**Award Number 255**
**Docket Number TE-150**

# NATIONAL RAILROAD ADJUSTMENT BOARD

## Third Division

**Lloyd K. Garrison, Referee**

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**PARTIES TO DISPUTE:**

**THE ORDER OF RAILROAD TELEGRAPHERS**

**THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY**

DISPUTE.—

"Claim of the General Committee of The Order of Railroad Telegraphers on Atchison, Topeka, and Santa Fe Railway, that the following named positions of Agent, shown in the wage scale of Telegraphers' Schedule Agreement:

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|---|---|
| Abbyville, Kansas, Agent-Telegrapher | $0.69 |
| Ashton, Kansas, Agent-Telegrapher | .59 |
| Bellefont, Kansas, Agent-Telegrapher | .66 |
| Bolton, Kasnas, Agent-Telegrapher | .61 |
| Buxton, Kansas, Agent-Telegrapher | .57 |
| Castleton, Kansas,[1] Agent-Telegrapher | .62 |
| Coyville, Kansas, Agent-Telegrapher | .57 |
| Cummings, Kansas, Agent-Telegrapher | .60 |
| Danville, Kansas,[1] Agent-Telegrapher | .70 |
| Dundee, Kansas, Agent-Telegrapher | .63 |
| Dillwyn, Kansas, Agent-Telegrapher | .68 |
| Geuda Springs, Kansas, Agent-Telegrapher | .65 |
| Hartland, Kansas, Agent-Telegrapher | 65 |
| Heizer, Kansas, Agent-Telegrapher | .63 |
| LeLoup, Kansas, Agent-Telegrapher | .62 |
| Milan, Kansas,[1] Agent-Telegrapher | .70 |
| Mitchell, Kansas, Agent-Telegrapher | .61 |
| New Salem, Kansas, Agent-Telegrapher | .57 |
| Plevna, Kansas, Agent-Telegrapher | .69 |
| Spivey, Kansas, Agent-Telegrapher | .70 |
| Vilas, Kansas, Agent-Telegrapher | .57 |
| Webber, Kansas, Agent-Telegrapher | .63 |
| Zenith, Kansas, Agent-Telegrapher | .69 |
| Glendale, Kansas, Agent-Telephoner | .56 |
| Halls Summit, Kansas, Agent-Telephoner | .56 |
| Morehead, Kansas, Agent-Telephoner | .56 |
| Shaffer, Kansas, Small Non-Telegraph Agent | .48 |
| Rest, Kansas, Small Non-Telegraph Agent | .48 |
| Frizell, Kansas, Small Non-Telegraph Agent | .48 |
| Copan, Oklahoma, Agent-Telegrapher | .66 |
| Elmer, Oklahoma, Agent-Telegrapher | .68 |
| Nardin, Oklahoma, Agent-Telegrapher | .62 |
| Owasso, Oklahoma, Agent-Telegrapher | .66 |
| Vera, Oklahoma, Agent-Telegrapher | .63 |
| Chriesman, Texas, Agent-Telegrapher | .62 |
| Christoval, Texas, Agent-Telegrapher | .68 |
| Longworth, Texas, Agent-Telegrapher | .68 |
| Maryneal, Texas, Agent-Telegrapher | .68 |
| Umbarger, Texas, Agent-Telegrapher | .64 |
| Vroman, Colorado, Agent-Telegrapher | .67 |

[1] 61¢ rate agreed upon effective 12-5-32.

| | |
|---|---|
| Berino, New Mexico, Agent-Telegrapher | $0.67 |
| Buchanan, New Mexico, Agent-Telegrapher | .68 |
| Capulin, New Mexico, Agent-Telegrapher | .70 |
| Dona Ana, New Mexico, Agent-Telegrapher | .67 |
| Bluewater, New Mexico, Agent-Telegrapher | .68 |
| Nutt, New Mexico, Agent-Telegrapher | .67 |
| San Antonio, New Mexico, Agent-Telegrapher | .79 |
| San Marcial, New Mexico,[2] Agent-Telegrapher | .95 |
| Scholle, New Mexico, Agent-Telegrapher | .68 |
| Shoemaker, New Mexico, Agent-Telegrapher | .70 |
| Taiban, New Mexico, Agent-Telegrapher | .71 |
| Tolar, New Mexico, Agent-Telegrapher | .71 |
| Santa Rita, New Mexico, Agent-Telegrapher | .98 |
| Chambers, Arizona, Agent-Telegrapher | .70 |
| Topock, Arizona,[3] Agent-Telegrapher | .82 |
| Del Rosa, California, Agent-Telegrapher | .62 |
| El Toro, California, Agent-Telegrapher | .67 |
| Goffs, California, Agent-Telegrapher | .82 |
| La Mirada, California, Agent-Telegrapher | .67 |
| Newberry, California, Agent-Telegrapher | .62 |
| San Onofre, California, Agent-Telegrapher | .68 |

(To these rates, except at Elmer, Christoval, Longworth, and Maryneal, an increase of 3¢ per hour was added Jan. 1, 1928.)

be restored to Telegraphers' Schedule Agreement as Agent, and a just and reasonable rate of pay be negotiated for each position in conference between the Committee and Carrier, retroactive to the date reclassified and declared abolished by the Carrier."

