Award No. 7311
Docket No. CL-7214

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

LeRoy A. Rader, Referee

PARTIES TO DISPUTE:

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

PACIFIC ELECTRIC RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that: 1. Carrier violated agreement rules when, effective July 15, 1953, it abolished Station Clerk Job No. 67 at Fullerton, California, and transferred, effective July 16, 1953, a position of Assistant Agent, under the scope and operation of the Agreement of another craft and class, previously assigned one-half day at Santa Ana, California, and one-half day at Yorba Linda, California, to perform four hours Agent's work per day at Yorba Linda, California, and four hours of work of abolished Station Clerk Job No. 67 and/or other work under the scope and operation of the Clerks' Agreement at Fullerton, California.

2. The Carrier shall now pay L. W. Housley and other employes adversely affected to be determined by joint check of Carrier's payroll and other records for wage loss sustained from July 16, 1953, until violation terminated on June 16, 1954.

EMPLOYES' STATEMENT OF FACTS: There are three non-telegraphic stations of the carrier involved in this dispute; namely, Santa Ana, Fullerton and Yorba Linda, California. Prior to July 16, 1953, the station forces at these stations were as follows:

Santa Ana Station Force	Fullerton Station Force	Yorba Linda Station Force
#Job 203—Agent	#Job 64—Agent	*Job 344—Asst. Agent (½ day)
Job 207—Ticket Clerk	Job 66—Ticket Clerk	
Job 209—Ticket Clerk	Job 67—Sta. Clerk	
*Job 344—Asst. Agent (½ day)		

*Prior to November 1938 was Agent of Motor Transit Company, a subsidiary of Pacific Electric Railway Company. This position became Assistant Agent (Job No. 344) by Agreement between carrier and The Order of Railroad Telegraphers dated November 8, 1938, at which time Motor Transit Company operations were consolidated with Pacific Electric. Subsequently, this Assistant Agent was permitted to work one-half day at Santa Ana and one-half day at Yorba Linda through letter Agreement between carrier and the Telegraphers, although agreement between these parties had designated Yorba Linda as a Pacific Electric Agency.

#Historically Pacific Electric Agent positions.

If this be true, then the present dispute is tantamount to an abrogation of the principles which have now been agreed to by the national officers of the organization involved in the present dispute.

Factually, the Assistant Agent at Fullerton performed a portion of his day's work in capacity recognized as work usually performed by employes within coverage of the Telegraphers' Agreement, and the balance of his day (approximately 3½ hours) was utilized in performing clerical duties.

It goes without further comment that the position taken by the employes in the instant case is repugnant to the recognized principles of work performance and particularly repugnant to the principles recently agreed upon between railroad managements and labor organizations, including the labor organization party to the present dispute.

CONCLUSIONS

The Board is respectfully requested to:

1. Dismiss the claim because the subject matter of the dispute is a jurisdictional dispute, the merits of which the Board has no authority to determine.

2. Dismiss the claim because the Board is without legal authority to render an award in the absence of notice to all parties involved.

3. Dismiss the claim because it is vague, uncertain, ambiguous and unintelligible.

4. Enter a denial award because there has been no violation of any rule of the collective agreement in effect between the parties.

All data in support of Carrier's Submission is within the knowledge of the employes. Carrier reserves the right to submit additional data in opposition to data which may be presented by the employes and of which the Carrier now has no knowledge.

(Exhibits not reproduced).

OPINION OF BOARD: The controlling facts in this claim are set out in detail in the record and there is no dispute or conflict to be resolved on the same. It is deemed unnecessary to repeat these facts in this Opinion.

Petitioner relies upon Rules 1—Scope, 2—Definition of Clerical Workers, 5—New Positions, 6—Rates, 9—Hours of Service, 19—Notified or Called, 24, 26, 27 and 29 dealing with Seniority Rights. These rules are set out in whole or in part and will not be set out herein.

It is contended by petitioner that after clerical position No. 67 at Fullerton was discontinued effective June 16, 1953, the Assistant Agent performed 4 hours of clerical work and in working this job with other duties traveled some 10 miles to complete his day's work; that no telegraphers' work was involved as the work was strictly clerical in nature and had been performed by Clerks for years. Hence the claims, as stated.

Carrier's position is first a motion on the so-called third party notice, in this instance to the O. R. T., and, 2, on the "ebb and flow" theory of the work involved. Also that business in the Fullerton area had diminished. Cited is Award 4559 with other awards. Also that the work in question varies depending on circumstances, and that Carrier had a right to establish a new position under its agreement with the O. R. T. on a part-time basis. Also that Petitioner's position is stated in a vague and indefinite manner.

We will first consider the jurisdictional question. In citations presented for our consideration of court decisions, all have been cited before, with one exception, in cases presented involving the so-called third party notice to

this Division. As far as we are informed the Supreme Court of the United States has avoided a square ruling on this issue and until such a decision is rendered we believe the weight of authority is that such notice is unnecessary as the latest pronouncement of the Court seems to be that as the Railway Labor Act, as amended, does not give an answer it is concluded that no notice need be given beyond parties to the submission. 349 U. S. 370.

On the proposition that the claim is vague and indefinite, we are not in accord. Sufficient facts are cited to give an understanding of the involved situation and likewise we are not in accord with the Carrier's stated position on the establishment of a new position with the O. R. T., on facts here presented. The clerical work of the position continued and a year later the new arrangement was terminated. Also the principle of "ebb and flow" doctrine is of doubtful application on these facts. There never had been a position of Assistant Agent at the station involved therefor it did not ebb back to any position from which it flowed.

See Award 4288 on the general situation presented here which we adopt and reaffirm.

