleged contention of the Carrier may not necessarily have followed, the evidence there offered was of such substantive character as to present the elemental issue which the claim presented, that is, whether or not the exclusive right claimed by the Clerks existed. Such issue required, by conformance with the normal complete procedures of this Division, the customary and legally necessary action to secure and admit all the evidence which this rebuttal of the Carrier clearly indicated existed, and it would have placed the Division in a position to decide that issue accurately and conclusively.

The error of procedure in its disregard of the essential existing evidence bearing upon that elemental issue is further disclosed by the 40th paragraph of the Opinion in its disposition of the Telegraphers' rights to the work involved by limiting its consideration to the provisions of the Clerks' Agreement only. True, it may not have been necessary to determine the Telegraphers' rights as they may have existed under their Agreement, but it is equally certain that there cannot be justice in a decision that exclusive rights did or did not prevail under the later Agreement which the Clerks held when such probative evidence essential to a correct decision upon such an issue, as was indicated by this rebuttal statement of the Carrier to otherwise exist, was thus summarily disposed of.

The further continued error of procedure here by denial of rights of all employes involved by this claim, which automatically denied this Division of its hitherto right by its normal procedures to consider the essential rights of

all employes involved, is exposed by the limited and unconvincing declarations in the 22nd, 23rd, 24th and 25th paragraphs, which reversed the procedures followed by this Division for three preceding years in those respects as regards the rights of all employes involved,—more particularly here the Telegraphers, members of whose craft at this time occupy the positions and perform work involved in this claim.

Not only is this decision reached after denial to such employes and their representatives of a hearing, but it is supplemented by a refusal to give consideration to the submissions and statements made on behalf of such employes by their representatives, the Order of Railroad Telegraphers, under date of November 10, 1942, and of June 26, 1943. Those documents, rejected here, contain vital information essential to a final and binding determination of the fundamental issue involved, that is, whether or not exclusive rights to the work, as here claimed by the Clerks, existed.

In addition to the primary errors which derive from the refusal to grant opportunity of hearing to the Carrier and to other and all employes involved by this claim, and further from the limited considerations of the Opinion because of its rejection of submitted written documents by such other involved employes, the Award is in fundamental error as to the substance of the dispute.

This is due to the narrowly limited field of consideration by the Division, with the referee sitting as a member, arising from the imposed limitations as to procedure above noted, to which is added the other and even more serious limitations of the narrow construction placed upon the rights of involved employes and equally as restrictively placed upon the precise, general, all-inclusive wording of Section 3 (j) of the Railway Labor Act.

The Opinion of Board disposes of the rights of all employes involved and restricts the meaning of the language of Section 3 (j) of the Act, as it had heretofore been accepted by this Division, in the 19th paragraph of the Opinion by saying that "the language and reasoning of the Opinion in Award 1400 on this subject is difficult to follow and understand." The language of that Award was naught but reiteration of the procedure of the Division as it had prevailed in protection of the rights of all employes involved in similar former disputes before this Division and in protection of the final and binding action of this Division, through its complete consideration of those elements of fact and evidence, which heretofore have enabled it to give complete, final, and binding decisions upon the fundamental issue that such claims for exclusive rights on behalf of one craft of employes, as contrasted with the rights as necessarily in many instances they are claimed by other crafts, have presented to this Division.

The Opinion of Board proceeds thereupon in the succeeding 19th and 20th paragraphs to a review of Awards, particularly Fourth Division Award No. 181, to express a philosophy that is utterly destructive of the purposes of the Railway Labor Act and to the rights of employes, as well as those of respondent Carriers; that philosophy is quoted in the sentence reading "It is better that a Division take jurisdiction of a dispute * * * even though its award may not be binding on parties not before it than to refuse jurisdiction," and by the instant Opinion is accepted as a declaration or a decision against the grant of "a notice and hearing to third parties in a Scope Rule case." The essence of the case here is not a refusal of jurisdiction by this Third Division. It was a refusal by this Award to give consideration to essential facts, producable both by the Carrier and representatives of employes other than Clerks, who may or may not have been successful in producing such evidence as would have resulted in an Award contrary to the sustaining Award in this case.