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

The parties to said dispute were given due notice of hearing thereon.

As result of a deadlock, Lloyd K. Garrison was called in as Referee to sit with this Division as a member thereof.

An agreement bearing date of February 5, 1924, as to rules, and January 1, 1928, as to rates of pay, is in effect between the parties.

On various dates between 1930 and February 1, 1935, the Carrier discontinued telegraph or telephone service at the stations involved in this dispute, except at Shaffer, Rest, and Frizell, Kansas, which were small non-telegraph agencies. A few days prior to such action the Carrier, in each instance, notified the General Chairman that the telegraph or telephone service would be discontinued on a certain date, the position abolished and a "Resident Agent" installed in lieu of the existing agent. The Resident Agents were paid at monthly rates ranging from $20.00 to $80.00, the average, as stated by the carrier, being $31.23.

These changes were made, according to the Carrier, because of greatly decreased business at the stations in question. Motives of economy were controlling. The case, like so many others, is a depression case. The management felt the necessity of curtailing expenses. This curtailment, however, came out of payrolls, and the sole question before us is not whether the management's action was justified on business grounds, but whether the agreement permitted it.

The scope rule of the agreement provides that:

> "This schedule will govern the employment and compensation of * * * Agent-Telegraphers, Agent-Telegraphers * * * and such agents and other employees as may be shown in the appended wage scale."

All of the positions involved in this dispute are shown in the wage scale appended to the agreement. Article I of the agreement provides that:

> "All employees herein specified shall be paid on the hourly basis."

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[2] 85¢ rate agreed upon effective 11–1–31.
[3] 80¢ rate agreed upon effective 12–1–30.

Unless a contrary understanding between the parties can be shown to exist, the unmistakable meaning of these two rules is that all agency work performed at the stations specified in the appended wage scale shall be governed by the agreement and paid for on the hourly basis.

Before considering whether any such contrary understanding exists, we must determine whether the service performed at the stations, after the changes complained of were made, fairly constituted agency work, or whether in fact agency work at the stations had been abolished. The record shows that while the duties of the Resident Agents vary somewhat from station to station, they include in general such work as meeting trains, receiving and delivering freight, handling express where there are express agencies, inspecting cars for loading, checking yards and making reports, making switch lists, signing bills of lading, soliciting new business, carrying mail, etc. The Carrier's instructions to its agents describe their duties in some detail, and the employees assert that the major portion of these duties are being performed by the Resident Agents. These contentions are nowhere denied in the record, and in the Carrier's printed brief, signed by its Vice-President, the following passage appears:

> "But it is said that these part-time agents perform some of the duties of a full-time agent. Manifestly that is so. Some of the duties of an agent have to be performed or the agency would be abolished altogether."

On the evidence before us we conclude that the agencies have not been abolished, that agency work is still being carried on, and that the payment on a monthly basis of the employees who are doing that work violates the agreement unless there is some understanding to the contrary. The Carrier in essence rests its case upon the existence of such an understanding. The understanding is said to have been arrived at by an exchange of letters between the Carrier's representative and the General Chairman representing the employees. These letters were exchanged during the progress of negotiations which culminated in the execution, several weeks after the letters were written, of the present agreement between the parties. (The agreement was executed in the latter part of March 1924 although its effective date is February 5, 1924.)

The letters in question were as follows [italics ours]:

File 123052

CHICAGO, *February 25, 1924.*

Mr. C. GREEN, *Gen. Chrmn.,*
*The Order of Railroad Telegraphers,*
*501 Main St., Newton, Kansas (Delivered at Chicago).*

DEAR SIR: In order to dispose of the questions in dispute with the Telegraphers' Committee, we are willing, effective as of February 5, 1924, the date on which Ex Parte No. 72 was issued by the Interstate Commerce Commission and became effective, to include as coming under the provisions of the schedule those exclusive agents now in dispute, who, in addition to their supervisory duties, are required to perform work usually performed by telegraphers, telephone operators, ticket sellers, bookkeepers, towermen, and levermen, or similar routine duties, as referred to in subdivision (a) under the heading "Supervisory Station Agents." This includes small non-telegraph and/or non-telephone agents who devote their entire time to the railroad service.

We will not include—

(1) Those supervisory station agents whose duties are wholly supervisory and who are not required to perform routine office work, and whom the Interstate Commerce Commission has designated as subordinate officials in subdivision (b) of Ex Parte No. 72.

