Award No. 9658
Docket No. CL-9444

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Joseph E. Fleming, 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 that:

1. The Carrier violated the clerical Agreement dated August 2, 1945 and amended to January 16, 1956, particularly the Scope Rule of that Agreement, when effective September 1, 1955, the Local Agent, Mr. V. F. O'Dell at Hutchinson, Kansas, issued joint instructions to Clark R. M. O'Bryan and the Telegrapher-Operators that effective September 4, 1955, the Telegrapher Operators would perform the head end work on train #4 on Sundays instead of a Clerk being called, and

2. P. M. O'Bryan be paid a call of two hours overtime each Sunday, effective September 4, 1955, that a Clerk is not used to work train #4, at rate of $301.17 per month, plus additional increases granted to all rates, effective December 1, 1955 and November 1, 1956.

EMPLOYES' STATEMENT OF FACTS: Prior to September 1, 1955, the Clerks at Hutchinson, Kansas, performed the front end work on passenger trains, which included train #4.

Local Agent, V. F. O'Dell on September 1, 1955, issued the following instructions:

"Hutchinson, Kansas, Sept. 1, 1955

"P. M. OBryan
Operators
Hutchinson

"Effective Sunday Sept. 4, 1955 Operators on Duty will work head end No. 4 on Sundays instead of calling a clerk to do this work,

Award 5489, Opinion of Board:

"In the interests of stability in labor relations, we feel compelled to conform to past decisions of this Board interpreting the same or identical clauses to the Agreement unless our past ruling be clearly erroneous. For a concise recital of the ebb and flow doctrine see Award 4477."

Award 7198, Opinion of Board:

"While the record is clear that all ticket work has been assigned to and performed by clerks for a number of years, it is likewise clear that such work had initially been done by telegraphers and had been assigned to clerks classified as Ticket Agents (two positions) when the volume of work required."

We again refer to your Board's Award No. 4492 which disposed of the identical question of on-duty telegraphers performing head-end work on trains without being in violation of the applicable Clerks' Agreement.

There was no necessity to call an off duty clerk to perform head end work on Train #4 at Hutchinson when the on-duty telegrapher could and did perform such station work without violation of either the Telegraphers' or Clerks' Agreements.

In summary, the Carrier's position, which has been sustained by your Board's interpretation of the applicable agreement, is:

1. If a telegrapher, but no clerk, is on duty, the telegrapher performs head-end station work.

2. If both a telegrapher and a clerk are on duty, it may be more advantageous to assign the clerk to perform head-end work, and relieve the telegrapher to do other work at that time. In so so doing, the telegrapher does not relinquish his right to perform head-end work.

In view of the long history of this issue before your Board and the determination of it under the applicable agreement in previously cited awards on this property and others, the Carrier has denied the organization's claim and we respectfully request your Board to do likewise.

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

OPINION OF BOARD: Claimant, P. M. O'Bryan was assigned to work the second shift at Hutchinson, Kansas from Monday thorugh Friday. For some time prior to September 1, 1955 the clerks at Hutchinson, Kansas performed the front end work on passenger trains which included thain #4, and Claimant was called prior to September 4, 1955 to perform it on Sundays. On that date Agent O'Dell issued the following orders:

"Effective Sunday Sept. 4, 1955 Operator on Duty will work head end No. 4 on Sundays instead of calling a clerk to do this work, operator on duty be sure work lined up and have messages orders, etc. ready so there will be no delay to No. 4."

The telegraphers were notified of the hearing in this dispute and notified the Board that they were not interested.

Carrier introduced the Telegraphers Agreement but the introduction of the agreement was not proper as it is not relevant to this case. This is clearly and only a dispute between the clerks and the carrier.

