

Award No. 10852

Docket No. CL-10061

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Raymond E. McGrath, Referee

PARTIES TO DISPUTE:

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

CHICAGO, GREAT WESTERN RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood

(1) That the Carrier violated the agreement between the Brotherhood and the Carrier effective August 15, 1939, reprinted May 1, 1955, when on March 3, 5 and 6, 1956, it permitted junior employees to perform certain work when senior employees were qualified and available to perform such work, in the Auditor of Revenues' Office, Oelwein, Iowa;

(2) That the Carrier shall now be required to compensate employees J. J. Pyznarski, Elfreda Tindell, M. D. Lewis, Mrs. E. R. King and Mrs. B. W. Welch for five (5) hours each at the rate of time and one-half of their respective positions for loss of compensation due to Carrier's failure to permit their performance of duties to which their seniority rights entitled them on March 3, 1956; and

(3) That the Carrier shall now be required to compensate employees J. J. Pyznarski, Elfreda Tindell, Mrs. E. R. King, Mrs. B. W. Welch and Ella Gallagher for three (3) hours and forty (40) minutes each at the rate of time and one-half of their respective positions for each day, March 5 and 6, 1956, when they were not permitted by Carrier to perform duties to which their seniority rights entitled them.

EMPLOYEES' STATEMENT OF FACTS: On Saturday, Monday and Tuesday, March 3, 5 and 6, 1956, respectively, a special statement was required to be made pertaining to petroleum products, commodity Nos. 501 and 507. The duties attached to computing this statement are duties which are not attached to any position in the office of Auditor of Revenues, Seniority District No. 15; employees in that office were requested to perform these duties on an overtime basis.

With respect to the work performed on March 3, 1956: Employees ranking in seniority order up to Rank No. 22, were requested and permitted to perform this work, with the exception of the following employees who were not permitted to perform such duties:

were reasonably familiar with freight records. In the second place, the special report was work of the nature attached to regular positions handling freight accounts; as a matter of fact, regular assigned employees in the freight bureau worked on the special report during their regular assigned hours. Rule 38(b) contemplates that employees who perform a certain class of work during their regularly assigned hours should be given preference to said work when it is performed on an overtime basis.

In the instant case the situation was handled precisely as provided by Rule 38(b) — had it been handled otherwise the Employees would have been quick to charge the Carrier with having violated Rule 38(b). This Division, under the Railway Labor Act, is required to give effect to the collective agreement and adjudicate this dispute in accordance therewith. To sustain this claim would require the Board to impose upon the Carrier conditions of employment not provided or contemplated by the Agreement. In view of all the foregoing, we suggest that this Division has no alternative but to render a denial award in this case.

Carrier affirms all data in support of its position has been presented to the other party and made a part of the particular question in dispute.

OPINION OF BOARD: The claim is that the Carrier violated the Agreement between the parties when it permitted junior Employees to perform certain work when senior Employees were qualified and available to perform such work in the Auditor of Revenues Office at Oelwein, Iowa and for compensation to be paid to certain named Employees whose seniority rights are involved in this claim.

The Carrier attacks the jurisdiction of this Board to consider the dispute because no conference was held on the property as required by the Railway Labor Act and the Rules of Procedure of this Board.

Because both sides have aggressively and capably presented their position on this question, because this question has been before this Board many times and because the awards of this Board are in conflict this question will be discussed and ruled on first.

The latest decision of the Third Division which was cited by Claimants is Award Number 10675 dated July 13, 1962 by Referee Robert J. Ables. It is an excellently written opinion and states extremely well some of the aspects of the problem.

The following are partial quotations from the part of this award devoted to the jurisdiction question.

"Jurisdiction: The Carriers have held the view for many years that this Board does not have jurisdiction of a claim where a conference was not held on the property prior to submission of the dispute to the Board, or where the dispute was not handled in the usual manner. They continue to hold this view strongly, as evidenced in the dissents to Awards 10139 and 10567, decided in recent months, and by pursuing the point further in this proceeding. This view has merit; although on balance it is not held to be the best view.

"The Employes say that the Carriers' view has been rejected so many times that the point ought to be considered as having been settled. This is a matter of opinion. The weight of authority is with the Employes but there is respectable authority to the contrary and there is reason to think that the majority view has not been articulated clearly or on the best grounds.

"The principal thrust of the Carrier's case on the point is that the plain language of the Railway Labor Act (Sec. 2 Second: 'All disputes . . . shall be considered . . . in conference . . .') requires that such a conference take place before this Board may assume jurisdiction of the dispute. This position is strengthened, the Carrier maintains, by the provision in Section 3, First (i) of the Act which requires that disputes be handled on the property 'in the usual manner' (including a conference before coming to this Board).

"Without question, the Congress intended for the parties to meet face to face in conference before progressing a dispute to this Board. The Railway Labor Act is bottomed on the principle that direct personal confrontation of representatives of both sides is the best way to get agreement. This is the essence of collective bargaining and of settling disputes.

"It is also without question that the parties do confer regularly to settle disputes. The only question is whether they must confer for this Board to have jurisdiction."