In this connection, while this class is not in dispute, we will be governed by the interpretation placed by the United States Railroad Administration on "Routine Office Work", in that supervising or signing bills, vouchers, reports, pay rolls, or similar duties and individual or confidential correspondence personally performed by the supervisory officer shall not be considered as routine office work.

(2) Those supervisory station agents at large and important stations, whose duties are wholly supervisory and who are of necessity vested with greater responsibilities, duties, and authority than the agents whom the Commission has designated as subordinate officials.

(3) *Such agents at small non-telegraph and/or non-telephone stations designated as "Resident Agents", who render only part time service to the company, and whose compensation for such service is fixed by special agreement between the company and the individual.*

Effective as of February 25, 1924, we are willing to make the starting time in one-shift offices between 6 and 9 A. M. or 6 and 9 P. M. except in small non-telegraph and/or non-telephone stations.

When small non-telegraph and/or non-telephone agencies are included in the schedule they will be covered by the intermittent service rule (No. 3), as awarded by the United States Railroad Labor Board in its Decision No. 2025. This class of employee has not been included within the scope of any schedule with our telegraphers, and to now include them and apply to them the overtime and other rules of the schedule would add very materially to their earnings without restricting their starting time. As a class, they are required now in many cases to meet early trains, the schedules of which cannot be changed, and when they have met those trains their principal duty for the day has been performed. To fix their starting time at 6:00 A. M. or P. M. would not change the service requirement or change a long established practice on their part of reporting for duty sufficiently early to meet these trains, and it would, therefore, accomplish no other purpose than to burden the carrier and the public with an expense which cannot be justified. We are unwilling, therefore, to agree that a restrictive starting time rule shall apply to such small non-telegraph and/or non-telephone agencies.

We should have the right to start two-trick jobs at any time, and evidently the only reason why the United States Railroad Labor Board in its Decision No. 757 of March 3, 1922, changed the rule where three consecutive shifts are worked covering a 24-hour period from 5 A. M. to 6 A. M. was because of the fact that it did not restrict the starting time of one and two-shift assignments, thereby permitting the carriers to put into effect many economies that could not be given effect under any kind of a restrictive starting time rule. To restrict the starting time between 12 o'clock midnight and 6 A. M. on two-trick assignments, as suggested by you, would place us in a much worse condition with respect to our right to economically operate the railroad than we were in prior to our request to the Labor Board for relief, and which was given us under Decision No. 757. Under Supplement No. 21, which was the rule in effect on our lines, and which seemingly was satisfactory to your committee, the starting time in one-shift offices was between 6 and 9 A. M. or 5 and 9 P. M., in other offices no shift to begin between 12 o'clock midnight and 5 A. M. If it will dispose of the matter, however, we are willing that in two-shift offices no trick will be started between 12 o'clock midnight and 5 A. M. You will still be one hour better off with respect to one-shift jobs in the afternoon, and also on three-trick jobs where continuous service is required covering a 24-hour period, than you were under Supplement No. 21.

Yours truly,

(Signed) T. A. GREGG.

At CHICAGO, ILL., *February 28, 1924.*

Mr. T. A. GREGG,
*Assistant to Vice President,*
*The A. T. & S. F. Ry. System, Chicago, Illinois.*

DEAR SIR: With reference to your letter of February 25th, file 123052, and our conference relative thereto, regarding the question of spread of commencing time and exclusive and non-telegraph agents in dispute to be included in Telegraphers' agreement.

We are agreeable to the spread of commencing time as proposed in our memo and as agreed by you.

We are also agreeable to including the exclusive agents in dispute under Docket No. 1962, some 196 in number, effective as of February 5, 1924, with the understanding and agreement that if later a ruling or decision is made by the Interstate Commerce Commission or United States Railroad Labor Board authorizing the payment of compensation claimed for service for such agents during the interval of this dispute that such compensation will be allowed these employes in accordance therewith.

> As to the small non-telegraph and/or non-telephone agents to be included as proposed by you, *this to include all such agents who devote their entire time to the railroad service, and upon the terms agreed upon.*
>
> Yours truly,
>
> (Signed) C. GREEN, *General Chairman.*

The case depends upon the construction to be placed on these two letters. The most natural construction, taking into account not only the language used but the circumstances under which the letters were written, is that those stations which were then in charge of Resident Agents (and there were a number of such stations) would not be included in the schedule of stations to be covered by the pending agreement. In addition, it was understood that the small non-telegraph agencies would be covered by the intermittent service rule (Article III (b) of the agreement), which provides, among other things, that "at small non-telegraph or non-telephone agencies where service is intermittent eight hours actual time of duty within a spread of twelve hours shall constitute a day's work." As Mr. Gregg said in his letter, referring to agents of this sort:

> "As a class, they are required now in many cases to meet early trains, the schedules of which cannot be changed, and when they have met those trains, their principal duty for the day has been performed."