The only evidence in this record is that the clerk did the front end work on #4 for some time prior to September 1, 1955, that it was part of his regular assignment Monday through Friday, and that he had been called to do the work on Sundays. There is no evidence in this record to show that the telegrapher had idle time so that this assignment might be given to him to fill out his own assignment or that the work was incidental or in proximity to his telegraphic work in such amount as to fill out the telegrapher's assignment. The job was not abolished and there are no facts in the record which would indicate an application of the "ebb and flow" doctrine.

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 Employe involved in this dispute are respectively Carrier and Employe 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 Carrier violated the Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Shulty
Executive Secretary

Dated at Chicago, Illinois this 1st day of December, 1960.

DISSENT TO AWARD NUMBER 9658, DOCKET NUMBER CL-9444

This Division, without the assistance of the Referee, found that the Telegraphers are involved in the dispute in this docket and in accordance with the provisions of the Railway Labor Act, Section 3, First (j), gave notice of hearing to The Order of Railroad Telegraphers and of their right to appear and file papers and any documents desired in answer to the submissions in evidence. The Opinion now expressed, that the introduction of the Telegraphers' Agreement was not proper as it is not relevant to this case, is neither timely nor correct. The Telegraphers' Agreement is properly before this Division. Award 8330.

In Awards 4492, 8256 and 8871, among others, this Division denied claims involving handling U. S. Mail, such as here. Such prior awards are final and binding and should have been followed here.

For these reasons, among others, Award 9658 is palpably wrong and we dissent.

/s/ J. F. Mullen

/s/ R. A. Carroll

/s/ W. H. Castle

/s/ C. P. Dugan

/s/ J. E. Kemp

LABOR MEMBER'S REPLY TO CARRIER MEMBERS' DISSENT TO AWARD NO. 9658, DOCKET NO. CL-9444

In the first paragraph of their Dissent, Carrier Members have usurped their authority by assuming they have the right to speak for the five Labor Members of this Division. The Labor Members have never agreed that the serving of a procedural notice to a third party under this Section gives the Board jurisdiction over such parties or their agreement.

The Carriers and their Representatives on the Division are not concerned whether such parties are notified, this is nothing more than a subterfuge to disguise their basic purpose. Actually, what they seek is an unrestricted right to transfer work across craft lines, regardless of agreements. Something that they failed to accomplish in Carriers' Proposals Nos. 6 and 16, served on certain employes of said Carriers within thirty days following May 22, 1953. Proposal No. 6 being disposed of in accordance with Article IV, August 21, 1954 Agreement, Proposal No. 16 was rejected by Emergency Board No. 106.

Emergency Board 106, consisting of Chairman Charles Loring, members Adolph E. Wenke and Martin P. Catherwood, in their report to President Eisenhower on May 15, 1954, in connection with Carrier's Proposal No. 16 requesting a rule making it mandatory to submit to artitration all disputes as to class or craft of employes which may be used to perform any particular work, stated on page 72 that:

> "The proposal would have the effect of entirely relieving Carriers from any responsibility in cases where they violated the scope rule of an Agreement by giving to employees not covered thereby work exclusively contracted to a class or craft of employee covered thereby.
>
> "In other words, Carriers could be quite indifferent to the contend of scope rules, or the application thereof, because any dispute arising therefrom could easily be made subject to arbitration, as in the proposal provided, without any liability.
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> "We do not think such unilateral practice on the part of the Carriers is desirable insofar as collective agreements are concerned. It would permit Carriers to destroy the exclusive effect of any existing scope rule.
>
> "The Railway Labor Act, as amended in 1934, established the National Railroad Adjustment Board. It has exclusive jurisdiction of disputes between an employe or group of employees and a Carrier

or Carriers growing out of the interpretation or application of Agreements concerning rates of pay, rules or working conditions that may be referred to the appropriate division thereof by petition of either party thereto, with authority to make findings upon such disputes and render Awards accordingly. Thus it is possible for either party, which would include a Carrier or Carriers, to appeal a dispute to the appropriate division of the Adjustment Board to have a scope rule of an Agreement interpreted and applied. If such procedures resulted in Awards finding a Carrier had exclusively contracted certain work to two or more crafts or classes, it could seek relief under Section 6 of the Railway Labor Act.

