Award No. 2596
Docket No. CL-2527

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Bruce Blake, Referee

PARTIES TO DISPUTE:

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

CHICAGO GREAT WESTERN RAILWAY COMPANY

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

(1) The carrier has violated and continues to violate its agreement with the Clerks' Organization when effective November 17, 1942, it removed certain daily yard clerical work consisting of compiling Form 480 reports from the scope and operation of the Clerks' Agreement at the Kansas City Yard Office and permits and assigns such daily duties and work to employes at that point, who hold no seniority rights under the Clerks' Agreement, and

(2) That the carrier shall be required by appropriate award and order to assign said clerical work back to the clerical employes working under the scope and operation of the rules of the Clerks' Agreement, and

(3) That the now assigned clerical employes affected by the Carrier's action shall be entitled to receive payment at overtime rate for time required to perform this work as determined by a joint check of these reports handled by other than clerks and time consumed in their compilation.

EMPLOYES' STATEMENT OF FACTS: Prior to November 17, 1942 the clerical employes under the scope and operation of the Clerks' Agreement at the Kansas City Yard Office compiled the daily Form 480 reports and entering thereon all information required and requested, that is; train number, date, conductor, all car numbers and initials, contents, point of origin, destination, consignee, shipper, carrier delivered to, etc. The same report is compiled of all cars forwarded from this yard.

Form 480 is 11 × 14 inches in size and each sheet provides for entry of record of 35 cars. Several copies are compiled and each set covers the consists of every train inbound and outbound. It is an important record for much information and data is secured therefrom.

Effective November 17, 1942 the carrier removed this work from the clerical employes and assigned the compiling of this report to employes not covered by the Clerks' Agreement.

POSITION OF EMPLOYES: The employes cite the following rules in the Agreement—

"RULE 1 SCOPE. These rules shall govern the hours of service and working conditions of the following employes, subject to the exceptions noted below:

(1) Clerks—

(a) Clerical workers;
(b) Machine operators.

fact that telegraphers are performing much less clerical work than formerly, there has been no violation of the Agreement and there is no basis for the claims made.

Support of the facts given above are found in certain awards as referred to in the following:

> "There are few, if any, employes of a carrier, from the President down to the laborer, who do not perform some clerical work in connection with their regularly assigned duties." (Award 1405)

In Award 1418 where a claim of employes was made on the basis that Yardmasters and switch foremen were preparing scale tickets and making other records, etc. was an infringement upon the rights of the clerks, the opinion of the Board (George E. Bushnell, Referee) is as follows:

> "**OPINION OF THE BOARD:** Rule 1 of the Agreement (Scope Rule) does not enumerate the kind of work to which the Agreement applies, such as weighing in this instance, but only enumerates the type of employes covered by the Agreement. Not all clerical work is performed by clerical and other employes. As said in Award No. 806, 'There are few, if any, employes of a carrier, from the President down to the laborer, who do not perform some clerical work in connection with their regularly assigned duties.' The assignment of the work in question to the Yardmaster and/or the Yard Foreman antedates the agreement with claimant Brotherhood.
>
> The insertion of date, station, initial and number, and tare weight is incidental to the duties performed by the Yardmaster and Yard Foreman when acting as Weighmasters. In the absence of more explicit language in the Agreement, it cannot be held that the practice involved in the instant case constitutes a violation of the Agreement, and the claim should be denied."

The findings were that the evidence failed to disclose a violation of the Agreement, and, therefore the claim was denied.

Reference in Award 1418 is made to Award 806 where a claim made by the clerks of the Terminal Railroad Association of St. Louis upon the premise that certain incidental clerical work on the part of baggage and mail handlers should entitle the claimants to a higher rate of pay—that is, of a clerk. The opinion of the Board (William H. Spencer, Referee), who denied the claim, pointed out in part:

> Moreover, it is to be remembered, Rule 4 does not encompass all clerical work performed in the service of the carrier. As this Division has previously pointed out, there are few, if any, employes of a Carrier, from the president down to the laborer, who do not perform some clerical work in connection with their regularly assigned duties.