For this reason the Carrier was unwilling to apply to these employees the restrictive starting time rule, and Mr. Green acceded to the request that the intermittent service rule be applied. The passage just quoted from Mr. Gregg's letter is of some significance. It asserts that the principal duties of these small non-telegraph agents were in connection with the meeting of trains—duties which are now performed by the Resident Agents—and yet, despite the relatively unimportant nature of the work, the employees were classed as agents and covered under the agreement.

The dividing line between the small non-telegraph agent and the Resident Agent is therefore seen to be a slender one; the chief difference, so far as the work is concerned, is that the former has fixed hours of assignment (eight within a spread of twelve) while the latter has no fixed hours, but must attend to everything that comes up whenever it comes up. There is a difference in the method of payment but none of real substance in the duties performed.

We have said that the most natural interpretation of the Gregg-Green correspondence is that the then existing Resident Agents were not to be included in the schedule of the pending agreement. Pursuant to this apparent understanding the agreement, when it was executed, did not include in the schedule the stations which were then in charge of Resident Agents. This interpretation of the correspondence is therefore consistent with what took place when the agreement was executed, and explains why some of the stations where agency work was being done were not included in the schedule.

If the meaning of the correspondence is as we have stated it, the carrier had no right, after the agreement was executed and without the consent of the employes, to alter the method of payment for agency work at those stations which were deliberately included in the schedule and covered by the agreement.

It is an elementary principle of contract law that a written contract embodies all the understandings between the parties, and that prior correspondence leading up to the contract, unless incorporated by reference into the contract, can only be considered as evidence of what the parties meant by the words which they used in the contract, where those words are capable of more than one meaning. The prior correspondence, in short, can be used only as a guide to interpreting the language of the contract, and not as modifying or qualifying the contract. The construction we have placed upon the Gregg-Green correspondence, namely that stations then in charge of resident agents were not to be included in the pending schedule, is consistent with what followed and does no violence to any of the language in the contract. What other construction could be placed upon the correspondence? As we have stated, the correspondence cannot be used to attach conditions to the contract but only to shed light upon its meaning. How then would we have to interpret the scope rule if we are to uphold the carrier's position?

We would have to read into the scope rule some such language as that which is italicized below:

"This schedule will govern the employment and compensation of * * * Agent-Telegraphers, Agent-Telephoners * * * and such agents and other employes as may be shown in the appended wage scale *except that such agents shall cease to be governed by this schedule whenever the carrier shall place them on a part-time monthly wage basis.*"

The word "agents" in the scope rule is a general term meaning men who do what is commonly considered to be agency work, and, as we have said before, the clear meaning of the rule is that at the stations specified in the schedule the men who do the agency work there, whoever they may be from time to time, will be governed by the agreement. To escape from the effect of this provision, we would have to add, as above, a proviso that men doing agency work at these particular stations would be covered by the agreement only so long as the carrier chose to keep them on an hourly wage full-time basis. If we added such a proviso, the effect of Article I that the employes "herein specified" (which simply means the employes from time to time working at the stations listed) "shall be paid on the hourly basis" would be changed to mean that the carrier could at its option change the hourly basis to the monthly basis, at least at one-man stations.

To inject qualifications and conditions of this sort into the agreement would be not to interpret it but to amend it, and, as we have said, correspondence which precedes an agreement cannot be used to modify the agreement but only to interpret it where its meaning is doubtful. If the employes had understood that any such qualifications or conditions were by implication to be read into the agreement, they might not have signed it, for these qualifications and conditions would have meant that every one-man agency in the schedule could at will be removed from the agreement by the Carrier through a slight alteration in the responsibilities and method of payment of the employes. Possibly the employees might have felt forced to sign the agreement notwithstanding, but if so it is difficult to suppose that there would not have been protests and at least some evidence that they understood what they were doing. It is hard also to believe that the Carrier, if it had desired the power to take positions out of the agreement, would not have insisted upon the insertion of a clause to that effect instead of signing an agreement without any limitations whatever and relying solely upon an earlier exchange of letters which do not expressly talk about the future.

We do not think that Mr. Green's reply to Mr. Gregg's letter can fairly be construed as agreeing that the positions to be inserted in the schedule could at any time be converted into non-schedule positions. One of the most essential and jealously guarded principles of collective agreements is that the work which is covered cannot be taken out of the agreement so long as the work remains to be done. This principle has been repeatedly affirmed in a series of cases. See U. S. Railroad Labor Board Decision No. 2555, Dockets 2258 et al. (improper to assign agency duties to clerks not under the agreement after the consolidation of several stations under a head agent); U. S. Railroad Labor Board Decision No. 3277, Docket 3482 (improper to assign the duties of a ticket agent to a clerk not under the agreement); Award No. 3, Docket TE-24 of this Division (improper to assign a vacant position to an employee not under the agreement—decided without a Referee); Award 94, Docket TE-161 of this Division (improper to assign two agencies to a general agent not under the agreement—decided without a Referee); Award 231, Docket TE-152 of this Division (improper to assign a ticket agency to a freight agent not under the agreement); Award 248, Docket TE-236 (improper to assign agency duties to an employee not covered by the agreement).

