Award No. 6203
Docket No. SG-5970

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Curtis G. Shake, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD SIGNALMEN OF AMERICA

THE BALTIMORE AND OHIO RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railroad Signalmen of America on the Baltimore and Ohio Railroad that:

(a) The Carrier violated the provisions of the current Signalmen's Agreement when, on February 13, 1948, it assigned the work of repairing an air pipe line which operates an electric-pneumatic track switch, an integral part of a car-retarder system located at Cumberland, Md., to employes not covered by the Signalmen's Agreement.

(b) Signal Maintainers L. F. Harmon, H. P. Logsdon and B. L. Cowgill be allowed an adjustment in pay for an amount of time at the time and one-half rate equal to that required by employes not covered by the Signalmen's Agreement to perform the repairs to the air-line described in part (a).

Note:—Pursuant to an agreement consummated between the Carrier and the Brotherhood in Washington, D. C., on June 6, 1951, the monetary claim in part (b) is waived, subject to the provisions of the June 6, 1951 agreement, which is made a part of the Brotherhood's Submission on this dispute and is identified as Brotherhood's Exhibit "A".

EMPLOYES' STATEMENT OF FACTS: An agreement bearing effective date of August 1, 1939, as subsequently revised, is in effect between the parties to this dispute. (The revisions referred to are not applicable in this dispute). This agreement governs the rates of pay, hours of service, seniority, and other working conditions of all employes in the Signal Department who perform the work covered by the Scope rule of the agreement. This agreement is by reference made a part of the record in this dispute.

There are no exceptions to the Scope rule which permit the diversion of the generally recognized signal work as comprehended in this claim.

* * * * * *

The work of maintaining a car-retarder system and its integral parts is covered by the Scope rule of the Signalmen's Agreement, as is clearly

The Carrier specifically directs the Division's attention to that portion of the Sheet Metal Workers' Special Rules which is captioned "Rule 114—Classification of Work" and which to the Sheet Metal Workers ascribes in part "* * * the bendings, fitting, cutting, threading, brazing, connecting and disconnecting of air, water, gas, oil and steam pipes; * * *".

On the basis of the above quoted portion of Rule 114 of the Sheet Metal Workers' Rule, the Carrier concluded and rightly so that the maintenance of the air lines on the car retarder system at Cumberland, Md. was work properly belonging to employes coming within the preview of the Shop Craft Organization and in conference with the provisions of the Sheet Metal Workers' Special Rules.

The Carrier submits there is no rule in either the August 1, 1939 Signalmen's Agreement, or in the revised agreement of October 1, 1951 which grants Signalmen any right to perform pipework. Indeed, there is no language in either agreement relating in any manner to pipe or pipe work.

The Carrier asserts that on the basis of the facts involved and in consideration of the specific provisions contained in the applicable rule, its action cannot now be disuted as improper nor without merit.

The Carrier in conclusion asserts that on the basis of all that is contained herein, this Division is without authority to render decision on the question submitted by the petitioner and this question should be accordingly dismissed.

All data submitted in support of the Carrier's position has been presented to, or made known to, the other parties and is a part of the particular question in dispute. (Exhibits not reproduced.)

OPINION OF BOARD: Since, as indicated by the title, Part (b) of the Claim has been waived, the only issue before this Board is whether—

> "(a) The Carrier violated the provisions of the current Signalmen's Agreement when, on February 13, 1948, it assigned the work of repairing an air pipe line which operates an electric-pneumatic track switch, an integral part of a car-retarder system located at Cumberland, Md., to employes not covered by the Signalmen's Agreement."

The claim arose when, on February 13, 1948, the Carrier used a group of employes represented by the Sheet Metal Workers' International Union to repair a compressed air line that serves a power-operated switch located within the limits of the Carrier's Cumberland car retarder system.

The Employes contend that the work in question came within the scope rule of their Agreement of August 1, 1939, wherein it was provided that said Agreement should apply to employes performing the work generally recognized as signal work, etc. A scope rule identically like the one in the 1939 Agreement has been in effect between the Organization and the Carrier since 1921. On the other hand the Carrier asserts that it has been under contract with the Sheet Metal Workers' International Association, represented by System Federation No. 30, Railway Employes' Department, A. F. of L., since September 1, 1926, and that employes within the jurisdiction of that group have performed work of the character here involved ever since the car retarder system was installed at Cumberland.

