

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Dozier A. DeVane, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

**THE CHICAGO, ROCK ISLAND AND PACIFIC
RAILWAY COMPANY**

**THE CHICAGO, ROCK ISLAND AND GULF
RAILWAY COMPANY**

STATEMENT OF CLAIM: "Claim of the General Committee of The Order of Railroad Telegraphers, Chicago, Rock Island and Pacific Railway, that the positions of second and third trick telegrapher at Missouri-Pacific Junction, Missouri, were improperly discontinued on March 9th, 1938; that said positions shall be restored, the telegraphers regularly assigned thereto, as of March 9th, 1938, be restored therein, reimbursed for all monetary losses sustained, and that all other employes resultantly displaced be likewise restored to their respective positions and reimbursed for all their monetary losses."

EMPLOYES' STATEMENT OF FACTS: "It is the contention of The Order of Railroad Telegraphers, who have a working Agreement and Schedule of rates of pay covering employes enumerated in the Scope Rule of the Agreement, dated January 1st, 1928, copies of which have been supplied to the Board, in the wage scale of which appears under the caption, 'St Louis-Kansas City Terminal Division,' the station of Missouri-Pacific Junction, showing three telegraph shifts at rates of pay of 63¢ per hour. These jobs were established and given into the jurisdiction of the Telegraphers' Agreement, in February, 1924, being located at milepost 263.4, a point 1.5 miles West of the Pleasant Hill, Missouri, depot and was created and maintained by the Chicago, Rock Island and Pacific Railway Company in order to handle Missouri-Pacific Railway trains over Rock Island rails from this Junction to Kansas City.

"During July, 1932, the first trick telegraph position was discontinued and the work incident to this position was transferred to the first shift telegrapher at the Missouri-Pacific depot at Pleasant Hill, Missouri, instead of having been transferred to the agent-telegrapher at the Rock Island depot at the same point, and continued under the jurisdiction of the Rock Island Telegraphers' Agreement.

"March 9th, 1938, the second and third shifts were also discontinued and the work incident to them was transferred to Missouri-Pacific telegraphers at Pleasant Hill, Missouri, which office is located approximately one and one-half miles from Missouri-Pacific Junction, in direct violation of the Rock Island Telegraphers' Agreement. Before these changes were made there were no

"The Board has emphasized in Award No. 367, Docket TE-390 and Award No. 368, Docket TE-391, that:

'It has been repeatedly held by the Board, first, that carriers have a right to abolish positions included in agreements when there is no longer work to be performed in those positions, and second, that the removal of work from the scope of agreements by arranging for its performance by employes not covered by those agreements gives rise to violations for which redress may be claimed by and granted to the employes.'

"In addition to the above, let us suggest that you view the following Awards, 529, 535, 553, and 556, as well as others.

"As already stated by the Committee, it is our contention that the three Chicago, Rock Island and Pacific Railway telegraph jobs which were created at Missouri-Pacific Junction in 1924, advertised to the Rock Island telegraphers and filled by Rock Island telegraphers exclusively, in accordance with their agreement, all wages having been paid to Rock Island telegraphers by this carrier, which is evidence of no other contract having jurisdiction than the contract of the appellant, be restored and all telegraphers monetarily affected adversely be reimbursed for any loss from July, 1932, on the first shift and from March 9th, 1938, on the two remaining, second and third shifts to the date of their restoration and occupancy by telegraphers who have seniority on the Rock Island property under the Telegraphers' Agreement. And we ask this Board to sustain our claim.

"The Committee affirms that this case has been handled in accordance with the Railway Labor Act and the rules of this Board."

POSITION OF CARRIER: "The discontinuance of the two telegrapher positions at Missouri Pacific Junction was made in accordance with Article 10 (c) of the telegraphers' current agreement of January 1, 1928. Naturally, the work performed by these two telegraphers pertaining to Missouri Pacific business has, since the discontinuance of the positions, been handled by the Missouri Pacific telegraphers in accordance with the agreement which the telegraphers have with the Missouri Pacific management, and the position of agent-telegrapher on the Rock Island, which is under the telegraphers' agreement, is sufficient to handle all station and train order business for the Rock Island at that point.