If Mr. Green had supposed that he was yielding this vital point and not simply yielding the minor point of excluding from the pending schedule certain existing stations, it is hard to believe that the matter would not have been more clearly put, if not by Mr. Green, then at least by Mr. Gregg. From the point of view of the Carrier, the most favorable view of the correspondence which can possibly be urged is that it is capable of two meanings: (a) the more restricted meaning that certain existing stations were to be excluded, and (b) the broader meaning that, in addition, whenever any included stations were converted into part-time agencies they would automatically be excluded. Of the two meanings, the first is the more natural for the reasons already stated. There is no evidence whatever that the second meaning, which would have affected the very essence of the agreement, was intended; at least there

is no evidence that it was intended by both parties. But even if that meaning had been in the minds of both parties—and there is every reason to suppose that it was not—it could not be carried into the agreement without adding thereto an exception which does not appear in it and which cannot be read into it without doing violence to its language.

Significant light is shed on this whole case by decision 4101 of the U. S. Railroad Labor Board, dated April 5, 1926, involving exactly the same question as that presented here. Shortly after the agreement was executed the Carrier reclassified the agency positions at seven stations as resident agencies and changed the hourly rate to a monthly rate, varying from $50 to $60. The employes presented to the Labor Board arguments similar to those which they have presented here and the Carrier, as in the case now before us, contended that the action was in the interest of economy; that the agency positions listed in the agreement had been abolished; and that the positions of resident agent "are not included in the telegraphers' agreement." It is reasonable to suppose that in the argument before the Board, coming so soon after the execution of the agreement, the Gregg-Green correspondence was before the Board and was duly considered. However that may be, the Board in its opinion, after referring to Article I, held "that a rate below the minimum for small nontelegraph agencies, 48 cents an hour, should not be established without agreement with the representatives of the employes." It is true, as urged by the carrier, that the Board under the statute creating it had mediatory as well as quasi-judicial functions, whereas the functions of our Board are quasi-judicial only. Nevertheless, it is hard to believe that the Board would have ruled as it did had it not been convinced in its quasi-judicial capacity that the Carrier had no right under the scope rule of the agreement and Article I to convert agency positions, deliberately included in the schedule as hourly paid positions, into monthly paid positions. The Board went on to provide that a rate of 48 cents an hour should be established, subject to negotiations by the parties regarding the proper rate, with a joint check and a further report to be made to the Board in case no agreement could be reached. This portion of the decision may or may not have been quasi-judicial in nature, but as to this we need not inquire because, as we have said, the heart of the opinion seems almost certainly to have rested upon a quasi-judicial construction of the agreement.

No question of bad faith on the part of the Carrier is involved. The Carrier may have acted under an honest mistake in supposing that because certain stations in charge of resident agents had been excluded from the schedule, it had the right to place in the hands of resident agents stations which were included, and by this method to remove the agency work from the agreement.

Nor is there any question of the right of the carrier to abolish positions. The Carrier asserts in its printed brief that the theory of the employes "would prohibit the Carrier from absolutely abandoning a station or discharging an employe that was named in the agreement." But this statement is quite unfounded. The Carrier has an absolute right to abandon a station. It has an absolute right to discharge employes, subject to the procedure laid down in the agreement (no employes are "named" in the agreement but only positions). The Carrier has also an absolute right to abolish any position in the agreement provided the duties of the position are in fact abolished. What the Carrier does not have the right to do is, under the guise of abolishing a position, to transfer its duties to someone not covered by the agreement, or, as in the present case, again under the guise of abolishing positions, to pay employes performing agency work at stations included in the agreement on any other than an hourly basis.

There remains the question of the form of the award to be made in this case. The employes have asked that the positions in question be restored to the agreement "as Agent, and a just and reasonable rate of pay be negotiated for each position in question between the Committee and the Carrier retroactive to the date reclassified and declared abolished by the carrier." Much has been said to the effect that the employes are asking that the former positions of Agent-Telegrapher, Agent-Telephoner, and small non-telegraph agent be restored to the agreement as "Agent", using this last word with a capital letter which normally implies a higher rated position than that of the three others just mentioned. But at the beginning of the employes' claim they refer to "the following named positions of Agent" and then list the positions of

agent-telegrapher, agent-telephoner, and small non-telegraph agent. Thus it is apparent that the employes are using the word "Agent" in the general sense of one who performs agency work and that what they are really asking is that the positions which were reduced to a monthly wage basis in violation of Article I be restored to the hourly basis, the rate of pay to be adjusted according to the correct classification of the several positions.