While this claim was under consideration between the parties the International Brotherhood of Electrical Workers asserted its claim to the electrical work in connection with the Carrier's car retarding system at Willard, Ohio, and the International Association of Machinists claimed the right to perform

the maintenance and repair work on retarding system installations at both Cumberland, Md., and Willard, Ohio.

When top level officials could not resolve the claim, they joined in an application invoking the services of the National Mediation Board. The Mediation Board failed to reconcile the differences and proposed arbitration, but the parties were unable to draft an acceptable arbitration agreement.

Meanwhile, the Carrier instituted an action for a declaratory judgment in the Circuit Court of Baltimore City, Maryland, against all the organizations heretofore mentioned in this opinion, for the purpose of determining the rights of said organizations to the work in question.

On June 6, 1951, all of said contending organizations entered into an agreement with the Carrier whereby it promised to dismiss its court action and the said organizations agreed that they would assert no money demands prior to the rendition of an award by the National Railroad Adjustment Board. Prior to the execution of said agreement System Federation No. 30, Railway Employes' Department, A. F. of L. representing its electrical and machinists' crafts had prosecuted a claim to the Second Division of this Board wherein it asked that this same Carrier be ordered to assign to said crafts all electrical and machinists' work connected with the repair and maintenance of car retarders in accordance with the scope rules of the Carrier's agreement with said organizations. In due course that claim was dismissed by the Second Division without prejudice, because the Brotherhood of Railroad Signalmen had not been given notice of the proceeding, the Labor Members of the Board dissenting. See Second Division Docket No. 1423, Award No. 1523.

Thereupon, System Federation No. 30 gave notice of its intention to file an ex parte submission with the Second Division of a new claim like that involved in Second Division Award No. 1523. The Second Division deadlocked on the issue as to whether its Executive Secretary should forthwith give the usual notice of pendency to the Carrier or withhold such notice until notice had been given the Signalmen's Organization. A referee was appointed and it was decided in Second Division Award No. 1640 that the Executive Secretary should give the Carrier the usual letter of notification, requesting it to file its submission within thirty days; that upon receipt of the submissions of the petitioner and the respondent Carrier the case should be docketed; and that when docketed the Secretary of the Division should so advise the Signalmen's Organization and give it due notice of all hearings. So far as we are presently advised, that claim is still pending before the Second Division.

On September 11, 1951, the Signalmen's Organization and the Carrier entered into a new agreement which became effective October 1 of that year. Sub-section (f) of the scope rule of that Agreement was left blank, with a memorandum of understanding to the effect that a determination of the language to be inserted at that point in the Agreement would be held in abeyance pending further negotiations after the present dispute is finally resolved.

From the proceedings of this Board it also appears that on January 22, 1952, it was moved by a carrier member that the hearing on this claim be postponed; that a new hearing date be set, and that the party or parties whose interests might be affected be given notice to appear at such hearing. The motion did not prevail.

On this state of the record, briefly summarized, the Carrier makes the following contentions:

1—The claim is moot in view of the provisions of the special agreement of June 6, 1951, and the new agreement between the parties, effective October 1, 1951.

2—The subject matter of the claim is within the exclusive jurisdiction of the National Mediation Board.

3—The claim should be dimissed without prejudice on account of the action of this Board in refusing to cause notice to be given to the other party or parties whose interests might be adversely affected.

1. The Carrier's contention that the claim before us is moot is predicated upon two propositions, namely: ((a) that by the special agreement of June 6, 1951, the Organization waived its money demands, and (b) by the terms of the current Agreement between the parties the scope rule is silent as to any definition or description of the work here involved. The Agreement of June 6, 1951, contained the following provision:

"With respect to the claims involving the said car retarder systems which the Electrical Workers and Machinists have filed with the Second Division of the Railroad Adjustment Board, or may hereafter file, and with respect to any similar claims which may hereafter be filed with the Adjustment Board by the Sheet Metal Workers and/or Signalmen, each of said labor organizations agrees that any such claims will not be accompanied by, or the subject of, any claim for money damages as to any period prior to the rendition of an award by the Adjustment Board. It is understood and agreed by and between the parties hereto, however, that claims for money damages may be filed, if so desired, by the said labor organizations as to any period subsequent to the rendition of any such awards by the Adjustment Board."

