Award No. 8760
Docket No. CL-8021

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Carroll R. Daugherty, Referee

PARTIES TO DISPUTE:

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

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes:

(1) That Carrier violated the Clerks' Agreement when, effective May 19, 1950, it unilaterally abolished a regular scheduled position of Night Ticket Clerk, rate $267.17 per month at Enid, Oklahoma, and transferred the work normally attached to that position to employes not covered by the Clerks' Agreement.

(2) That the scheduled position of Night Ticket Clerk at Enid, Oklahoma be restored; and

(3) That O. W. Hern, who was displaced from his regular assigned position of Night Ticket Clerk by Carrier's unilateral action, set forth in section (1) hereof, and also any other employes affected, be reimbursed for wage losses sustained, retroactive of May 19, 1950.

EMPLOYES' STATEMENT OF FACTS: This is a resubmission of dispute originally submitted to your Board on February 29, 1952, covered by Docket CL-6081. On January 26, 1953, in Award 6052, the following Opinion, Findings and Award were issued:

"**OPINION OF BOARD:** Decision in the claim is governed by our Award 6051, Docket TE-5827 which follows Awards 5432, 5433, 5599, 5600. Notice was not given to all interested parties involved in this dispute in conformity with Section 3, First (j) of the Railway Labor Act.

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:

interested parties involved in the dispute had not been given notice. On September 13, 1955, following determination of that issue by the Supreme Court in **Whitehouse vs. Illinois Central**, et al, the Organization filed intention to resubmit this docket and requested your Board to render an Award on the merits of the dispute as originally presented. On September 30th, the Organization notified the Board, with copy to the Carrier, that they desired to withdraw its letter of September 13, 1955. On November 8, 1955, the Organization notified your Board of its intention to file an Ex Parte Submission covering the same dispute. Action of the employes in alternately submitting and withdrawing this case has subjected the carrier to added liability inasmuch as this is a continuing claim. For that reason, we urgently request your Board to limit the Carrier's liability and recognize no claim beyond September 30, 1955, when the Organization voluntarily withdrew its request to resubmit this claim to your Division. (See Carrier's Exhibits "A", "B", and "C".)

Inasmuch as this claim is without support in the agreement and in the light of prior awards of your Board, we respectfully petition you to deny the claim.

It is hereby affirmed that all of the foregoing is, in substance, known to the Organization's representative.

(Exhibits not reproduced.)

OPINION OF BOARD: This case, which involves a claim of wrongful abolishment of a Night Ticket Clerk's position by Carrier at Enid, Oklahoma, on May 19, 1950, comes again to this Division for adjudication on the merits. Its resubmission by the Organization's notice of November 8, 1955, followed by almost three years a decision on the case, identical as to Parties, as to language of their presentations, and as to the issues and principles involved, made on January 26, 1953, by this Division, with Referee Begley sitting as a member thereof. Said Award, No. 6052 on Docket CL-6081, dismissed the claim without prejudice on the ground that notice of opportunity to be heard had not been given to a third party at interest, the Telegraphers.

Carrier's representatives on this Division now raise the issue of **res adjudicata**, contending that the resubmitted claim is barred from further consideration, including third party notice as well as the merits. This issue of **res adjudicata** was not raised by Carrier on the property or in Carrier's representations to the Board.

Because the point of **res adjudicata** was not previously raised, the Board must first rule on whether said issue is properly before it. The Board finds that it is. Although it is true that the main purpose behind the creation of the Board was and is the final determination of unsettled, appealed disputes on their merits, it is also true that the Board, as an administrative agency, is bound by the provisions of the Act creating it and is obligated to interpret said provisions as written by the Congress. Under circumstances like those in the instant case, then, the fact that Carrier did not previously raise the question of **res adjudicata** cannot be held to be of controlling significance.

The provision of the amended Railway Labor Act that here must be given due effect by and binds the Board is Section 3, First (m), which states that an award of the Board is to be final and binding upon both parties to the dispute,

except insofar as a money award is involved. Because Award No. 6052 contained no money award, it was and is finally determinative of the dispute as originally presented and now resubmitted.

As previously stated, Award No. 6052 dismissed without prejudice the claim contained in Docket CL-6081. This was the final, binding decision. The question at once arises, under that case's circumstances what did and does "dismissed without prejudice" mean? Without prejudice to what and to whom?

The only definitive answer to this question could have been or could be given by this Division, with Referee Begley sitting as a member thereof. Such answer could have been made in response to a request by one or the other or both of the Parties for an interpretation of the decision. Such request having never been presented, the Division with the instant referee sitting as member thereof is not now authorized or empowered to render an interpretation of Award No. 6052, and it must stand as written. The instant claim is therefore not now properly before the Division.

This much may further be said. There seem to be only two possible interpretations of "without prejudice", as used in Award No. 6052. One is "without prejudice to a consideration of the claim on its merits after the Board orders third party notice to the Telegraphers." The other is "without prejudice to a settlement on their merits of the basic issues raised by the particular claim." The first interpretation, it appears, could not be the proper one. This is because the Division with Referee Begley did not say that "consideration of the merits is deferred pending notice to the Telegraphers." That Division could have so ruled; but it did not. It dismissed the claim instead of deferring consideration of its merits pending notice. This Division with Referee Daugherty cannot now change the "Begley" Division's decision. The latter was final.

It follows that the second interpretation stated above would be the proper one. The original claim raised certain basic principles and issues that are involved when a position subject to a Carrier's agreement with one organization is abolished and its work is given to employes not covered by said agreement. The "Begley" Division's Award did not, one way or another, decide such principles and issues as applied to the facts of said claim.

The inescapable conclusion is that the Division with the present referee may not now order Third party notice and then, following the sending of same, and the holding of hearing, consider on its merits the claim as now resubmitted. The instant claim must be ruled barred.

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 instant claim is not properly before this Division.

AWARD

Claim is barred.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 12th day of March, 1959.