Elsewhere in the record the employes concede that after the removal of the telephone and telegraph instruments from all of the stations except the three which did not have them in the first place, the duties of the agents were sufficiently changed to justify their reclassification. The employes also concede the right of the Carrier to reclassify positions where there are substantial bona fide changes to justify such action, and they cite with approval the Carrier's statement that the matter of reclassification "is one of fact to be determined by the parties depending upon the importance of the station and the duties and responsibilities of the position, the Carrier to make the reclassification but the employes' committee to be given reasonable notice prior to the reclassification; and if the carrier's action is disputed by the employes' committee, then a joint check and investigation is to be made."

As we understand the employees' claim, they are asking only that this procedure be followed. They do not insist that the positions be restored to their former rates. They recognize that the proper classification of the positions in view of the changed duties may no longer be those originally provided for. They wish to discuss with the Carrier the proper classification and rate, and to endeavor to reach an agreement which will be fair to the Carrier and fair to the employees. They are asking us to declare in substance that the Carrier's action in converting the positions to monthly paid positions was improper, and then to order that such rates as may be agreed upon shall be made retroactive to the date of the changes.

The question is whether, without assuming a mediatory function which we do not possess, we can make such an award. Clearly our decision that payment for the agency work on the monthly basis was a violation of Article I of the agreement is within our jurisdiction. We think it is also within our jurisdiction to find, as the employees in effect invite us to find (and as the Carrier can scarcely object to our finding since the finding would be in its favor), that the removal of the telegraph and telephone work from the stations may well have justified a reclassification and a lower rate of pay. All positions listed in the schedule as those of small non-telegraph agents—and there are a considerable number—carry an hourly rate of 48 cents, the lowest rate of any position in the schedule. It may be that upon the elimination of the telegraph and telephone work the positions should properly have been classified as small non-telegraph agencies, payable at the 48 cent rate. The record is insufficient to enable such a finding to be made and the point was not expressly argued, although at one place in the record the employees apparently concede that the positions became those of small non-telegraph agencies. It may be that as a result of further negotiations some other rate, whether lower or higher, may be agreed upon. As to this we cannot tell. But since the employes have not asked us to order that the old rates should be restored, and in view of the evidence that the duties of the positions have been materially changed, we think it proper to refer the matter back to the parties for such adjustment as may be possible, subject to a joint check of the duties performed at the station and a determination by this board of the correct classification in case an agreement is not reached. We have no power to fix wage rates as such, but we think it is within our jurisdiction to determine the proper classification of work where the duties have materially altered. Such a determination would be quasi-judicial and not mediatory, provided the classifications in the agreement were sufficiently clear-cut to enable such a determination to be made. And if the classification so arrived at by a quasi-judicial consideration of the facts carried with it in the schedule a uniform rate of pay, such rate (in the absence of agreement) would follow automatically once the classification was fixed.

## AWARD

1. The action of the Carrier in paying for the agency work at the stations listed in the claim on a monthly basis was in violation of Article I of the agreement between the parties, because the positions remained under the agreement.

2. The parties are given 90 days in which to endeavor to reach an agreement covering the proper classification and hourly rate of pay of the positions, and if such an agreement is reached, the rate of pay shall be made retroactive to the respective dates on which the monthly paid agents were installed in the several stations.

3. If such an agreement is not reached within such time, the employees may resubmit the question to this Board, the Carrier, of course, to be fully heard as well as the employees. In such resubmission evidence should be submitted, if possible on the basis of a joint check by the parties, indicating, with respect to each of the stations in question, (a) the nature of the duties performed before the removal of the telegraph and telephone instruments and subsequently; (b) such other data as may aid the Board in determining whether the old classifications should be restored or whether some other and if so, what, classifications under the schedule should be fixed.

4. Pending such resubmission, we make no decision requiring the restoration of the positions to their former classifications and rates of pay, but the Carrier is at liberty to restore the positions to such classifications under the schedule as it deems proper with the rates of pay attaching thereto, and if such action is taken the propriety of the classifications may be determined upon the resubmission of the case, if it is resubmitted.

By Order of Third Division:

NATIONAL RAILROAD ADJUSTMENT BOARD.

Attest:

H. A. JOHNSON, *Secretary.*

Dated at Chicago, Illinois, this 7th day of May 1936.

DISSENT

I dissent from the findings and award in Docket TE-150 for the following reasons:

The claim states, first, "That the following named positions of *Agent* shown in wage scale of Telegraphers' Schedule Agreement" (underscoring ours). This is an incorrect statement, because the sixty-one stations referred to are *not* shown in the wage scale of Telegraphers' Schedule as "Agent", but as *Agent-Telegrapher, Agent-Telephoner, and Small Non-Telegraph Agent*; second, the claim requests "be restored to Telegraphers' Schedule Agreement as *Agent* * * *." [Italics ours.] How can you restore Agents' positions to the Schedule that were never removed?