The memorandum of understanding entered into at the time the current agreement was signed contains the following language:

". . . it is agreed that determination of the specific language to be placed in paragraph (f), (of the current agreement) shall be held in abeyance pending further negotiations when the dispute (as to whether the installation and maintenance of car retarders is signal work) is finally resolved."

In view of the above quotations we think it clear that the Organization has not foreclosed itself against asserting the present claim. Apparently all of the parties to the memorandum wer disclosed to make concessions to facilitate the final disposition of the matters in dispute. The contention that the claim is moot is, therefore, denied.

2. It is true that the record before us discloses an unsuccessful effort of the parties to agree upon a revision of the scope rule of the agreement that was in effect when the controversy arose; and it is the peculiar province of the National Mediation Board, rather than this Board, to deal with such problems if the parties are unable to agree. In this case, however, the Organization has charged that on February 13, 1948, the Carrier violated the scope of an agreement then in effect between the parties, which provided that employes covered thereby were entitled to perform the work generally recognized as signal work by assigning work of that character to other employes not covered by said agreement. The claim before us tenders a clear-cut issue of fact within the proper jurisdiction of this Division. If the facts do not sustain the claim it should be denied, not dismissed. It is only in cases where the lack of jurisdiction is apparent on the face of the record or is admitted by the parties that the Board would be justified in entering an order of dismissal. Such is not the situation here.

3. The Carrier's third procedural proposition is that we should dismiss the claim because of this Board's failure, on January 22, 1952, to order that notice be given to the other alleged parties in interest. That would be a strange procedure. Even if the Carrier's contention as to the necessity of

notice is correct, why should the Organization be penalized by being required to start over again? The better practice would appear to be to treat the question of the necessity of notice to third parties as one of the deadlocked issues presently before this Division and, if it should be concluded that such notices are required, to order that they be given and the claim continued for further proceedings subsequent to such notices. This logically leads to the question as to whether under the facts disclosed by the record before us notice to the Sheet Metal Workers and the Electrical Workers, represented by System Federation No. 30, was necessary.

The confronting problem is not one of first impression with this Board, with the agency of which it is a part, or with the courts. There is a basic and fundamental conflict among awards dealing with the subject. Illustrative of the conflicting schools of thought that have prevailed from time to time among a majority of the members of this Board (referees sitting) are Awards Nos. 2253 (Swain, Referee), 5432 (Parker, Referee), and 5702 (Wenke, Referee). There are numerous other awards to the same effect.

In Award No. 2253 it was concluded that Section 3(j) of the Railway Labor Act only requires that notice of hearing be given to the organization submitting the claim and the carrier involved; and that third persons whose interests might be indirectly affected by an award cannot be considered "parties of the dispute" or parties "involved" in the dispute within the meaning of Section 3(j), an exception being noted in the case of a third party covered by the same agreement and whose seniority rights might be adversely affected.

In the case disposed of by Award No. 5432 the Carrier had asked that the claim be dismissed because notice of the hearing had not been given to another organization that claimed that the work in question belonged to its members by virtue of its separate agreement with the Carrier. After taking note of the previous holdings to the contrary, a majority of members of the Board sustained the Carrier's contention, predicating its conclusion on a number of federal court decisions rendered since Award No. 2253 was adopted.

Award No. 5702 re-examined the subject, including the court decisions that were deemed to be pertinent to the inquiry, and re-affirmed the conclusion reached in Award No. 2253. It should be further noted that there were dissents in each of Awards Nos. 2253, 5432 and 5702.

We have read the decisions of the federal courts that have been called to our attention. No good purpose would be served by citing them again or by endeavoring to distinguish or reconcile them. It is enough to say that none of them decide the issue before us with such clarity and finality as to constitute a binding precedent for the guidance of this Board. We doubt if anything short of a definitive decision of the Supreme Court of the United States or a congressional amendment of the Railway Labor Act will put the issue at rest. The writer of this question does not indulge the hope that anything he may say will materially contribute to the solution of the problem.

