Award No. 2550
Docket No. CL-2379

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Bruce Blake, Referee

PARTIES TO DISPUTE:

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

THE BELT RAILWAY COMPANY OF CHICAGO

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

(a) Carrier violated the Clerks' Agreement when it nominally abolished three Yard Clerks positions (one on each shift) at East End Switches, Clearing Yard and assigned all of the work to employes not covered by the Clerks' Agreement, and

(b) That all employes involved in or affected by carrier's action be compensated for wage loss suffered retroactive to October 24, 1939.

EMPLOYES' STATEMENT OF FACTS: Prior to October 24, 1939 three Yard Clerks were employed at the East End switches, one on each shift, their duties being to check the initials and numbers of all cars arriving in all trains from the East, this information being recorded on wheel report form and 'phoned to the Cut-Card Clerk located in the teletype room of the Agent's Central Office, who prepared what is known as a cut-card or switch list from information thus supplied, together with information obtained from the waybills, and this cut-card or switch list was then sent to the hump towers where cars were humped or classified into outgoing trains according to the information shown on the cut-card. Likewise three Yard Clerks, one on each shift, were employed at the West Sub-office, their duties being exactly the same as regards the checking of trains arriving into the yard and telephoning the information to the teletype room, but they also perform other clerical work such as checking the Stock Yards tracks, calling yardmaster with information as to trains arriving in yard and keeping a current check of the condition of the receiving yard so that tracks can be assigned to incoming trains and in that way being quite busy during their eight hour assignment. The West End Sub-office is located about three miles west of the East End switches.

The East End Switches are located approximately 1500 feet west of the point known as Hayford where the Grand Trunk Railroad crosses the tracks of the Belt Railway. Three Yard Clerks were employed, one on each shift, at East End Switches, in addition to a Switchtender on each shift. At the Hayford Crossing three Gate Tenders were also employed.

Effective October 24, 1939 an interlocking plant was placed in operation at Hayford to handle traffic on the Grand Trunk and Belt (including the owner lines) and resulted in the discontinuance of the three Yard Clerks positions and three Gate Tenders positions while three former Gate Tenders were placed

reasons of the Management for its position in this case were fully outlined and a letter was written under date of March 1, 1940 by the President and General Manager to former General Chairman Van Dahm of the Brotherhood of Railway Clerks, confirming the position taken at the conference on February 29, 1940.

Nothing more was heard about this case until late in 1942; under date of December 10, 1942 former General Chairman Sullivan wrote General Superintendent Fox indicating that the Organization proposed to submit the case to the National Railroad Adjustment Board and requested a conference to see whether it would be possible to reconcile the difference of opinion which existed in this case or, if not, whether it would be possible to arrange for a joint submission to the Adjustment Board. A conference was held with the representatives of the Clerks' Organization on January 27, 1943, at which General Superintendent Fox advised the Committee that the position of the Management was unchanged and that the claim could not be allowed. He further stated that he had no objection to formulating a "Joint Statement of Facts" and such a "Joint Statement of Facts" was actually formulated and signed by Mr. W. L. Fox, General Superintendent, Belt Railway Company of Chicago, and Mr. Harry K. Mills, General Chairman of the Brotherhood of Railway and Steamship Clerks. The next advice received in this case was a letter from Mr. H. A. Johnson, Secretary of the Third Division, N. R. A. B., dated April 20, 1943, indicating that the Brotherhood of Railway and Steamship Clerks had filed an ex parte submission in the above claim.

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.

With respect to the merits of this case there is no dispute on the facts; and, we think, there is little room for controversy over the principles which are decisive of the issues.

That the work transferred to the levermen at Hayford, upon abolishment of the clerk positions at East End Switches, was clerical work in contemplation of the scope rule of the controlling agreement there can be no doubt. Admission of the fact is inherent in the carrier's submission notwithstanding, by the written word, it asserts the contrary. For, taking its submission by the four corners, it amounts to an attempt to justify the abolishment of the clerical positions, and the transfer to levermen of the attendant work, on grounds of expediency and economy of operation.

The carrier contends that the scope of the agreement does not cover positions when the attendant clerical work amounts to less than four hours a day. Under the decisions of this Division this contention cannot be sustained. It has been repeatedly held that, while the carrier may abolish a clerical position in the interest of economy in operation, subsisting clerical work, attendant upon the abolished position, must be assigned to employes covered by the agreement. See Award No. 1300 and Awards therein cited. And the fact that the subsisting work, attendant upon the abolished position, may be of less than four hours duration affords no justification for assigning it to employes not covered by the agreement. See Awards Nos. 458, 751, 754, 1551. In Award No. 754 it was said:

> "The four-hour rule relied on by the Carrier has no application; it is simply a line of demarcation between two classes of employes both within the agreement and not a limitation on the scope of the agreement."

The carrier contends that the dispute falls within the principles laid down in Award No. 615; and that the claim should be denied on the authority of that decision. We fail to see the basis for any such contention in this case

other than the fact that levermen are covered by the Telegraphers' agreement. That decision (Award No. 615) does not rest on any such narrow base. The decision is grounded upon the long-established historical practice, in the industry, of assigning clerical work to Morse Code telegraph operators. The decision has no bearing upon the facts presented by this record notwithstanding it is made to appear that the levermen engage in telephoning information to the "Central Office."

Claim is made for wage loss from October 24, 1939—the date the clerical positions were abolished. The claim was handled expeditiously on the property. Denial by the carrier became final March 1, 1940. The Organization took no steps, however, to bring the dispute to this Division until April 19, 1943. There appears to have been no excuse for this long delay. By reason of it the carrier was warranted in believing that its rejection of the claim had been accepted by the Organization. Under all the facts and circumstances disclosed by the record we think that allowance of wage losses from October 24, 1939 would impose an unjustifiable penalty on the carrier. Elements of estoppel exist. It is only equitable that that doctrine be invoked against the claim for reparation prior to April 19, 1943—the date of notice of intention to submit the dispute to this Division.

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 the carrier violated the agreement.

AWARD

Claim sustained with limitation on reparation as indicated in opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

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