

Award No. 7409
Docket No. TE-5722

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Donald F. McMahon, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

ILLINOIS CENTRAL RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Illinois Central Railroad Company, that

(1) The Carrier violated and continues to violate the terms of the agreement between the parties, when on September 1, 1949, it declared abolished the position of first trick telegrapher at Palestine, Illinois, without abolishing the work thereof;

(2) The Carrier further violated said agreement when on October 16, 1949, acting alone, it transferred the work of the Agent's position, except between February 15 and May 10, 1950, to an employe not subject to the agreement.

(3) The position of first shift telegrapher at Palestine, Illinois, shall be restored to the agreement, and the work of said position and the former incumbent thereof shall be returned thereto;

(4) The position of Agent shall be restored to its former status and the work of said Agent's position shall be returned to the agreement with the incumbent thereof undisturbed;

(5) All other employes covered by the agreement who have been affected as a result of these violative acts, shall be returned to their former positions and compensated for any wages and expenses incurred.

EMPLOYES' STATEMENT OF FACTS: An agreement bearing effective date of June 1, 1939, as amended September 1, 1949, is in evidence, hereinafter referred to as the Telegraphers' Agreement.

Prior to September 1, 1949, all the station personnel at Palestine, Illinois, was under the Telegraphers' Agreement, as follows:

Agent's hours 7:00 A. M. to 4:00 P. M., one hour for lunch.

Not required to telegraph, performing all agency duties with the full supervision and responsibility of the station.

The Award held:

"Claim continued for the purpose of notifying the Brotherhood of Sleeping Car Porters so they may appear and be represented in this proceeding if they so desire or to be settled on the property by the three parties involved."

The summarized position of the Carrier is:

1. No rule of the agreement with The Order of Railroad Telegraphers has been violated.

2. The position of Agent-Operator (~~not Agent as is stated in Items 2 and 4 of claim~~) has been in effect continuously since June 1, 1939, and before, in fact the same incumbent has been continuously assigned to the same position (and title) since August 1, 1932, and changes in the forces needed have been in accordance with the provisions of agreements with The Order of Railroad Telegraphers and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes.

3. No work exclusive to the agreement with The Order of Railroad Telegraphers has been or is being performed by employees outside the scope of that agreement.

4. The awards of this Division have held that telegraphers hold no exclusive right to clerical work but may be assigned such work to fill out their tour of duty as an operator. (See Awards 109, 615, 2334, 4477, 4492, 4969, 4998 and 5318).

5. A decision in this case does not fall within the authority of the Board because there is no rule or rules to be interpreted.

6. Under the conditions and situation here related the petitioner is contending for work that is exclusive to another agreement, and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes should be notified so they can be represented at this proceeding.

If, however, your Board gives consideration to the merits in this case, the claim should be denied.

All data submitted in support of the Carrier's position have been presented to the Employees in correspondence or discussion in conference and are made a part of the question in dispute.

(Exhibits not reproduced.)

OPINION OF BOARD: Carrier has raised a jurisdictional question in this cause, as to the authority of the Board to make a sustaining award herein.

It is contended by Carrier the rights of employees of another organization may be adversely affected by such an award. Several decisions have been recently written concerning the question at issue by our Federal Courts, but the courts are not agreed as to a method of procedure to make a definite determination of this issue. The particular case before us has been determined by the U. S. Supreme Court, on the jurisdictional question, and under such decision we must hold, that no notice to parties other than those named in the submission need be given. See—Whitehouse vs. Illinois Central R. R. U. S. Supreme Court, opinion dated 6-6-55.

The organization contends that Carrier has violated the provisions of the agreement, when on September 1, 1949 it abolished the position of 1st trick telegrapher, at Palestine, Illinois, but did not abolish the work of the position, which was assigned to the agent operator, and that within a short period of time, the agent operator was relieved of many of the

clerical duties, consisting of a major portion of the clerical work formerly performed by the operator before the position was abolished. That such work was assigned to an employe covered by an agreement with the Clerks' organization is also contended.