"It might be subject to monetary claims in the meantime, but that would be no different than is the legal obligation of any other person, who, because of separate contracts he has entered into, finds himself under obligation to two or more persons for the same thing.

"It may be true that the foregoing procedures do not operate as fast nor as effectively as the Carriers might desire, and can and do result in delay and monetary loss, but those factors are not sufficient reasons for our recommending what would, in effect, destroy jurisdiction of the National Adjustment Board in many disputes involving scope rule violations.

"We think that much of the difficulty here sought to be remedied arises from the language of Section 3 First (j) of the Railway Labor Act, because of the construction given it by the courts.

* * *

"The difficulty which the several divisions of the Adjustment Board have in dealing with the notice requirements of this section, as a result of this construction, arises primarily from two causes.

"First, the Act limits the jurisdiction of each division to disputes involving employees in certain classes or crafts, which classes or crafts are definitely named. Consequently, if notice is given by a division to an employee or employees of a class or craft over which it does not have jurisdiction such service would serve no useful purpose because the division would have no authority to settle the dispute as far as the employee or employees served are concerned, it having been given no jurisdiction over them.

"Second, if the employee or employees served are of a class or craft over which the division does have jurisdiction, but not covered by the agreement to which the immediate disputes relates, the division would not have authority to determine their rights because the dispute over which a division is given jurisdiction are those which have been properly handled on the property and then appealed to the appropriate division.

* * *

"If Congress intended, by the language used in this section, to mean what the courts have generally construed it to mean, that is, that the several divisions of the Adjustment Board must give

notice of all hearings to the employee or employees involved in any dispute submitted to them regardless of whether or not they have been given jurisdiction over their disputes, it should then broaden the jurisdiction of the division in such cases so that it has authority to, and can, dispose of all the rights of the parties before it that arises out of any by reason of the dispute submitted.

"If, on the other hand, Congress intended the language to mean that a division shall give due notice of all hearings only to an employee or employees involved in any dispute submitted to it of the class or craft of which it has jurisdiction, then the language of this section should be clarified so as to definitely limit such notice requirements accordingly."

The Members of Presidential Board No. 106 are leading authorities in law and labor-management relations. On the other hand, it appears that the inferior court judges that have held that "third-party" notices were required under this section have never had any experience in the labor-management field. Judge Shake, another authority in the labor-management field, ruled further in Award 6203, supra, that:

"We have read the decisions of the federal courts that have been called to our attention. No good purpose would be served by citing them again or by endeavoring to distinguish or reconcile them. It is enough to say that none of them decide the issue before us with such clarity and finality as to constitute a binding precedent for the guidance of this Board. We doubt if anything short of a definitive decision of the Supreme Court of the United States or a congressional amendment of the Railway Labor Act will put the issue at rest. The writer of this question does not indulge the hope that anything he may say will materially contribute to the solution of the problem.

An observation or two may, however, be ventured. In the court decisions that have been called to our attention and in the briefs that have been submitted to us, much has been said about 'due process of law.' We can see how that subject might be pertinent if, as has frequently occurred, a third party should go into a court of equity and seek an injunction against the enforcement of an award on the ground that he had had no notice of a proceeding that had adjudicated his property rights. On the other hand, **we cannot see how a carrier can invoke an application of the due process doctrine in favor of a third party, as has been attempted here. What the Carrier is really attempting to do is to bring in an additional party or parties in order that there may be a final determination of its liability, if any, to each of such parties. This is a matter quite aside from due process.** (Emphasis added)

The Labor Members have agreed to give notice under Section 3, First (j), to anyone designated by Carrier Members, for the purpose of eliminating these technical objections until the Supreme Court or Congress has determined the issue for all time. However, we do so without prejudice to our position that third parties are not involved, nor, does the Division have jurisdiction over such parties or their agreements with a Carrier or Carriers.