An observation or two may, however, be ventured. In the court decisions that have been called to our attention and in the briefs that have been submitted to us, much has been said about "due process of law." We can see how that subject might be pertinent if, as has frequently occurred, a third party should go into a court of equity and seek an injunction against the enforcement of an award on the ground that he had had no notice of a proceeding that had adjudicated his property rights. On the other hand, we cannot see how a carrier can invoke an application of the due process doctrine in favor of a third party, as has been attempted here. What the Carrier is really attempting to do is to bring in an additional party or parties in order that there may be a final determination of its liability, if any, to each of such parties. This is a matter quite aside from due process.

The implications of the problem with which we are confronted are as unique as they are serious. The Carrier says, in effect, that if this Board should render an award sustaining the claim presently before us, without giving notice to "another (unnamed) party whose interest **might** be affected," our award would be void; and if notice is given and the third party intervenes the dispute will have to be resolved by negotiation or through the good offices of the Mediation Board. According to the Carrier's theory, this Board can retain jurisdiction of the claim only in the event that notice is given and the third party defaults. We do not believe the statutory jurisdiction of this Board can hang on such a slender thread.

We fully recognize the force of what the federal courts have said about due process of law, as applied to the situations that have been presented to said tribunals, but we have searched the cases in vain for any guidance as to how this agency can function if the contention of the Carrier is ultimately adopted. If Carrier's contention prevails, we may expect to be confronted with the situations whereby groups of employes over which this Division has no jurisdiction, but which are within the peculiar jurisdiction of another Division, will be coming to this Division and asking it to determine their contractual rights. There is no authority in the Railway Labor Act for such a procedure, and as far as we are advised no court has yet considered that aspect of the problem. Until that is done we think the safer course is to follow the practice that has generally prevailed, with only recent exceptions, ever since the Railway Labor Act was adopted.

The Carrier's contention with respect to the necessity of notice to third parties is accordingly denied.

Coming to the merits of the case, the Carrier says that the repair of an air pipe line which operates an electric-pneumatic switch forming an integral part of the car retarder system at Cumberland, Md., is not work within the scope rule of the Signalmen's Agreement. The scope rule, which has been in effect since 1920, reads:

> "The following rules shall apply to employes . . . performing the work generally recognized as signal work . . ."

Carrier is correct in asserting that car retarder systems were unknown when the quoted rule was first adopted. However, Awards 4712 and 5218 are authority for holding that the maintenance of car retarder systems comes within the above rule. Since said awards apply peculiarly to the work with which we are here concerned, and involved the same carrier and organization, we are disposed to follow them rather than Awards 4452 and 4768 which were concerned with the operation of C.T.C. machines.

Part (a) of the claim will be sustained, but part (b) will be denied because demands for monetary redress were waived by the special agreement of June 6, 1951, heretofore referred to.

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

Part (a) of claim sustained; part (b), having been waived, is denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 15th day of May, 1953.

DISSENT OF CARRIER MEMBERS

DOCKET SG-5970 — AWARD NO. 6203

We again reiterate the dissents made in Awards Nos. 5702 and 5781, and for the reasons expressed therein and the further reasons expressed here, this Award is null and void.

It is not within the power of any tribunal to make a binding adjudication of the rights of parties not brought before it by due process of law. A proceeding without having gained jurisdiction over the parties involved is void. In deciding that the Carrier could not invoke the due process doctrine in favor of a third party the majority overlooked the fact that the question before them was not merely one of "due process" but an even more basic question involving the Board's statutory authority.

It is elementary that the jurisdiction of this Board is entirely dependent upon the provisions of those statutes which repose power in it. If the provisions of the statutes are not met and complied with, we have no jurisdiction. The jurisdiction of this Board is limited by Sec. 3 (i) "to disputes * * * growing out of grievances or out of the interpretation or application of Agreements concerning rates of pay, rules, or working conditions * * *." Therefore, this Board is not the proper forum to interpret the statutes that created it.

The Statute then states in Sec. 3 (j) "* * * the Adjustment Board shall give due notice of all hearings to the employe or employes * * * involved in any dispute * * *."

