

Award No. 13120

Docket No. TE-12388

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

John H. Dorsey, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

DETROIT, TOLEDO AND IRLINGTON RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Detroit, Toledo and Irlington Railroad, that:

1. The Carrier violated the terms of the Agreement between the parties hereto when it failed to fill the assignment on the second shift operator-clerk's position at Toledo, Ohio, October 12 to 16, inclusive; and October 19 to 23, inclusive, in accordance with applicable rules.

2. The Carrier shall, because of the violation set forth in Item 1 of this Statement of Claim, pay the following employees, idle and available on their respective rest days, on the dates shown, a day's pay at the time and one-half rate:

October 12th (Monday)	N. E. Addy (Diann)
October 13th (Tuesday)	N. E. Keller (South Yards)
October 14th (Wednesday)	J. E. Baldrige (Dearborn)
October 15th (Thursday)	J. H. Fernstrom (Diann)
October 16th (Friday)	G. A. Addy (Diann)
October 19th (Monday)	N. E. Addy (Diann)
October 20th (Tuesday)	N. E. Keller (South Yards)
October 21st (Wednesday)	J. E. Baldrige (Dearborn)
October 22nd (Thursday)	J. H. Fernstrom (Diann)
October 23rd (Friday)	G. A. Addy (Diann)

EMPLOYEES' STATEMENT OF FACTS: There is in evidence an Agreement by and between the parties to this dispute, effective May 1, 1946 (revised September 1, 1949), and as otherwise amended.

Briefly the facts in this case are: F. M. Wilcox is the regularly assigned occupant of a clerk-operator position at Toledo, Ohio. The position which Mr. Wilcox occupies has an assigned work week of Monday through Friday, rest days Saturday and Sunday; assigned hours 5:30 P. M. to 2:30 A. M.

At a time not shown in the record, but sometime prior to October 12, 1959, Mr. Wilcox submitted a formal request to Superintendent-Stations E. B. Turnpseed asking that he (Wilcox) be given permission to be absent from his

the advent of the 40-hour week, there is no requirement that a carrier must fill a position every work day, this claim should be declined in its entirety.

However, should this Board decide that this Carrier was wrong in its handling of this matter, the claim should not be sustained at the rate of time and one-half. Your Board has ruled in many awards that punitive penalty should not be imposed upon the Carrier where no work was performed. For just a few such awards so holding see 5887, 5638, 5608, 5607, 5562, 5558, 5476, 2346, 2695, 2893.

OPINION OF BOARD: The record reveals that no conference was held on the property in an attempt to resolve this dispute before filing of the petition with this Board. The Board must determine whether it has jurisdiction. This gives rise to the question whether such a conference on the property is an indispensable condition precedent to invoking this Board's jurisdiction. The question must be resolved by application of the principles of statutory interpretation to the Railway Labor Act, as a whole, and in particular Section 2, Second and Section 3, First (i) of the Act; also, Circular No. 1 of the Board's Rules of Procedure promulgated pursuant to the Board's rule making power vested by Section 3, First (u) of the Act. Rules promulgated by statutory authority have the force and effect of statutory enactment.

This jurisdictional issue has been raised in a substantial number of cases. Unfortunately our Opinions are conflicting. This is demonstrated in the following recent Opinions.

JURISDICTION: Award Nos. 12853 and 13023

NO JURISDICTION: Awards Nos. 11434 and 11484

It is a fundamental principle of Administrative Law that a party has no resort to the courts until having exhausted the administrative remedies. We are of the opinion that this principle is equally applicable in the handling of disputes under the Railway Labor Act. That is to say, the parties must, on the property, exhaust the procedures prescribed in the Act—which include “conference between representatives designated and authorized so to confer”—as an indispensable condition precedent to perfecting a petition to this Board. To hold otherwise would ascribe meaninglessness to words of the statute.

We find, absent a conference on the property, this Board has no jurisdiction. We will dismiss the Claim for lack of jurisdiction.

This Opinion is not to be construed to mean that either party can evade this Board's jurisdiction by refusing or otherwise evading a conference when requested. The statutory indispensable condition precedent is satisfied if either party requests a conference and the other party fails, refuses or evades its obligation to confer within a reasonable time.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

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;

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

AWARD

Claim dismissed for lack of jurisdiction.

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

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 11th day of December 1964.

DISSENT TO AWARD 13120, DOCKET TE-12388

My reasons for disagreeing with the majority holding that a personal conference is "an indispensable condition precedent" to the submission of a dispute to this Board are stated in my dissent to Award 13097, and are by this reference incorporated herein.

Moreover, in the present case no such issue was raised in the record before us. The Carrier merely made a passing remark to the effect that no conference was held. The majority then took this bare observation and built it into a vehicle for getting around our obligation to decide the legitimate dispute that was submitted to us.

I dissent.

J. W. WHITEHOUSE
Labor Member