It is noted the Telegraphers' agreement covered positions at Palestine, and included positions listed as agent operator, second and third trick operators. Although the record shows for many years prior to September 1, 1949, that Carrier had in effect such positions as agent, and 1st trick operator, in addition to those above enumerated and set out in the agreement. It is further noted in the record that the 1st trick operator, in addition to his telegraphic duties, did perform clerical work for a period of several years prior to 1949, except for a period prior to 1942, when Carrier had no 1st trick position and the work was performed by the agent operator. Since 1942, Carrier has had a first trick operator on duty until on September 1, 1949, when the position was abolished and this claim came into being.

While the Scope Rule in the agreement is general in character, it does specify certain positions covered by the agreement. This Board has held in many awards, based on sound reasoning, that the Scope Rule, being general in character, does not give the telegraphers the exclusive right to perform all the clerical work, and no such contention is made in this case. But we do find that in the matter before us, that because of a long and established custom and practice at Palestine, the telegraphers had been performing such work, and it is covered by their agreement.

On September 1, 1949, Carrier abolished the position of 1st trick operator and required the agent operator to perform the work of the abolished position.

Subsequent to September 1, 1949, Carrier did relieve the agent operator of many of his clerical duties, including those assigned him when the telegrapher position was abolished. A new position was bulletined to take over such work from the agent operator and was assigned to an employe covered by the Clerks' agreement, the correct date to be determined by a check of Carrier's record by the parties.

On February 15, 1950, Carrier reassigned the work and required it to revert to the agent operator, which arrangement continued to August 24, 1950, and the work in question was again assigned to an employe of the Clerks' organization.

We fully agree, with the numerous awards cited, that Carrier has the right to abolish positions. But Carrier is not authorized to abolish a position and assign the work to employes in another organization, when such work has been performed over a period of many years, and it has become an established custom and practice, as in this case, for the telegraphers to perform the work. Such action constitutes a violation of the agreement, as Carrier herein did abolish the 1st trick operator position, while the work remained, and it was subsequently assigned to an employe outside the Telegraphers' agreement.

It is also noted in the record that the Telegraphers protested such action by the Carrier, promptly and in clear and concise terms, in abolishing the position, and each time an alleged violation of the agreement took place.

The Board is of the opinion that Carrier did violate the agreement, by its actions in assigning the clerical work of the abolished position to those of another craft, causing the employes of the Telegraphers' organization to be wrongfully deprived of the work to which they were justly entitled, under their agreement and the long and established custom and practice of assigning such work at Palestine.

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 Carrier has violated the provisions of the agreement as alleged.

AWARD

Claim sustained as per Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois this 19th day of September, 1956.

DISSENT TO AWARD NO. 7409, DOCKET NO. TE-5722

This dispute is a thinly camouflaged perversion of this Division's proper function for, *ab initio*, this has actually been a jurisdictional dispute between two Organizations, with the Illinois Central in the middle. The Illinois Central established a new position to render purely clerical assistance to an Agent-Operator. The position performed no telegrapher functions. Under such circumstances, the Illinois Central was bound to recognize the awards of this Division which hold that such "... excess clerical work belongs to clerks and must be assigned to them." Award 4559. See Awards 615, 4477, 4832, 5014, 5489, 7246, 7356 and many others.

The Illinois Central established this clerical position and assigned it to D. A. Shears, whereupon the Telegraphers' Organization made claim to the position and work. The Clerks' Organization then notified the Illinois Central that they would file monetary claims if it acceded to the Telegraphers' request and replaced the clerk with a telegrapher. The Clerks also requested the Telegraphers to withdraw their claim. The Telegraphers persisted, and ultimately progressed their jurisdictional dispute to this Division.

The Division as originally constituted failed to perform its constitutional and statutory obligation to give due notice of all hearings to D. A. Shears and the Clerks' Organization. The dispute was deadlocked, whereupon the present Referee was appointed by the National Mediation Board to act as a member of the Board for the purpose of making an award.