Essential evidence remains outside the considerations given this dispute by the declarations of the Opinion of Board in this case imposing limitations upon admission of evidence essential to a correct and binding Award. All of the evidence that could be presented by the petitioner was doubtlessly pre-

sented, and was fully and completely considered by the Division with the referee sitting as a member in arriving at this sustaining Award. Equal in quality and character, evidence and facts essential to a proper disposition of the issue of exclusive right to the work involved exist in the disregarded submissions and statements of the respondent Carrier that might have been normally received if hearing as customarily and properly held had been afforded, and as well exist in the discarded submissions and supplementary statements of the representatives of the employes other than Clerks involved by the claim.

It is this discordant and disturbing feature of possible conflicting findings, through a succession of claims and Awards, of dual possession of rights by employes of two different crafts that here presents the contradictory and inconsistent situation which the procedures of the Division heretofore, in respect to giving notice to and opportunity for others who may have superior rights than those employes on whose behalf claim is presented, were designed to and have been effective in preventing up to the rendition of this unfortunate Opinion.

The narrow field here, which limits consideration to the interpretation of the Clerks' Agreement only, with a finding of possession by the Clerks of the rights claimed in this dispute, with full comprehension, and acknowledgment thereby, that such another narrow consideration of the Telegraphers' Agreement, in the event of submission of claim by that Organization, would give possibility of finding thereby possession by the Telegraphers of the identical rights previously awarded to the Clerks, is the very incongruous and contradictory situation that would be avoided if, in consideration of a claim based upon either the Clerks' Agreement or the Telegraphers' Agreement, the complete evidence, historical data, and presentations of all such parties whose allegements of possession of such identical rights have such common and definite probative possibilities so well known to this Division as to warrant taking judicial notice of them, such evidence and information were opportunely considered and heard. Final and binding determination of the issue presented by the claims of either the Clerks or the Telegraphers in a dispute thus advanced and considered, as should have been the instant case, would then have been possible of issuance.

The decision here, limited to evidence admissible only within the narrow field presented by the Opinion of Board, admits of the possibility in successive turn of sustaining Awards respectively in behalf of the Clerks' and the Telegraphers' Organizations to the effect that the right to performance of claimed work, carrying with it the automatic right to a single position required for such work, is the exclusive possession of two employes of separate crafts,—an incongruous result accruing wholly and only from the inadequate and narrowly limited procedure here followed and one that is thus a restricted, illogical, incomplete and disturbing procedure as it may be measured by the hitherto complete consideration of the rights of all involved employes and by the exact and general specifications of the Railway Labor Act, Section 3 (j).

In paragraphs 5 to 12, inclusive, the Opinion gives its technical and restrictive interpretation of Section 3 (j) and of the general purposes of the Railway Labor Act, suggesting that (par. 10) "the Congress, by the use of the word 'involved,' did not intend to open the doors of the hearings before this Board to all persons who might in some manner be indirectly affected by an award." Had inquiry been made in that respect to the 178 printed pages of the hearings before the Committee on Interstate and Foreign Commerce of the House of Representatives, wherein testimony was given as to the intent of Congress, there would have been found in the colloquy between Members of Congress and Commissioner Eastman, the latter generally accredited with sponsorship and most intimate knowledge of the intent of this Congressional Act, that which would be a direct refutation of the restricted meaning which is here ascribed to the word "involved."

By this restricted meaning thus given to Section 3 (j) of the Act there is here an Opinion contrary to the intent of the Congress, as well as destructive of the rights of employes with possible basic primary contractual possession of them, and discordantly transgressive of that full consideration of conflicting claims of employes which heretofore has been given by this Division, enabling it to render Awards that by their reasoning and adequacy of consideration and finding are accepted as being final and binding.

This Award, incomplete because of refusal to give hearing to respondent Carrier or to other involved employes and refusal to give consideration to other existing contracts of prior execution, other existing facts, evidence, and historical data,—all necessary to a complete and sound decision upon the substantive issue presented,—gives expression of unsound restrictive interpretations of this Division's procedures and of the purposes of the Railway Labor Act which can but identify it as being unfortunate and altogether worthless as a disposition of the issues which the claim presented.

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