Award No. 7975
Docket No. CL-7486

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

A. Langley Coffey, Referee

PARTIES TO DISPUTE:

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

FLORIDA EAST COAST RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that

(a) Carrier violated and continues to violate the parties' agreement effective January 1, 1938, when on August 5, 1953 it abolished Clerk Position No. 2, at Stuart, and transferred duties of that position to the Agent and to incumbent of Ticket Clerk-Operator Position No. 4074, established on November 24, 1953, and that

(b) Carrier shall compensate Clerk C. H. Stauss and all other employes who may have been or who may be affected by the abolition of Clerk Position No. 2, at Stuart, for all wage losses resulting from abolition of this position on August 3, 1953, and the transfer of the work of that position to employes of another craft and class of employes.

EMPLOYES' STATEMENT OF FACTS: Subsequent to the effective date of the current agreement between the parties Position No. 2, at Stuart, was first advertised as shown by Employes' Exhibit "A", with the following described duties:

"The duties of this position will consist of expensing, way-billing, abstracting, by use of typewriter; handling OS&D's, reports, and receiving and delivering freight, delivering and receiving baggage, and other duties assigned by Agent."

By referring to Employes' Exhibit "B", it will be observed that on May 30, 1953, the Employes complained that the incumbent of Clerk Position No. 2, at Stuart, whose advertised duties are quoted above, was being required to perform work connected with the sale of tickets and making of reservations, a function of work that carries a daily rate of pay $1.6471 higher than the rate of pay of Position No. 2, and $0.7416 per day in excess of the rate of pay of Ticket Clerk-Operator Position No. 4074 that was established at Stuart on November 24, 1953.

From Employes' Exhibit "C", which is a letter from the Superintendent dated July 1, 1953, it will be observed that the Superintendent alleged that

In a case where the claim of the employes was similar to the one in the instant case insofar as it relates to the establishment of Position No. 4074, the Third Division in Award 635 denied the claim on the Opinion that:

> "This case is similar in principle to that involved in Award No. 615 in which the relations between the Clerks' agreement and the Telegraphers' Agreement so far as concerns situations of this kind was given extended consideration and the conclusions there reached are applicable here."

For the reasons stated herein, the claim in its entirety is without merit and should be denied.

The Florida East Coast Railway Company reserves the right to answer any further or other matters advanced by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, in connection with all issues in this case, whether oral or written, if and when it is furnished with the petition filed ex parte by the Brotherhood in this case, which it has not seen. All of the matters cited and relied upon by the Railway have been discussed with the employes.

(Exhibits not reproduced.)

OPINION OF BOARD: The basic issue in dispute concerns jurisdiction over work. It is contended that the Carrier abolished a position under the Clerks' Agreement and later created one under the Telegraphers' Agreement for performing substantially the same work, thereby depriving the named claimant and others believed to be similarly situated of a work opportunity provided by contract.

In its first submission and as its first stated position in accordance with Circular No. 1 (Board Rules of Procedure), Carrier states:

> "The Employes covered by the Agreement with the Order of Railroad Telegraphers are interested parties to the dispute and in accordance with Section 3, First (j) Railway Labor Act, should be notified by the Third Division, National Railroad Adjustment Board, and afforded an opportunity to protect their interests."

The record further shows that the instant docket, after oral hearing had been scheduled, again came on for Board consideration pursuant to the Carrier Members' motion that the scheduled oral hearing be cancelled, and that a new date be set for the oral hearing in order to give a Section 3, First (j) notice to other parties involved in the proceeding. Motion failed.

The Board next referred the case for decision after appointment of a Referee to assist therein. As shown by the briefs on file, the jurisdictional question was argued to the Referee. Except for the suggestion made in the Carrier brief that a denial award will eliminate the need for deciding the question of due notice, there is no escape for entertaining and deciding in this docket some of the questions that the Supreme Court in **Whitehouse vs. Illinois Central R. Co.**, 349 U. S. 366, found to be perplexing and difficult, but not to be decided in an action for injunctive relief in that case.

