

Award No. 8419
Docket No. TE-7972

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Edward A. Lynch, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

READING COMPANY

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

1. The Carrier has violated and continues to violate the provisions of the Agreement between the parties when and because it declined and continues to decline to assign to employees covered by said Agreement the duties of operating teletype and other mechanical machines used for transmitting and/or receiving communications of record; and

2. The Carrier shall be required to forthwith assign such operation to employees covered by the Telegraphers' Agreement.

EMPLOYEES' STATEMENT OF FACTS: This is a resubmission of the dispute that reached your Board through Employees' notice dated October 6, 1950, covered by Docket TE-5487, but was dismissed, by Award No. 5432, without prejudice on the 6th day of September 1951, without a decision being given on its merits. The Opinion and Findings are quoted in part:

"OPINION OF BOARD:

* * *

"At the outset the Carrier advances two contentions which must be disposed of because if its position with respect to either is sustained the confronting claim is not now in shape to be heard upon the merits. First, the Carrier challenges the right of the Board to hear and determine the claim for the reason the record shows a jurisdictional dispute is pending between the Clerks and the Telegraphers with respect to the operation of teletype and other mechanical machines used for transmitting and/or receiving other communications of record. Secondly, it points out the Clerks have rights under their contract which may be affected by our decision, hence they are interested parties, and question our right to render a valid sustaining award because the Clerks' Organization was not

The carrier further maintains that the Board lacks power and authority to render a valid sustaining award in the instant dispute for the reason that the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees have not been served with what is known in law as "process" and made a party to the pending proceeding.

In the opinion of Board in Award No. 5432 it was stated in part:

"From what has been heretofore related, it becomes apparent the established law of the land now is that the provisions of Section 3, First (j), supra, require that notice be given to the Clerks' Organization under the existing facts and circumstances of the case now before us. This Board is no greater than the source of its creation. When that source gave the courts power to set aside its orders and that authority is exercised in the manner above indicated we not only have the right but it becomes our duty to adopt and follow a practice which the courts definitely indicate will give validity to what are now held by them to be invalid awards. With the rule so well established to hold otherwise can only result in unnecessary waste of time and useless expenditure of funds on the part of the employees, the carriers and the Board. Therefore we bow to the inevitable and, notwithstanding what may be found to the contrary in any of our previous awards, hold that this case cannot now be heard on its merits because it appears from the records that the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, representing employees having rights that might be affected by our decision, were not served with notice of the filing of the claim and given an opportunity to be present and heard throughout all stages of the proceedings. In such a situation the proper procedure in our opinion is to dismiss the claim without prejudice, thereby affording the claimant an opportunity to take whatever action it may deem advisable in the future."

The Carrier submits this is not a new claim but is simply a resubmission of the same claim decided and disposed of in 1951 by Third Division in Award No. 5432. Furthermore, the 'Telegraphers' Organization has not submitted any new or additional evidence or contentions other than as set forth in their submission in Award No. 5432 and Carrier reserves the right after receiving copy of the Organization's submission, to file answer to any new evidence or contentions which may be advanced by the Telegraphers' Organization in resubmitting this claim to the Board.

Under the facts and circumstances and for the reasons set forth hereinbefore and in Carrier's submission in Award 5432 on file with the Board, the Carrier requests the Board not to assume jurisdiction of this claim and to dismiss same; however, should the Board assume jurisdiction, it is the Carrier's position that the claim is unjustified and not supported by the evidence, practice or meaning and intent of the rules of the Telegraphers' Agreement and respectfully requests that the Board so find and deny the claim in its entirety.

The instant claim was handled on the property by exchange of letters as outlined previously herein and brief discussion of claim as submitted to the Board in Award 5432.

(Exhibits not reproduced.)

OPINION OF BOARD: The claim confronting us reads as follows:

"Claim of the General Committee of The Order of Railroad Telegraphers on the Reading Company that:

"1. The Carrier has violated and continues to violate the provisions of the Agreement between the parties when and because it declined and continues to decline to assign to employes covered by said Agreement the duties of operating teletype and other mechanical machines used for transmitting and/or receiving communications of record; and

"2. The Carrier shall be required to forthwith assign such operation to employes covered by the Telegraphers' Agreement."

These same parties were involved in an identical claim, both as to issue and language, in Docket TE-5406 before this Division, disposed of by Award 5432 (Parker), dated September 6, 1951.

Almost four years later, on August 26, 1955, Organization's General Chairman wrote Carrier with respect thereto, in part, as follows:

"We, the Organization feel that the decision of the Third Division of the National Railroad Adjustment Board in dismissal of these cases was an error and that they should have been decided on their merits at the time they were before the Board.

"It is our opinion, since these cases are legitimate disputes and remain unsettled, I am asking whether you are agreeable, or in a position at this time, to consider a settlement on the property, otherwise we expect to refer them to our President for approval to resubmit them to the Third Division of the National Railroad Adjustment Board."

