Award No. 2548
Docket No. MW-2367

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Bruce Blake, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood on behalf of William Kenney, Painter, Arkansas Division, that he be paid for 32 hours at 63½ cents an hour as a result of not being called to paint and stencil roadway signs during February 1941.

EMPLOYES' STATEMENT OF FACTS: On February 7, 1941 William Kenney, B. & B. painter, was laid off in force reduction.

On February 8, 1941 painters employed at Biddle Shops, Biddle, Arkansas, were assigned by the Carrier to paint roadway signs.

The work was performed on February 8, 10 and 11, 1941.

The employes who performed the work were Joseph Wyley and George Porter, shop painters, neither of whom held seniority on the roster of B. & B. painters on the Arkansas Division.

POSITION OF EMPLOYES: There is an agreement in effect between the parties, bearing effective date of May 1, 1938, which agreement, by reference, is made a part of this case.

Rule 1, Group 2, of said agreement, reads as follows:

PAINTERS, DECORATORS AND SIGN WRITERS

"Painters, Decorators and Sign Writers' work shall consist of painting and decorating all buildings, bridges, signs, etc., coming under the supervision of the Master Carpenter, Division Engineer or the Engineer Maintenance of Way, and will be divided into the following classes:

(a) Foremen

(b) Painters

(c) Painter apprentices may be employed to assist painters in the performance of their work. The ratio of apprentices shall not be more than one (1) apprentice to each three (3) painters."

It is the Employes' contention that the Carrier violated the provision of the above rule in assigning shop painters to perform work of painting signs used in the Maintenance of Way Department.

"I am enclosing complete file on a claim made by W. M. Kenney for painting signs Biddle Shop which you will understand. I am not sure that Mr. Popke or myself is correct, in this case. If we are wrong will appreciate your advice in this matter.

"If we are right will also appreciate an early reply as I have been corresponding with Mr. Langston for some time and he may be correct in his decision as it seems to be a past practice for these signs to be put out from Silvis store as well as Biddle store.

"Let me have an early reply."

Mr. Fisher did not furnish Mr. Langston with a copy of his reply to Mr. Gay.

Attention is called to that part of Division Chairman Gay's letter of May 2, 1941 wherein he confirms statement of the Carrier that such signs in the past had always been put out from Silvis Store as well as Biddle Store and there is, therefore, no dispute between the employes and the Carrier that painters in the Bridge and Building Department on the Arkansas Division have not heretofore performed any work in connection with **making, painting and stenciling new signs** before being shipped to locations where they are to be placed and maintained by maintenance forces. After the new signs have been placed in service on the right of way and it later becomes necessary to repaint them, painters in the Bridge and Building Department perform the work of re-painting and they always have been assigned to perform such painting work because it then comes under the supervision of the Master Carpenter, Division Engineer or the Engineer Maintenance of Way.

The contention of the employes in the instant case is not sustained by agreement rules and many years of established practice on this property and the claim should be declined by your Board.

OPINION OF BOARD: Dockets CL-2374, CL-2379, CL-2400, CL-2425, MW-2367, CL-2526, CL-2527 and CL-2544 were initially deadlocked on the issue of giving notice to persons or organizations, other than parties to the disputes, whose interests may be affected by awards on the merits. The Carrier Members take the position that binding and conclusive awards can be rendered only after notice is given to all whose rights may be involved.

The question raised is not a new one to this Division. It has been exhaustively considered in at least five cases and adverted to in another. In two cases only has it been held that notice to other than parties to the dispute is a prerequisite to the rendition of a valid and binding award as between the parties. These are Awards Nos. 1193 and 1400. The first was a dispute involving seniority rights. Before hearing the dispute on the merits, the Board, sitting with a Referee, ordered notice to be given to the person whose seniority rights were challenged by the claim. In Award 1400 the claim was denied because parties whose rights would have been affected by its allowance had not been given notice. In the others—Awards Nos. 371, 844, 902 and 2253—decision on the merits was reached without notice to parties other than those to the dispute. In each of these cases, as in Awards Nos. 1193 and 1400, it was recognized that the dispute might involve rights of parties other than those of record. If there were such parties, the award, of course, would not be binding on them. But it was held that this did not affect the jurisdiction of the Board to entertain the dispute nor impair its power to render a binding and conclusive award as between the parties to it. This for the simple reason that neither the Statute (Section 3-j, The Railway Labor Act) nor the Rules of Procedure established by the Board require notice to parties other than those to the dispute.

Of course, the Carrier Members challenge this proposition. But it was so effectively maintained and established by analysis of the Statute in Awards Nos. 844, 902 and 2253 that it would seem no longer debatable. Indeed, as

we read the Opinions in Awards Nos. 1193 and 1400, no attempt was made to refute the proposition that the Statute and Rules of Procedure set up by the Board require notice only to the parties to the dispute. In Award 1400 the Referee's remarks amounted to nothing more than advice to the Board with respect to Rules of Procedure. He undoubtedly acted within his power as Referee when he joined the Carrier Members in denial of the claim. From the decision, however, it is very apparent that he was aware that, as Referee, he could not trench upon the rule-making power vested in the Board. Section 3 (u), The Railway Labor Act.

In Award No. 1193, the Referee, in joining the Carrier Members in requiring notice to be given to a party other than those to the dispute, did trench upon the rule-making power of the Board. Not only that, he exceeded the power conferred upon Referees by the Act, which is, "to sit with the Board as a member thereof and make an award."

However desirable a Referee may think notice to parties, other than those to the dispute, would be, he cannot order it because the Statute and Rules of the Board do not require it. The limitation of the power of Referees is epitomized in the Memorandum of the Referee attached to Award No. 902, reading:

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

We conclude that it is necessary to give notice of hearing only to the parties to the dispute.

The signs—the painting of which gives rise to this claim—were manufactured and painted in the Mechanical Department of the carrier. They were new signs manufactured on orders from the Store Department which in turn were based on a maintenance of way requisition by the Arkansas Division.

The claim is based on Rule 1, Group 2 of the current agreement. Since the rule is set out in the submission of each party it is unnecessary to quote it. The contention of the Committee is that the painting of these signs falls within the scope of the rule because they were manufactured upon a maintenance of way requisition.

We think, however, that the signs did not come within the scope of the rule until they were delivered to Roadmasters by the Mechanical and Stores Department. To sustain the claim would serve only to confuse the line of demarcation between work of different crafts. Allowance of it would mean that the mechanical department would have to deliver them unpainted. We do not think that, by any fair inference, the agreement can be so construed as to bring about that result.

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 no violation of the agreement has been established.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 27th day of April, 1944.