The Fourth Division in Award 1223 (Coburn) fully supports our position.

While the Federal Courts and Awards of this Board are in hopeless conflict over whether notice to third parties is required, no Federal Court, including the Supreme Court, has ever ruled that the Adjustment Board has jurisdiction over such parties or their agreements with a Carrier after the procedural notice has been given, as contended by the Dissenters here. See Fourth Division Award 1223, supra.

The statement contained in the second paragraph of the Dissent is rather vague and indefinite. The Dissenters do not give any reasons why three denial Awards should be "final and binding", other than they involved handling U.S. mail and should be followed here. If this is true, then they must be attempting to invoke the legal doctrine of stare decisis to the instant dispute. If this is so, Carrier Members have overlooked the differences in the Awards cited and those involved here, as well as the inconsistent position they took in their Dissent to Award 1680 and Referee Garrison's Memorandum attached thereto. See Award 8687, Referee Lynch, where the same assertions were made and rejected.

In the application of the doctrine of stare decisis, however, precedents must always be weighed and evaluated in the light of the facts upon which they are predicated. This the Dissenters have failed to do.

Award 4492 involved head end work that was assigned to Claimant on an overtime basis each day of the work week because the Agent was physically unable to perform it. When she retired, it was performed by the new Agent. Award 8256 involved a different rule than that confronting us here. However, the Award is clearly erroneous as it failed to follow previous precedents that had sustained claims under similar circumstances, as we will later show. Award 8871 is clearly distinguishable in that it held that the work of claimant's positions had been blanked on the holiday and that the Yard Clerks called were sufficient to perform the work that was necessary. Further, there was no evidence that any employe called performed any work that he was not entitled to perform as part of his regular assignment.

In the instant case it was undisputed that Claimant and his relief performed the disputed work, without assistance, from Monday through Saturday during their regular tour of duty. That a Clerk was called on rest day Sunday for this service prior to September 4, 1955, when Carrier discontinued the call and assigned it to a telegrapher. In a desperate attempt to evade its responsibility to call Claimant, the "regular employe", under Rule 46½, Work on Unassigned Days, which Carrier admitted had been violated, Carrier on October 16, 1956, instructed telegraphers to perform head end work as a part of their assignment, if and when available. The Board properly recognized the controlling principle by sustaining the claim.

In Award 9557 (Bernstein), involving the handling of mail under similar circumstances, the Board held:

> "It is undisputed that during his regular work-week he was regularly assigned to handle the mail here in dispute. Consequently, he was entitled to be called to perform such work on the Saturdays in dispute in accordance with the third sentence of Rule 3½ (i). * * *."

In Award 6216, Referee Wenke ruled, here pertinent, that:

> "Prior to the 40 Hour Week Agreement, under circumstances such as here where clerical work has been regularly assigned to a

clerical position during the work week thereof, that same work could not be assigned to employes not under the Clerks' Agreement on the assigned rest days of the clerical positions. See Awards 2052, 2706, 3360, 3425, 3491, 3858, 4059, 4477, 4815, 4832, 4866 and 5880 of this Division. Since the 40 Hour Week Agreement this Division has often held, and properly so, that it did not change the application of this principle. See its Awards 5117, 5195, 5254, 5879, 5580, 5622, 5623, 5925, 6019 and 6115."

Also, see Awards 2469, 2549, 2858, 3101, 3381, 4477, 4866 prior to the 40 Hour Week and Awards 5700, 5772, 6216, 6217, 6600, 7047, 7427 subsequent thereto, in addition to those cited in Award 6216.

In view of the above sustaining awards that are on all fours with the confronting circumstances, the doctrine of stare decisis was properly applied here.

/s/ J. B. Haines

J. B. Haines
Labor Member