Carrier replied, in part, as follows:

This claim was dismissed without prejudice for the reasons and upon the ground set forth in the Opinions and Findings of the Adjustment Board by award dated September 6, 1951."

Carrier, in its ex parte submission here, states that

"Following the correspondence quoted above (here only in part) and without further discussion, claim was resubmitted to the Board, ex parte, by the Organization, as per President Leighty's letter to Secretary Tummon dated September 22, 1955."

It is the position of the Carrier that

"the Board cannot lawfully assume jurisdiction of the question here involved for the following reasons:

"1. The instant claim was previously submitted to and decided by the Third Division in Award No. 5432." * * *

Docket TE-5406 upon which Award 5432 was based is herein evidence.

Carrier argument continues:

"The Carrier submits the claim decided and disposed of by the

Board in Award No. 5432 is the identical claim here resubmitted to the Third Division by the Telegraphers' Organization as per President Leighty's letter to Secretary Tummon dated September 22, 1955.

"Section 3, First (m), of the Railway Labor Act provides that the awards of the National Railroad Adjustment Board shall be final and binding upon both parties to a dispute, except in so far as they shall contain a money award. Award No. 5432 did not contain a money award and Carrier maintains that were the Board to assume jurisdiction in the instant dispute, such action would not be in accord with Section 3, First (m), of the Railway Labor Act and would circumvent the language contained therein providing that awards of the Adjustment Board shall be final and binding. * * *"

Section 3, First (m), of the Railway Labor Act, reads:

"(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute, except in so far as they shall contain a money award. In case a dispute arises involving an interpretation of the award the division of the Board upon request of either party shall interpret the award in the light of the dispute."

It is very clear what Award 5432 did. Referee Parker noted that

"* * * although the courts have no jurisdiction to interpret agreements between Carriers and their employees or to settle disputes arising out of the construction of such agreements * * * they do have express power, under Section 3, First (p) of the Railway Labor Act, when actions are brought to test the validity of orders of the respective divisions of the National Railroad Adjustment Board, to enforce or set aside such orders. * * * Therefore we bow to the inevitable and, * * * hold that this case cannot now be heard on its merits because it appears from the records that the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, representing employees having rights that might be affected by our decision, were not served with notice of the filing of the claim and given an opportunity to be present and heard throughout all stages of the proceedings. In such a situation the proper procedure in our opinion is to dismiss the claim without prejudice, thereby affording the claimant an opportunity to take whatever action it may deem advisable in the future."

Argument offered in behalf of Carrier notes there never has been a request made by the Organization for an interpretation of Award 5432, with Referee Parker, "as permitted by law."

Among the citations by or in behalf of Carrier's position here is Second Division Award 1740 (Wenke) and Interpretation No. 1 of Second Division Award 1740, in which Referee Wenke also participated.

Award 1740 was: "Claim dismissed without prejudice." The same phrase appears in Award 5432 here with the addition of the words "and in accordance with the Opinion and Findings."

When Referee Wenke interpreted Second Division Award 1740 he noted

he was doing so "in light of the dispute between the parties as to its meaning, as provided by Section 3, First (m) of the Railway Labor Act." The latter is involved here.

There, Referee Wenke was asked the following question:

"Are the words in Award 1740 reading: 'Claim dismissed without prejudice' to be interpreted to mean that if the organization can prove by evidence that the claim set forth in the above award was handled in accordance with the terms of the agreement and the Railway Labor Act they are permitted to file the identical claim as contained in Award No. 1740 with the National Railroad Adjustment Board, Second Division, and have it decided on its merits."

The official answer of the Second Division, as written by Referee Wenke, was:

"As phrased, the answer to the question is 'No.' The dismissal of the appeal had the effect of affirming the carrier's denial of the claim made on the property. However, since the award did not determine the issue presented on its merits the words 'without prejudice' were added to preclude any contention on the part of the carrier that an adjudication had been made on the merits of the issues in case the situation complained of continued after the carrier's denial thereof was made or if a similar situation developed at any time in the future and, in either case, a claim was made based thereon. It was not intended by the use of the words 'without prejudice' to thereby permit the identical claim, that is, a claim for the identical period of time as was denied on the property, to be again made."

There being no question that the claims in Dockets TE-5406 and TE-7972 are identical, we have no choice but to dismiss this claim for lack of jurisdiction in conformity with the mandate of Section 3, First (m) of the Railway Labor Act. The issue involved remains undecided.

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 Employees within the meaning of the Railway Labor Act, as approved June 21, 1934; and

That this Division of the Adjustment Board is without jurisdiction over the dispute involved herein.

AWARD

Claim dismissed for lack of jurisdiction, in accordance with Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 31st day of July, 1958.