

Award No. 8105

Docket No. TE-7748

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Paul N. Guthrie, Referee

PARTIES TO DISPUTE:

ORDER OF RAILROAD TELEGRAPHERS

THE CHESAPEAKE AND OHIO RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Chesapeake and Ohio Railway (Chesapeake District), that:

(1) Carrier violated and continues to violate the Agreement between the parties, when commencing on the 7th day of June, 1949, and continuing thereafter, it failed and refused to assign work of handling remotely controlled, electrically operated switches and signals from a central point at Richmond, Virginia, such switches and signals being located at "D" Cabin, Richmond, Virginia.

(2) Carrier now be required to assign such work to employes covered by the Telegraphers' Agreement, and that all Employes adversely affected by being deprived of such work, shall be compensated retroactively to June 7, 1949, at rate of pay for comparable positions, for each and every day and shift such work is performed by employes not covered by the Telegraphers' Agreement.

OPINION OF BOARD: This docket is a resubmission of a claim which was before the Division in Docket TE-6621 on which Award 6813 was made on November 29, 1954. In that Award the Division did not rule on the merits of the dispute, but instead dismissed the claim without prejudice because notice pursuant to the requirements of Section 3, First (j) of the Railway Labor Act had not been given to the Dispatcher's Organization.

Petitioner in resubmitting the dispute in the instant docket asks that the Division consider and render an Award on the merits of the claim as originally made.

It is necessary to consider two preliminary questions in connection with this case. First, can the Division consider the case in view of the fact that a prior Award was made concerning this identical case. In other words, is the case now barred because of the principle of *res adjudicata* and because of the provisions of Section 3, First (m) of the Railway Labor Act?

Second, is the Division required to give notice to the Dispatchers' Organization in accordance with the provisions of Section 3, First (j) of the Railway Labor Act?

With respect to the first preliminary question, it is important to note what the Division's prior Award, No. 6813, provided. The Award read: "Claim dismissed without prejudice in accordance with Opinion and Findings." Reference to "Opinion and Findings" indicates that the reason for dismissal was that notice had not been given to the Dispatchers' Organization in accordance with the requirements of Section 3, First (j) of the Railway Labor Act.

Had the Division made a decision on the merits, it is clear the resubmission would be barred by Section 3, First (m) of the Railway Labor Act and by the principle of *res adjudicata*. However, in view of the Award which was made, we do not believe its resubmission is barred by these considerations. However, in considering the resubmission, we are privileged to inquire whether the defect which dictated the Division's prior action has been adequately met in the meantime.

This leads to a consideration of the second question stated hereinabove. The record shows that the defect which dictated the Division's prior action has not been remedied in the meantime. Apparently, no action has been taken to give official notice of the pendency of this claim to the Dispatchers' Organization which apparently the Division in its prior action regarded as an "involved party". Since the Division in its prior Award, No. 6813, decided that notice to the Dispatchers' Organization was required, we are not privileged to redecide that matter. To this extent *res adjudicata* is applicable here.

Nevertheless, it is appropriate to point out that we agree with the decision made in Award 6813 to the effect that notice, under the circumstances involved, was a condition precedent to a consideration of the merits. The Referee now sitting has discussed this matter of third party notice to some extent in Award 8022. The views there expressed apply here.

The conclusions reached in Award 6813, and the conclusions reached in Award 8022 were dictated by the requirements of Section 3, First (j) of the Railway Labor Act, as construed by the various Courts which have considered the matter. Section 3, First (j) places the obligation of giving notice to other parties upon the Board. Therefore, the defect precluding the consideration of the merits at this time is one which the Board has the power and obligation to remedy. Since it is the Board's responsibility to remedy the defect, it is appropriate for the Board to retain jurisdiction, but to defer any action on the merits until such time as it has given notice to the Dispatchers' Organization in accordance with the requirements of Section 3, First (j) as interpreted by the Courts.

Award 7466 is in particular point here as it involved a similar resubmission to that in the instant case.

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 Employees 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 any decision on the merits must be deferred.

AWARD

Consideration of and decision on the merits is deferred pending notice by the Division to the parties, Carrier, Order of Railroad Telegraphers, and American Train Dispatchers Association, as contemplated by Section 3, First (j) of the Railway Labor Act as interpreted by the Courts.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 23rd day of October, 1957.