This Award then proceeds to quote the pertinent Statutes and Rules of Procedure and finally states that:

"As will be seen, Section 2, Sixth deals specifically with disputes considered by this Board. On the other hand, Section 2, Second is more general. It involves 'all disputes' including (perhaps primarily) disputes concerning intended changes in agreements under collective bargaining procedures.

"Truly, it cannot be argued sensibly that the provisions of Section 2, Sixth, which clearly imply that either party must **want** a conference and **request** it, do not condition the more unqualified terms of Section 2, Second. It follows from this that the Board is not without jurisdiction if a conference has not been held on the property prior to submission of the claim to the Board.

"So long as common, accepted, ordinary procedures were observed on the property, including the **opportunity** for a conference, the Board may conclude that the claim was handled in the usual manner and proceed to consider the claim presented to it. This is the conclusion we adopt in this case."

We cannot agree with these conclusions.

The record discloses the following factual situations and procedures in handling of these claims.

On November 16, 1956 the final letter denying these claims was written to C. E. Kief, General Chairman of the Claimant Organization by D. K. Lawson, the Personnel Officer of the Carrier.

On December 21, 1956 the following letter was written by the General Chairman:

"Chicago, Illinois
December 21, 1956
Case: G-835

"Mr. D. K. Lawson, Personnel Officer
Chicago Great Western Railway Company
700 Mulberry Street
Kansas City 1, Missouri

"Dear Sir:

"This will acknowledge receipt of your letter of November 16, 1956, your file K-212, which reads as follows:

'Yours September 27, file G-835, appealing from decision of Vice President and Comptroller Scott in the following claim:

'(a) in behalf of J. J. Pyznarski, Elfreda Tindell, Mrs. E. R. King, Mrs. B. W. Welch and Ella Gallagher for three (3) hours and forty (40) minutes at the rate of time and one-half of their respective positions for March 5 and 6, 1956; and

'(b) in behalf of J. J. Pyznarski, Elfreda Tindell, M. D. Lewis, Mrs. E. R. King and Mrs. B. W. Welch for five (5) hours at the rate of time and one-half of their respective positions for March 3, 1956.

'The circumstances and position of the Carrier is set forth in Mr. Wilk's letters of May 8 addressed to Local Chairman Foster. I concur in his decision that there is no basis for claims presented under governing schedule rules and payment is, therefore, respectfully declined.'

"Your attention is directed to Rule 40, paragraph (g) of our Rules Agreement which reads as follows:

"This agreement is not intended to deny the right of the employes to use any other lawful action for the settlement of claims or grievances provided such action is instituted within 9 months of the date of the decision of the highest designated officer of the Carrier."

"Therefore, this is to advise that it is our desire to dispose of this claim in the Joint Disputes Movement which resulted in the spreading of the strike ballot dated January 30, 1956.

"Yours truly

/s/ C. E. Kief
General Chairman"

On August 8, 1957 notice of intention to file ex parte submission with this Board was filed by Geo. M. Harrison, Grand President of the Organization.

At no time has there been a conference between the Claimants and the Organization with reference to these claims and from the record it appears that the dispute has been handled entirely by correspondence. Therefore the question is squarely before this Board in this case to decide whether the law and the rules require a conference. If the law makes it mandatory that there be a conference before this Board assumes jurisdiction, we are governed by that law.

The Railway Labor Act reads as follows:

"First. It shall be the duty of all carriers, their officers, agents, and employes to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employes thereof.

"Second. All disputes between a carrier or carriers and its or their employes shall be considered, and, if possible, decided, with all expedition, in conference between representatives designed and authorized so to confer, respectively, by the carrier or carriers and by the employes thereof interested in the dispute."

"Sixth. In case of a dispute between a carrier or carriers and its or their employes, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employes, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to spec-

ify a time and place at which such conference shall be held: Provided, (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice: And provided further, that nothing in this Act shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties."

Circular No. 1 issued by the National Railroad Adjustment Board entitled "Organization and Certain Rules of Procedure" reads in part as follows:

"No petition shall be considered by any division of the Board unless the subject matter has been handled in accordance with the provisions of the Railway Labor Act, approved June 21, 1934."

Section 2, Second is definitely mandatory when it says that **all disputes** between a Carrier and its Employees **shall** be considered and if possible decided in conference — the rest of the statute appears above.

We think that the language of Section 2, Sixth does not **modify** the language in Section 2, Second but supplements it and indicates that a conference was intended under the law and implements Section 2, Second by providing a specific method of procedure.

It would appear that equitable reasons have given rise to the reasoning in the many conflicting awards on this subject. Difficult cases sometimes make bad law.

To hold that a conference is not mandatory would not only change the intent of the law but also nullify some of its mandatory provisions. This of course this Board has no power to do.

Conference on the property not having been had this Division is without jurisdiction to consider these claims. They should therefore be dismissed without prejudice.

A discussion of the merits of this case would not be proper at this time.

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;

The facts of record here do not show that this matter has been properly progressed to the Board.

AWARD

Claim dismissed without prejudice.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 19th day of October 1962.