The plain facts are that the carrier abolished the positions (no proof being offered to the contrary) of Agent-Telegrapher, Agent-Telephoner, and Small Non-Telegraph Agent, at the sixty-one stations named in the claim, and petitioner admits he was given due notice of such action in each case and now comes to this Division with a request that we order the carrier to restore sixty-one positions to the Telegraphers' Schedule, not as Agent-Telegrapher, Agent-Telephoner, and Small Non-Telegraph Agent, as they appeared in the Schedule before such positions were abolished, but as "Agent", a position that does not now and never has, appeared in the Telegraphers' Schedule wage scale at the stations named.

I submit that such matters are questions of contract involving negotiation and outside the jurisdiction of this Board.

The claim further requests "a just and reasonable rate of pay be negotiated for each position in conference between the Committee and Carrier retroactive to the date reclassified and declared abolished by the carrier." The petitioner recognizes that this is a negotiable matter, and therefore outside the jurisdiction of this Board.

The findings refer to the Scope Rule and Article I of the agreement stating "unless a contrary understanding between the parties can be shown to exist, the unmistakable meaning of these two rules is that all agency work performed at the stations specified in the appended wage scale shall be governed by the agreement and paid for on the hourly basis." Such a finding indicates that once named in the wage scale the situation becomes crystallized and neither the station nor the employe could ever, under any circumstances short of complete abandonment of the station, be removed from the provisions of the Schedule except by agreement.

The liberty to act in accordance with judgment and discretion is not, in my opinion, lost to the management, but only limited, regulated, and curtailed to the extent and in the particulars set forth in the agreement. Where the carrier, in the exercise of an honest judgment born of economic change and necessity, decided to abolish the position of a full-time employe and to create a part-time employe at a particular station, it had a perfect right to do so, there being nothing in the contract to negative such right. The petitioner in this case agreed that the carrier had the right to reclassify these sixty-one positions the only qualification being "where substantial changes are made."

It is not denied by the petitioner that the telegraph and telephone service was eliminated at these stations—that in itself constitutes a "Substantial Change"; that it was so regarded is evidenced by Interpretation 4 to Supplement 13 to General Order 27, Question 4 and answer—"Question 4—Do the words 'for positions held by' in the preamble of Supplement 13 require that the terms of that Supplement shall be applied to positions held by employes competent to perform telegraphing if their duties do not require the use of the telegraph or telephone instruments? Decision—No, unless the positions come under those specified in Article II or are included in existing agreement, or those hereafter negotiated with the Railroad Telegraphers." There were other changes, of course, besides this. The carrier stated that these part-time Resident Agents perform some of the duties of full-time Agents otherwise the stations would have been closed altogether. To me this clears up, by the petitioner's own statement, the carrier's right to make the reclassification. Now going to the balance of the petitioner's statement—"We are not requesting that the former classification and hourly rate be restored"—What have we left out of this claim? Only this—That this Board direct the carrier to establish sixty-one "Agents" positions and require the carrier to meet the Committee in conference to negotiate a just and reasonable rate of pay for each of these part-time positions. It is a plain request that this Board order the carrier to change agreements affecting rates of pay, rules or working conditions enlarging the scope of the agreement, and order negotiation of just and reasonable rates of pay. Nowhere in the Amended Railway Labor Act can any provision be found conferring such authority on this Board.

Petitioner states, in commenting on the carrier's action in this case—"We consider such action arbitrary in the extreme and designed to destroy the intent of the Railway Labor Act, Amended, by *denying to employes their right to representation by the Organization of their choice.*" [Italics ours.]

This issue is not for this Board to decide, but rests solely with the employes themselves. The Railway Labor Act as amended provides in Section 2, Fourth and Ninth, how a dispute as to representation should be handled.

Reference has been made to United States Railroad Labor Board decisions as supporting position in this case, notably Decision 4101, dated April 5, 1926, O. R. T. and A. T. & S. F. Ry. System, which it is alleged the carrier refused to carry out. In commenting on this Decision the petitioner says: "The Labor Board further *directed the carrier and committee to confer and endeavor to agree on the proper rate which should be established for the positions involved. That is all we are requesting this Board to undertake.*" [Italics ours.] Obviously, the wide powers given the United States Railroad Labor Board to pass on any dispute is being confused with the restricted authority granted to the National Railroad Adjustment Board to pass only on disputes growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions. This Board has no authority to comply with petitioner's request.