The Illinois Central was aware of the disruptive and costly litigation which resulted from the Division's failure to give due notice in Awards 3932, 3933, 3934, 4735, 5014 (the M-K-T Cases), and Awards 2254 and 4734 (the N.O.T. & M. Cases), whereupon the Illinois Central sought injunctive relief to prevent the Division from proceeding unless and until formal notice, and an opportunity to participate, was given to D. A. Shears and the Clerks.

On July 3, 1953, the District Court of the United States, Northern District of Illinois, Eastern Division, Igoe J., granted the relief sought and held that the failure of this Division to serve notice of the hearings or proceedings in this dispute upon the individual presently filling the position in controversy and upon the Organization representing the craft of which he is a member, was a dereliction of the duty imposed upon the Board by the mandatory requirements of Section 3, First (j) of the Railway Labor Act. The Court prophesied that "The failure of the Board to serve the required notice will involve plaintiff in multifarious litigation."

The District Court's injunction was upheld by the United States Court of Appeals for the Seventh Circuit, 212 F. 2d 22. On appeal, the Supreme Court of the United States, in a split decision, reversed the lower courts on the single point that the "injuries were too speculative to warrant resort to extraordinary remedies." 349 U. S., 366.

The Supreme Court was obviously impressed with Labor's argument that the injunction was premature because the Referee might decide the claim in favor of the Illinois Central, either on the question of notice or on the merits.

The prophecy of the District Court has now been confirmed, for although the governing principle in this dispute has been decided adversely to the Telegraphers many times, and although the present Referee had adhered to the principle in Awards 6269 and 6363, in this dispute he completely ignored all precedent awards, including his own. Thus, after three years of multifarious litigation, we have only reached another plateau in the final determination of this dispute, viz., the Telegraphers have now exhausted their administrative remedies, and the injuries which the Supreme Court found hypothetical have been made real.

The dilemma in which the Illinois Central now finds itself must inevitably create further industrial friction for it must now decide whether to comply with this award and be subjected to a suit to enjoin compliance and/or Board proceedings by the Clerks, or to refuse to comply and attempt to defend an enforcement proceeding brought under Section 3, First (p) of the Railway Labor Act.

Whatever the future course of this dispute, it is obvious that this Division's failure to perform its constitutional and statutory duty results in increased tension and strife in the industry and burdens the judiciary with disputes this administrative agency was established to handle. As the United States District and Circuit Courts of Appeals uniformly hold that awards rendered without due notice to all parties are null and void, and inasmuch as the Supreme Court of the United States denies certiorari and refuses to review such lower court decisions (the N.O.T. & M. Case), it is high time that this Division restore its dignity by recognizing and conforming to the law of the land.

For the reasons stated herein, and those contained in previous dissents and concurring opinions on the same subject, we dissent.

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

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Interpretation No. 1 to Award No. 7409

Docket No. TE-5722

NAME OF ORGANIZATION: The Order of Railroad Telegraphers.

NAME OF CARRIER: Illinois Central Railroad Company.

Upon application of the Carrier involved in the above Award, this Division was requested to interpret the same because of an alleged dispute between the parties as to its meaning and application, as provided for in Section 3, First (m) of the Railway Labor Act.

Carrier requests an interpretation of said award, and for reasons set out in the application relies upon facts and circumstances which were not then pending before the Board at the time the award was made and adopted.

It must be distinctly understood that the granting of a hearing before the Board on an application for an interpretation of an award does not constitute a rehearing nor a reopening of the case. The only purpose that an interpretation of an award will serve is to clarify and explain the meaning of the award as made.

The only evidence properly before this Board is that which was disclosed by the record at the time the award was made. The evidence now submitted by the parties in reference to the request for an interpretation is based on facts and circumstances not found in the original record before the Board, and constitutes new evidence upon which the Board has no authority to consider.

The award as made herein is clear and is not ambiguous. The question raised by Carrier in its request before us is not subject to interpretation.

Referee Donald F. McMahon who sat with the Division, as a member, when Award No. 7409 was adopted, also participated with the Division in considering the application for interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of **THIRD DIVISION**

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 22nd day of May, 1958.