If the notice prescribed by Section 3, First (j), supra, is required in this proceeding, then the notice is a condition precedent to hearing and a denial award does not, as suggested, necessarily correct a defect in the record for failure to give notice.

Another possible escape is that suggested by the Labor Members on the Board when they argue that the Referee has no authority to decide the question of giving notice, citing **Whitehouse vs. Illinois Central R. Co.**, 7th C.C.A. 212 F. 2d 22, reversed by the United States Supreme Court, 349 U. S. 366.

The position thus taken, however, is at variance with and diametrically opposed to what was argued by counsel for the Labor Members in his brief in the Whitehouse case on appeal to the Supreme Court and we quote:

> "The Court below (the Circuit Court) held that the Board, with the referee sitting as a member, should be enjoined from proceeding further with the case because notice had not been given to certain allegedly involved parties, holding that the referee had no authority to participate in deciding whether third parties were involved, and if so, their identity. The Court conceded that it could find no precedent for such holding. It based such holding simply on the reasoning that the Act provides for the appointment of a referee only to sit with the Board and make an award, that such provision contemplates that all procedural requirements of notice have already been met, that the authority of a referee to sit as a member of the Board has no relation to the obligation of the Board to give notice to 'involved' parties and that the Board has no power to proceed to do anything until all notices have been given.
>
> **"Such holding has utterly frustrated the operation of the Railway Labor Act with respect to claims presented to the Board in which the Carrier makes the contention that notice to others than the claimant and the Carrier is required."** (Emphasis supplied.)

On appeal, the Supreme Court does no more than comment on the proposition, as follows:

> "We have been urged to reverse the holding of the lower court that a Referee may neither be appointed to resolve a deadlock on the question of notice nor, having been appointed to break a deadlock on the merits, may vote to dismiss the proceeding because of failure to give the required notice."

Further, and at another place in the opinion, the Court says:

> "These are perplexing questions. Their difficulty admonishes us to observe the wise limitations on our function and to confine ourselves to deciding what is necessary to the disposition of the immediate case."

A fair appraisal of the Supreme Court's opinion and what was decided on appeal in the Whitehouse case, is to be found, we think, in Labor Law Reports Weekly Summary, dated June 9, 1955, published by Commerce Clearing House, to-wit:

> "The Supreme Court reversed these decisions on the narrow grounds tha a request for judicial relief should not have been made before the Board had issued any award and that the railroad was not subject to irreparable injury which would justify the requested relief. By such action it avoided the necessity of deciding the following difficult questions: Was the Clerks' union entitled to notice? May a referee resolve a deadlock on the Board over a question of notice? Can claims of two unions be settled in a single proceeding before the Board? May defects in an N.R.A.B. award be cured in an enforcement proceeding? All these questions remain unanswered."

It is our impression, from what is said by the Supreme Court in the Whitehouse case, after being fully cognizant of referee participation as shown by reference to conflicting opinions, that the high Court is of the opinion that this Board is best qualified and peculiarly fitted to rule upon which of the disputes docketed before it should be handled pursuant to Section 3, First (j), supra, and leaves it clearly implied that this Board is the proper forum for making the initial decision. Hence, we agree with the Labor Members' counsel in the Whitehouse case that without referee partici-

pation in resolving questions of notice, the purposes of the Railway Labor Act will be thwarted.

Accordingly, and again that which is proffered as an escape hatch affords no escape at all.

Not every dispute docketed with this and other Divisions of the Board poses the question of due notice. See our Award 15220 (First Division) for a discussion of what the question of notice involves. In that case we concluded that the Board had jurisdiction over the only necessary parties and over the subject matter.