> "We think the rule stated in Award 615, as limited by Award 636 and other subsequent awards, means that telegraphers with telegraphic duties to perform have the right to perform clerical duties to the extent necessary to fill out their time, but that said clerical duties must be incidental to or in proximity with their work as a telegrapher. See Award 3988. It was never intended that a telegrapher might be severed from his post and sent to an unrelated location to fill out his time, or, that clerical work might be taken from a clerical position at an unrelated point and brought to a telegrapher to be performed by him. Such an interpretation would permit an improper invasion of the rights of clerks under their agreement and render the positions of clerks very insecure.
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> "In the case before us the clerical position abolished was in the freight house, located some 500 feet from the passenger station, where the telegraphers were employed. To abolish a position in the freight house, a position wholly clerical in character, and assign the work to telegraphers at the passenger station to fill out their time, constitutes a violation of the announced rule. The fact that telegraphers had formerly performed this work does not alter the situation. An affirmative award is in order."

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

Claims sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 30th day of April, 1956.

DISSENT TO AWARD NO. 7311, DOCKET NO. CL-7214.

In this dispute the Carrier made timely objection to the Division's proceeding without first giving Telegraphers the due notice required by Section 3, First (j) of the Railway Labor Act. The Division's failure to adopt Carrier's motion created jurisdictional error which could subsequently be cured by either denying the claim on the merits, or dismissing it for noncompliance with Section 3, First (j).

By disregarding its statutory duty and erroneously sustaining the claim, the majority has issued an illegal award. It thereby adds a "heavy thumb" to the scale of justice and concludes that dicta in **Whitehouse v. Illinois Central R. R. Co.**, 349 U. S. 366, becomes superior in weight of authority to unanimous agreement among the District Courts and the Courts of Appeal which have ruled squarely on the issue.

The undersigned believe that the instant award is not supported by the **Whitehouse** case because the Court therein specifically refrained from deciding the question of due notice. The opinion there said that the Court had decided "to confine ourselves to deciding only what is necessary to the disposition of the immediate case." This decision was:

> "We hold, in conformity with past decisions, that the injuries are too speculative to warrant resort to extraordinary remedies."

Recently, the Supreme Court has made clear that the **Whitehouse** case is limited to this simple procedural point. On March 26, 1956, the Supreme Court declined the specific invitation to overthrow a ruling that notice must be given. The Supreme Court denied certiorari in **Order of R. Telegraphers v. New Orleans, T. & M. R. Co.** In that case the Court of Appeals for the Eighth Circuit in an opinion on January 10, 1956, had held that the **Whitehouse** case was limited as follows:

> "By divided Court it simply reversed the decree of injunction on the ground that prior to any proceedings brought by Telegraphers before the Board, 'the injuries are too speculative to warrant resort to extraordinary remedies.' The Court declined to adjudicate upon the merits of the controversy."

It was specifically argued to the Supreme Court that this misconstrued the **Whitehouse** case. The Supreme Court evidently felt otherwise.

The Majority first admits that the Supreme Court has avoided a square ruling on the issue of due notice; then proceeds to use language of the **Whitehouse** case out of context to do just what the Supreme Court refused to do. The Supreme Court stated:

> "The wording of the notice provision of § 3 First (j) **does not give a clear answer.** In the context of other related provisions it is certainly not obvious that **in a situation like that now before us notice need be given beyond the parties to the submission."** (Emphasis added.)

Here, the majority says that as the Railway Labor Act, as amended, "**does not give an answer** it is concluded that no **notice need be given beyond parties to the submission.**" (Words also used by the Supreme Court emphasized.) The majority omits the qualifying phrase used by the Supreme Court, viz., "in a situation like that now before us." The Supreme Court was specifically ruling on the issue of whether injunctive relief could be brought prior to a decision by the Board and held that "the injuries are too speculative to warrant resort to extraordinary remedies." Although the Supreme Court specifically declined to adjudicate upon the merits of the controversy, the majority herein did not hesitate to do so.

If the Supreme Court chooses to avoid a square ruling on the issue, can we simply ignore the deliberate and solemn decisions of the District Courts and Circuit Courts of Appeals? It is elementary that decisions made by Courts after argument on a question of law fairly arising in a case, and necessary to its determination, are authority, or binding precedent, in the same court or in courts of equal or lower rank, in subsequent cases, where the very point is again in controversy. The majority herein attempts to move this administrative tribunal so far up the judicial ladder that it is answerable only to the Supreme Court. Obviously, Congress had no such intent in creating this Board for in Section 3, First (p) of the Railway Labor Act it gave the District Courts of the United States jurisdiction over all enforcement actions on Awards of this Board.

If the Supreme Court chooses to avoid a square ruling on the issue, and the Board persists in this jurisdictional error, what remedy does a Carrier have to avoid the costly litigation that has invariably ended with a holding that the Board's Awards are null and void? The Referee was cited the District Court decision wherein our **Award 4734** was held illegal and void because it was rendered by this Division without the Clerks being given notice and an opportunity to be heard. He was also given a copy of the Eighth Circuit Court of Appeals decision upholding the lower court's findings. **Order of Railroad Telegraphers v. New Orleans, Texas & Mexico Railway Co.**, supra. He was also cognizant that the Eighth Circuit Court of Appeal's opinion was made in light of the **Whitehouse** case, and that the Court found no conflict therein. The Referee was also aware that on March 26, 1956, the Supreme Court denied the Telegraphers' petition for writ of certiorari in that case. Thus, if our Awards are found illegal and void by lower Courts and the Supreme Court refuses to accept appeals therefrom, we can only assume that the Supreme Court concurs in the findings, for the end result is that the Craft has exhausted its judicial remedies and ends with an invalid Award. Hence, this dissent.

/s/ J. F. Mullen
/s/ R. M. Butler
/s/ W. H. Castle
/s/ C. P. Dugan
/s/ J. E. Kemp