Award No. 2597
Docket No. CL-2544

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Bruce Blake, Referee

PARTIES TO DISPUTE:

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

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, MISSOURI-KANSAS-TEXAS RAILROAD COMPANY OF TEXAS

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes that:

(1) The carrier (Missouri-Kansas-Texas Railroad Company; Missouri-Kansas-Texas Railroad Company of Texas) violated and continues to violate its several agreements with the organization when on May 1, 1943, after due notice, it failed and refused to assign to positions covered by the said agreements, incidental clerical work, then and now performed at Altus, Oklahoma, by the Agent-Yardmaster, the so-called Telegrapher-Cashier and the so-called Telegrapher-Clerk; and

(2) That the carrier (Missouri-Kansas-Texas Railroad Company; Missouri-Kansas-Texas Railroad Company of Texas) refused and continues to refuse to classify and restore the work to the scope and operation of the clerical agreement; and

(3) That the carrier (Missouri-Kansas-Texas Railroad Company; Missouri-Kansas-Texas Railroad Company of Texas) shall now be required by an appropriate award and order of the Board to:

(a) Recreate the position of Chief Clerk—rate $7.10 per day, and

(b) Recreate the position of Cashier—rate $6.60 per day, and

assign to the said positions and restore to the scope and operation of all the agreements and rules extant between the respective parties, all of the incidental clerical work, as set forth in the Statement of Fact, there to remain until removed therefrom by the proper processes set forth in the agreement (Rule 78) and the Railway Labor Act—1934—amended; and

(4) That the said positions of Chief Clerk and Cashier be advertised and assigned under the appropriate rules of the agreement as of May 1, 1943, and that any and all other employes adversely affected by the illegal and unlawful act of the carrier in assigning the said work and duties to positions and or persons not covered by the clerical agreement, shall be reimbursed for all their money losses.

carrier is junior to that of the telegraphers; and because of this junior status, clerical work having been previously under the senior agreement, and because of the absence of an all-inclusive scope rule in this junior agreement, the carrier insists it is not violating any agreement in having telegraph employes necessary for its service requirements, do such clerical work as it may be practicable for such telegraph positions to do.

W. Aside from the view that this is correct from the standpoint of agreement terms and interpretation, the carrier submits its position is supported by the commonsense considerations of the situation; and by the natural, right-minded and spontaneous repugnance to those specious reasoning and vague theories that foster and encourage the parasitism which grows out of those pronouncements that two or more men must be employed and paid for a piece of work where often this would be a physical impossibility, or where no possible justification could otherwise be found for such flagrant waste of manpower and violation of simple economics.

X. While these general considerations demand that this claim be denied, of even more direct and inescapable force and conclusiveness is the action of the petitioner, as to these specific positions, as set forth in carrier's "Statement of Facts," and referred to in paragraphs A, B, C, D, and N of its "Position." These things demand the denial of the claim.

Except as herein expressly admitted, the carrier denies each and every, all and singular the allegations of the employes' submissions and respectfully requests that the petitioner be placed on strict proof of allegations contained in said submissions.

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 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 beween 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 main issue in this dispute is, in all essential respects, identical with that in Docket No. CL-2527: the right of the carrier to assign clerical work to Telegrapher-clerks. What was said in Award No. 2596, in disposing of that case, is equally applicable to this. Upon this issue the decision in the instant case will be the same as in that for the same reasons.

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.