The Supreme Court in the Whitehouse case seemingly supports the view that the question cannot be decided in the abstract. Again we quote from the body of the opinion:

> "Apart from some lower courts dicta, there is no reason for holding, in the abstract, that any possible award would be rendered void by failure to give notice to an outside even if related interest that cannot be compulsorily joined as a party to the proceeding."

Although the Whitehouse decision fails to decide the substantive issues, it does point the way, in our opinion, for overcoming the great body of court precedent that holds awards of this Board void for failure to give notice. If our impression is the one intended by the Court in the Whitehouse case, there appears some assurance that the courts in the future will be less likely to strike down Board awards for failure to give notice once the Board, with or without the assistance of a Referee, has ruled on whether the dispute involves others than those whose appearance is a matter of record and makes its own judicial determination of whether or not notice should be given to others who purportedly are "involved" in the dispute.

One of the perplexing questions with which the Board always is faced concerns who is entitled to notice. Occasionally it is made to appear that another carrier's rights may be put in jeopardy but, in the main, the purported conflict of interest involves employes assigned or engaged in work that is the subject of claim made by others.

The Organization Member on the Board says in this docket that no employe is presently assigned, and argues, therefore, that no notice of hearing need be given since no "employe or employes" is or are involved.

This Referee has never been able to see where an individual employe who may be affected by an adverse decision involving the interpretation of a collective agreement is a necessary party to any dispute or has such inherent right to the work to which assigned or in which engaged, as will give him a voice in how the agreement that is put in issue by the dispute should be interpreted. The contrary view that seemingly has been expressed by our courts loses sight of awards by this and other Divisions of the Board in great numbers which hold that, as between the individual and the Organization holding the contract, the right to interpret these agreements is lodged exclusively in the designated Representative of the employe or employes whose rights are fixed by the agreement.

What then is the result where notice of hearing is given to the individual employe and he appears before the Board to lay claim to work that is in dispute? Is it to be expected of us, as Referee and the one who must make the decision finally, that, after hearing at which the individual employe appears, we must entertain and possibly adopt the employe's interpretation of the agreement that gives rise to the dispute, same frequently being an agreement under which the disputing employe, who some consider to be involved in another's dispute, has no rights? If, as we believe, no purpose is served by giving notice of hearing to the individual employe, it must then follow that the Congressional intent expressed by use of the term "employe or employes" is that the notice, if any is required, should be given to the Employe Repre-

sentative. Therefore, it continues to be our impression that the dispute must be one that involves interpretation of more than the one agreement at issue and not every conflicting claim to work brings the dispute under Section 3. First (j), supra, just because an individual employe stands to win or lose by the decision.

In the instant case notice of hearing should be given. The submission makes it clear that a decision here must hold that the position in dispute is under the scope of either the Clerks' Agreement or the Telegraphers' Agreement but not both, thereby making both agreements subject to interpretation by the Board in a jurisdictional dispute over work involving more than one contract.

We will not dismiss the claim for failure to give notice. Instead it will be the findings and award at this time that the dispute is not at issue and cannot be finally heard and decided until The Order of Railroad Telegraphers has been notified to appear and protect whatever interest the employes under its agreement may have in the outcome of the dispute.

FINDINGS: The Third Division of the Adjustment Board, 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, subject to the following finding as to notice:

That The Order of Railroad Telegraphers is involved in this dispute and, therefore, entitled to notice of hearing pursuant to Section 3, First (j) of the Railway Labor Act.

That the dispute is not at issue.

AWARD

Hearing and decision on the merits deferred pending due notice to The Order of Railroad Telegraphers to appear and be represented in this proceeding if it so desires, or to permit the parties involved to settle the claim on the property if they wish to do so.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 24th day of June, 1957.

DISSENT TO AWARD NO. 7975, DOCKET NO. CL-7486

We dissent.

/s/ J. H. Sylvester
/s/ C. R. Barnes
/s/ J. W. Whitehouse
/s/ R. C. Coutts
/s/ G. Orndorff
Labor Members