The notice prescribed by the Act is mandatory and when we fail to give said notice we do not acquire jurisdiction. It is elementary the question of jurisdiction may be raised at **anytime.**

The Award states:

> "On the other hand, we cannot see how a carrier can invoke an application of the due process doctrine in favor of a third party, as has been attempted here."

It was pointed out to the majority that this question was well settled by the Third Circuit Court of Appeals in **Kirby et. al., v. The Pennsylvania Railroad Company,** 188 F. (2d) 793, (1951). That case held in part:

> "(1) Can the carrier raise lack of notice to someone else as a defense to it? * * *

"* * * If the carrier is not permitted to raise the question of notice to employes, it is in a dilemma in deciding whether to comply with a Board order. If it complies, it may be exposed to suit by the ousted employes for back pay and reinstatement. If it refuses to comply it may increase the amount of back pay owed the claimants. Either way it runs the risk of paying two groups of employes for the same work.

"In addition to these considerations based on fairness, there is another reason which, though technical, loses nothing in force thereby. The Board's authority to act is based upon the statute. Until the statutory requirements are met, it has no more standing to produce legally effective orders than any voluntary group of citizens. Anyone to be affected by the purported order can raise the point that it has no legal foundation. **We conclude that defendant carrier may raise the point that employes involved in the dispute had no notice or knowledge of the hearing, and no opportunity to be heard before the Adjustment Board.** A party is entitled to an award that will protect it in the event that it complies." (Emphasis supplied.)

This Award was rendered after the United States District Court for the Northern District of Illinois had in Civil Action No. 51 C 238, Frank Allain et. al., v. N.R.A.B. et al., granted a permanent injunction to prevent enforcement of Award No. 5123 of this Division. The Conclusions of Law in that case makes this Award even more inexcusable for the Court held, and the majority were aware of the holding, that:

"Plaintiffs were 'employes involved' within the meaning of Section 3, First (j) of the Railway Labor Act (45 U.S.C.A. 153 First (j)) in the dispute submitted to the THIRD DIVISION, NATIONAL RAILROAD ADJUSTMENT BOARD, which resulted in its said Award No. 5123 and Order entered pursuant thereto, and, as such, were entitled to due notice of all hearing, hearings or proceedings resulting in said Award No. 5123 and Order entered pursuant thereto.

"Said Award No. 5123 and Order entered pursuant thereto was entered by the THIRD DIVISION, NATIONAL RAILROAD ADJUSTMENT BOARD, on November 30, 1950 without any notice to the plaintiffs or the members of the class they represent as required by Section 3, First (j) of the Railway Labor Act. The proceedings terminating in said Award and Order entered pursuant thereto were out of their presence and they were not represented at said proceedings or given an opportunity to be heard.

"Said THIRD DIVISION, NATIONAL RAILROAD ADJUSTMENT BOARD, did, in failing to give due notice of any and all hearing, hearings or proceedings resulting in said Award No. 5123 and Order entered pursuant thereto to plaintiffs, failed and neglected to accord plaintiffs due process of law in contravention of the Fifth Amendment to the Constitution of the United States, and did thereby deprive plaintiffs and the members of the class they here represent of their property rights without due process of Law in contravention of the Fifth Amendment to the Constitution of the United States.

"The Western Pacific Railroad Company is entitled to an award and order sufficiently definite to support a plea of res judicata in case a subsequent claim should be made on the basis of the same set of facts and in behalf of the same nine individuals specified in paragraph 4 of the cross-complaint.

"The Western Pacific Railroad Company, has a legal right to raise the question, in opposition to the cross-complaint filed here-

in by the Brotherhood of Railroad Trainmen, that the National Railroad Adjustment Board's Award No. 5123 and the order made pursuant there to are null and void because its lounge and tavern car attendants were involved in said dispute and were denied their statutory and constitutional rights to notice and an opportunity to participate in said hearing."

Therefore, as there was another party involved in this dispute, and as the Carrier Members' motion to give said party due notice of all hearings as prescribed by Sec. 3 (j) failed to carry, all parties involved were not before this Division and we had no jurisdiction to render a valid Award.

We dissent.

/s/ R. M. Butler

/s/ W. H. Castle

/s/ E. T. Horsley

/s/ C. P. Dugan

/s/ J. E. Kemp