

Award No. 5781
Docket No. CL-5731

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Angus Munro, Referee

PARTIES TO DISPUTE:

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

SOUTHERN PACIFIC COMPANY (Pacific Lines)

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that the Carrier violated the Clerks' Agreement:

(a) When on February 28, 1948, it removed the duties of calling crews at Santa Ana, California, from the Clerks' Agreement and assigned said work to an employee of another class or craft; and

(b) That Mr. A. L. Clem be compensated for a call, two (2) hours, at the rate of time and one-half of his assigned position for February 28, 1948.

EMPLOYEES' STATEMENT OF FACTS: 1. There is in evidence an Agreement between the Southern Pacific Company (Pacific Lines) (hereinafter referred to as the Carrier) and its Employees represented by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, bearing effective date of October 1, 1940, which Agreement (hereinafter referred to as the Agreement) was in effect on the date involved in the instant claim. A copy of the Agreement is on file with this Board and by reference is hereby made a part of this dispute.

2. On February 28, 1948, the station force at Santa Ana, California, consisted of positions of Agent and Telegrapher, not covered by the Agreement, and positions of Chief Clerk, Cashier, Assistant Cashier, Claim Clerk, Car Clerk, and various other positions covered by the Clerks' Agreement, and the occupants of the respective positions perform the usual and ordinary work assigned thereto in accordance with the rules, and at the rates of pay as classified under the applicable Agreement.

The clerical work of calling crews is assigned to the clerical force during their regular tour of duty, and while not a part of any particular clerical position, is performed when necessary by the occupant of whatever clerical position available.

3. On February 28, 1948, the date involved in the instant claim, A. L. Clem (hereinafter referred to as the claimant) was occupying a regular position of Assistant Cashier, with assigned hours from 8:00 A. M., to 12:00 noon, and 1:00 P. M. to 5:00 P. M., daily except Sunday, with rate of pay \$10.02 per day.

OPINION OF BOARD: The System Committee of the Brotherhood, hereinafter called Petitioner, complains Carrier violated Schedule Rules 1 and 21 in not directing one Clem, hereinafter called Claimant, to perform the act complained of.

Before presenting its defense to Petitioner's allegations Carrier urged the necessity of giving notice of this proceeding to the Telegraphers' Brotherhood in order that a valid award might issue. Carrier's plea is overruled in that it may not now be first urged and the record does not disclose sufficient facts to put us on inquiry within the meaning of Award 15220, First Division (Coffey, 1952).

The facts in the instant case fall within the rule announced in Award 3506 (Douglas, 1947).

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That both parties to this dispute waived hearing thereon;

That the Carrier and the Employee involved in this dispute are respectively Carrier and Employee within the meaning of the Railway Labor Act, as approved June 21, 1934;

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That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That Carrier violated the Schedule as alleged.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Acting Secretary

Dated at Chicago, Illinois, this 21st day of May, 1952.

DISSENT TO AWARD 5781, DOCKET CL-5731

By this Award, the majority takes the erroneous position that the question of jurisdiction may not be considered by the Division in that it is now first urged by the Carrier, and that the record does not disclose sufficient facts to put us on inquiry.

The holdings of courts and administrative bodies on this point are unanimously opposed to the position taken by the author of this Award. Affirmative relief cannot be granted by an administrative body in any case until it is definitely ascertained that the subject-matter of the complaint is clearly within its jurisdiction. *Snook v. Central RR. Co. of New Jersey*, 17 ICC 375. In a case involving a dispute between an employee of one carrier and the employees of another carrier, it was held this Division was wholly without jurisdiction of the subject-matter of the dispute, and our Award

No. 183 was "an absolute nullity, binding on no one." **Stephenson v. New Orleans and NER Co.**, (1937) 177 So. 509, 180 Miss. 147. The question of jurisdiction is not merely an issue, which must be raised by one of the parties before it will be considered by the Division, but is rather a prerequisite to the exercise of the Division's statutory powers, which the Division must determine for itself even if not put in issue by either party. Justice Robert H. Jackson, while Attorney General of The United States, expressed the opinion that: "Every case filed with the Railroad Adjustment Board involves a question of jurisdiction. * * * **If The Board is to function at all it must decide these jurisdictional questions subject, of course, to review by the courts in suits to enforce awards of the Board or other proper proceedings.**" (Emphasis added). 39 Op. Att. Gen. 415 (February 19, 1940). It is the duty of the administrative agency in the first instance to determine the problem of jurisdiction. **Myers v. Bethlehem Shipbuilding Corp.**, (1938) 303 U. S. 41; **Order of Railway Conductors v. Swan**. (1947) 329 U. S. 520.

If there is a lack of jurisdiction, it is the duty of the Division on its own motion to deny the petition, if neither party to the dispute raises the question of jurisdiction. The Interstate Commerce Commission, in **Chandler Cotton Oil Co. v. F. S. & W. Ry. Co.**, 13 ICC 473, said:

"In all controversies before it if there is lack of jurisdiction, whether from absence of essential facts or through want of power in The Statute, **it is the duty of the Commission, of its own motion, to deny jurisdiction.** This question it is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties. This rule applies to all tribunals of limited power. **Mansfield, Coldwater and Lake Michigan Railway Co. v. Swan**, 111 U. S. 382."

Therefore, in raising the question of notice to the Organization representing telegraphers, the Carrier did not seek to raise a new issue, but properly sought to determine whether the Division had jurisdiction to render a valid Award.

The jurisdiction of the Division is limited by Sec. 3, First (h). If the Division undertakes to make an Award in a dispute which is outside its jurisdiction, any Award entered is an absolute nullity. **System Federation No. 59 vs. Louisiana & A. Ry. Co.**, (1941) 119 F. 2d 509, certiorari denied, (1942) 314 U. S. 656. Failure to serve notice required by Sec. 3, First (j) renders an award null and void. **Nord v. Griffith**, (1930) 86 F. 2d 481, certiorari denied 300 U. S. 673; **Hunter v. AT & SF Ry. Co.**, (1949) 171 F. 2d 594, certiorari denied 337 U. S. 916.

The record in this case does disclose sufficient facts to put us on inquiry even though the Carrier had not urged the question.

The Award is a nullity and should be so treated.

/s/ J. E. Kemp

/s/ C. P. Dugan

/s/ R. M. Butler

/s/ W. H. Castle

/s/ A. H. Jones