A number of other United States Labor Board Decisions and decisions by this Board have been cited in this case, none of which to my mind are controlling or compelling in the claim to which this Division must address itself. The plain facts are that in 1924 before the existing agreement was closed up and signed by the authorized representative of the employes, General Chairman Green, when the Schedule was being negotiated, the representative of the carrier, Mr. T. A. Gregg, wrote Mr. Green, the General Chairman, under date of February 25, 1924, just what positions the carrier was willing to incorporate into the Telegraphers' agreement, and that letter stated in part—"We will not include—(3) such agents at Small Non-Telegraph and/or Non-Telephone Stations designated as 'Resident Agents' who render only part-time service to the Company, and whose compensation for such service is fixed by special agreement between the Company and the individual."

Mr. Green replied to that letter, February 28, 1924, reading in part—"As to the Small Non-Telegraph and/or Non-Telephone Agents to be included as proposed by you, this to include all such agents who devote their entire time to the railroad service, and upon the terms agreed upon."

It must be apparent to anyone from the text of these letters that there had been a dispute with respect to the exact point as to whether or not part-time agents, known as "resident agents," should or should not be included within the scope of the agreement. There had been a failure to agree during the progress of these negotiations, which apparently had made it necessary for the carrier in a more formal fashion to express definitely what it, on its part, would be willing to include and what it must insist should be excluded. After some days taken in consideration, the General Chairman of the employees' Committee acceded to the position of the carrier, and expressed this agreement in the form of the letter, above quoted in part.

Here we have a case where two responsible parties, by their duly authorized representatives, had been negotiating for some time looking toward the creation of an agreement. A dispute arose as to certain employees; the one party contending that they should be included, the other party that they should be excluded; and then the one party writes a formal letter to the other, expressing in clearest terms what he is willing to agree should be included in the contract, and the other party, in just as unequivocal langauge, accedes to that position. The contract is drawn and executed in the light of that understanding. The Committee does not deny this. In the concluding argument and brief filed herein by General Chairman C. Green, he being the same C. Green to whom the Gregg letter of February 25th was written, and the same who wrote the response thereto of February 28th, and the same man who, under the signature of Chauncey Green, affixed his signature to the agreement, several pages are devoted to an explanation of how the letter came to be written, concluding with this sentence:

> "In order to dispose of the situation at that time, the Committee felt itself forced to accept the proposal of the Carrier because of the adamant but erroneous position assumed by the carrier in these matters; hence the letter of acceptance of February 28, 1924, of the proposal of the carrier."

Full-time employes were to be included, part-time special employes were to be excluded. The scope of the agreement was thus defined and the authority of the Committee to represent employes was thereby limited.

Inasmuch as it was clearly understood that part-time employes were not included within the scope at the time of the execution of the agreement, and inasmuch as there is no provision of the agreement which prohibits the carrier from abolishing a full-time agency and creating a part-time agency, then it follows inevitably that the liberty of the carrier exercised in good faith, has not been circumscribed in that respect. A distinction made and recognized prior to the execution of the agreement remained just as clear a distinction after the execution and such distinction was made. At the time of the execution it was clearly understood that the committee did not represent the part-time employes; it has not represented them since, and does not represent them now.

The real essence of the matter, however, is that part-time employes, characterized as "resident agents", had been employed on the carrier's lines since 1900. It is also a significant fact, which cannot be gainsaid, that the expression "Resident Agent" was used in the negotiations leading up to the execution of the agreement, and as so used carried with it a real meaning and clear distinction known to both parties to the agreement, and the agreement was entered into with that understanding.

I submit that this exchange of letters definitely disposes of the question of whether the existing Telegraphers' Agreement closed and signed subsequent to this exchange of letters included in its Scope the positions of "Resident Agents." It did not include them then, has not included them since, and does not include them now. There is only one way that they may be included, and that is known full well to the telegraphers—it is by serving the required thirty days' notice of a desire to revise or modify the rules as provided in the enacting clause of the Telegraphers' Agreement, Article XXIII, and Section 6 of the Railway Labor Act, as amended June 21, 1934.

We have adverted to the fact that the remedy of the Committee lies in following the procedure laid down by Article XXIII (b) rather than by an

appeal to this Board, whose jurisdiction by act of Congress is limited to grievances growing out of the interpretation or application of agreements. The fact that such procedure has been attempted and failed does not serve to confer jurisdiction upon this Board which the statute does not give it.

This award takes a class of part-time employes admittedly not included within the scope of the Telegraphers' agreement in 1924, and no evidence in the record that they have subsequently been included, and adds them to the scope of the Telegraphers' agreement, not only exceeding the authority of this Board, but in violation of the enacting clause of the Schedule, Article XXIII and Section 6 of the Amended Railway Labor Act of June 21, 1934.

L. O. MURDOCK.

Concurred in by:

R. H. ALLISON.
C. C. COOK.
G. H. DUGAN.
A. H. JONES.