In view of the facts and circumstances related herein, Carrier contends that they have violated no rule of the Clerks' Agreement and that there is no merit in their claims and respectfully request the Board to so rule.

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 Reference 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.

On the merits, this dispute presents a subject of constant controversy between the Clerks' organization and the carriers. Generally speaking it may be said to be well established by the decisions of this Division that all clerical work, except such as is incidental to the duties of other positions, falls within the scope rule of agreements between the Clerks and the carriers. Until Award 615 was rendered this principle was applied to all clerical work. By its

decision in that case, however, the Board made a further exception as to clerical work done by Telegrapher-clerks who also handled orders and messages by telegraph. This decision overruled Awards Nos. 423, 452, 456 and 531 which had applied the general principle in such situations.

The decision in Award No. 615 was, it appears, brought about by the resistance of the Telegraphers' organization, which then had a representative on this Division, to the application of the general principle to cases where clerical work was performed by Telegrapher-clerks whose duties also comprised telegraphic communications.

The Clerks' organization, while protesting the soundness of the Decision in Award No. 615, of necessity, acquiesced in the holding as long as the Telegraphers' organization had a representative on this Board. The Telegraphers, however, no longer have a representative on the Board, and this dispute is deadlocked with the five carrier members for denial of the claim and the five labor members for allowance of it. So, a referee is free, if he chooses, to overrule Award No. 615 and apply the general principle as it was applied in Awards Nos. 423, 452, 456 and 531.

The claimants urge that such a course should be followed, and that it is warranted under the authority of Awards Nos. 2071, 2253 and 2329. In other words, they assert that Award No. 615 was effectually overruled by these and other later awards. We do not think these awards meet the issue now confronting us. In Awards Nos. 2071 and 2329 the clerical work in controversy was being performed by employes who were under the Telegraphers' agreement, but who performed no telegraphic duties. In the instant case the work in controversy has been assigned to Telegrapher-clerks who also handle telegraphic communications. Award No. 2253 rests upon a special agreement which evidently was intended to allay the dispute which actually has existed between the Clerks and the Telegraphers over their respective rights to clerical work ever since Award No. 6155 was rendered.

From what we have said it is apparent that the Telegraphers have a vital interest in the outcome of the instant dispute. So vital is it, indeed, that they sought to intervene. They were denied that right. Neither the Railway Labor Act nor the rules of procedure set up by the Board accord them the right. The referee has no power to grant them leave to intervene. His only function is "to sit with the division as a member thereof and make an award." To sustain the claim would, of course, deprive the Telegraphers' organization and its members of most substantial and valuable rights—rights accorded by this very Board in its Decision in Award No. 615. To deprive them of the rights accorded by that decision without giving them an opportunity to be heard would be subversive of democratic principles and processes. What was said in Award No. 1400 is peculiarly applicable here.

> "On the question of jurisdiction raised by the carrier, the Referee respectfully submits the following: Because of the prospective operation of the Railway Labor Act, jurisdiction, the right to hear and decide, seems plain. But the controlling issue is really one between telegraphers on the one hand, and switchmen on the other. The Division is asked to decide which of the two crafts is entitled as matter of contract right to do the work. In a controversy which might result in a denial to them of a valuable right, the switchmen have not been heard; they have been given no opportunity to present their side of the case.
>
> "That is not right morally or legally. It offends the basic principle and thwarts a main objective of due process of law.
>
> "So, as matter of propriety rather than jurisdiction, as matter of just plain fairness between craft and craft, to say nothing of due process, it is respectfully submitted that, in such a case as this, 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."

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 for the reasons stated the case will be dismissed without prejudice.

AWARD

Case dismissed without prejudice.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 1st day of June, 1944.