

Award No. 9451

Docket No. TE-8068

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

William E. Grady, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

**THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY
— EASTERN LINES —**

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Atchison, Topeka & Santa Fe Railway, that:

1. The Carrier violated the terms of the Agreement between the parties when, on December 6, 1949, it unilaterally declared reclassified the position of Agent-Cashier at Florence, Kansas, to Agent-Telegrapher and removed from the Agreement, and from said agent-cashier, work formerly comprising his position and transferred such work to a newly created position of Cashier-Clerk outside of the Agreement.
2. The Carrier violated the terms of said Agreement, when it unilaterally declared abolished the position of first trick telegrapher-clerk at Florence, Kansas, and assigned the work of this position to the reclassified position of agent-telegrapher and to employees not subject to the Telegraphers' Agreement.
3. The work comprising the position of agent-cashier, and of the first trick telegrapher-clerk at Florence, Kansas, shall be restored to the Agreement, and to the employees subject thereto; the employees resultingly displaced shall be returned to their former positions, and all employees adversely affected shall be reimbursed in an amount equal to the amount of compensation lost by them, plus expenses incurred by reason of these violative acts.

EMPLOYES' STATEMENT OF FACTS: Agreements between the parties bearing effective dates of December 1, 1938 and June 1, 1951, are in evidence.

Prior to December 6, 1949, the Carrier maintained four positions at Florence, Kansas, covered by the Telegraphers' Agreement classified and assigned as follows:

Agent-Cashier	8:00 A. M. to 5:00 P. M.
Telegrapher-Clerk	8:00 A. M. to 4:00 P. M. (first trick)
Telegrapher-Clerk	4:00 P. M. to 12:00 midnight (second trick)
Telegrapher-Clerk	12:00 midnight to 8:00 A. M. (third trick)

Without prejudice to its position as previously set forth herein that the claim in the instant dispute is improperly on appeal with the Board and should be dismissed by the Third Division for lack of jurisdiction, the Carrier respectfully asserts that the Employees' claim is entirely without support under the agreement rules and should be denied in its entirety for the reasons set forth in the Carrier's submission and subsequent briefs in Third Division Docket No. TE-5767 and which are hereby referred to, reaffirmed and made a part of this submission.

It is the respondent's further position that in the event the Third Division should accept jurisdiction in the instant dispute and sustain the Employees' claim, in disregard of the record which warrants either a dismissal or a complete denial thereof, the penalties claimed by the Employees should be denied because of the Employees' failure to comply with the orderly procedures prescribed in the amended Railway Labor Act and in the agreement rules in effect between the parties with regard to the presentation of claims and grievances.

Inasmuch as it is uninformed as to whether the Employees will rest on the record in Docket TE-5767, or if they will elect to ignore that record and attempt to amend the position they advanced therein, the Carrier reserves the right to submit such additional facts, evidence and arguments as it may conclude are necessary in reply to the Organization's ex parte submission, including any subsequent oral arguments or briefs the petitioner may present in this dispute.

All that is contained herein has been both known and available to the Employees and their representatives.

(Exhibits not reproduced)

OPINION OF BOARD: This claim was filed previously (Docket No. TE-5767) and dismissed without prejudice on May 14, 1952 by Award No. 5759.

The dismissal was based on the ground that Section 3, First (j) of the Act required notice to the Brotherhood of Railway and Steamship Clerks, whose agreement with the Carrier covered the position of Cashier-Clerk, and that notice had not been given.

The effect of absence of notice under Section 3, First (j) upon the Board's jurisdiction to determine the merits of a dispute (as distinguished from enforceability against an organization which has not received notice of an award sustaining a claim) and the effect of dismissal "without prejudice" have been cogently argued. There is room for difference of opinion (cf. Award No. 7222 characterizing Award No. 5759, above, as "ill-advised").

The questions, however, are no longer of first impression. The Referee feels constrained to accept the preponderant and current holdings that a prior dismissal without prejudice is a final disposition and precludes subsequent decision on the merits of the resubmitted claim (see e.g. Award Nos. 8022, 9025, 9255, 9376, 9397 and 9377, this Division, and Interpretation No. 1 to Award No. 1740, Second Division). And in view of the rationale of those Awards, the fact that the Brotherhood was given notice under Section 3, First (j) subsequent to the prior dismissal, does not now alter the finality of the prior disposition or reconstitute the Board's jurisdiction over the merits of the dispute (cf. Award Nos. 8105 and 8106).

Had Award No. 5759 definitely deferred consideration of the merits of this dispute pending notice to the Brotherhood under Section 3, First (j) as in

Awards No. 8022 and 8220, instead of dismissing without prejudice, a different question would be presented.

In view of the foregoing, it is unnecessary to discuss other issues presented.

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 the Board is without jurisdiction to entertain the claim.

AWARD

Claim dismissed.

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

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 2nd day of June, 1960.