"At one time there were three consecutive assignments of telegraphers at Missouri Pacific Junction. The day assignment was discontinued April 17, 1932. This position was discontinued in accordance with the telegraphers' agreement and no complaint was instituted as it was considered proper to make such arrangement and since it was proper to make the reduction of the position of the first trick telegrapher at Missouri Pacific Junction, it is likewise proper to discontinue the second and third trick assignments. Claim should be denied.

"It is hereby affirmed that all data herein contained is known to the employes' representative and is hereby made a part of this dispute."

OPINION OF BOARD: Under an agreement entered into in 1909 between the Chicago, Rock Island and Pacific Railway Company and Missouri Pacific Railroad Company, the latter company has continuously since said date used the tracks of the Rock Island Company for movements of its trains between Pleasant Hill and Leeds Junction, Missouri, a distance of approximately twenty-four miles. The record is in conflict as to how train orders were handled prior to 1924 for the movement of Missouri Pacific trains onto the tracks of the Rock Island Company at the junction of the two lines at Pleasant Hill, but that is of no importance in this dispute.

In 1924 there was established at the junction of the two lines at Pleasant Hill and on Rock Island Company property a telegraph office designated Mis-

souri Pacific Junction, which was maintained and operated by the Rock Island Company. Three telegrapher positions were established at the Junction and three continuous shifts were maintained, all manned by Rock Island telegraphers. After this office was established these telegraphers handled all train orders for the movement of Missouri Pacific trains onto the tracks of the Rock Island Company at Missouri Pacific Junction. When the current agreement was executed between the Telegraphers' Organization and Carrier, effective January 1, 1928, these positions were included therein. As the office was established and maintained for the benefit of the Missouri Pacific Company that Company reimbursed the Rock Island for the cost of operating same.

The arrangement outlined above continued until April 17, 1932 when, due to a substantial decrease in traffic, the first trick telegrapher position was abolished and the handling, for that shift, of train orders for the movement of Missouri Pacific trains onto the tracks of the Rock Island was turned over to the first trick telegrapher at the Missouri Pacific station at Pleasant Hill. Subsequently, on March 9, 1938, the second and third trick telegrapher positions were abolished and the work formerly performed by employes holding these positions was turned over to the second and third trick telegraphers of Missouri Pacific Company at Pleasant Hill.

The claim covers only positions of second and third trick telegraphers. The first trick position was abolished more than two years before the creation of this Board and is not involved in the claim.

Petitioner contends that this action of carrier was in violation of the Telegraphers' Agreement in that it took work covered by the agreement and turned it over to employes not covered by said agreement.

Carrier relies upon Article 10 (c) of the Telegraphers' current agreement as authority for its action in abolishing the two positions in question. Article 10 (c) deals with the displacement rights of employes when positions are abolished. It in no way governs the right of carrier to abolish positions which is the question involved in this dispute.

This Board has held in a long line of decisions that Carriers have the right to abolish a position when the work of the position no longer exists but that they do not have the right to take work out from under an agreement and turn it over to others not covered by the agreement. (See Award 753 and cases there cited.) In this case there is no dispute as to the fact that the work formerly performed by the second and third trick telegraphers still exists or that it is now being performed by employes not covered by the Telegraphers' agreement with the Rock Island Company.

Carrier contends, however, the principle announced above is not applicable in this case, for the reason that the work was turned over to employes of the Missouri Pacific Company who are covered by the Telegraphers' agreement with that Company. This Board has held in two cases, (Awards 323 and 331) that a carrier does not have the right to take work out from under an agreement and turn it over to another carrier to be performed by employes of the latter carrier. (See also Award 180.) These cases are considered as controlling here. The action of carrier was doubtless induced by proper motives of economy but the plan adopted infringed upon the terms of the agreement. The method of negotiation, rather than ex parte action, should have been followed.

Carrier contends that the claim for reparation is barred by Article 6 (h) of the current agreement which reads:

"Other Grievances. Other grievances will be taken up with the proper officials within thirty days; otherwise, redress in such cases will be waived."

The second and third trick telegrapher positions at Missouri Pacific Junction were discontinued March 9, 1938. The first complaint was submitted May 31, 1938, approximately eighty days after the positions were abolished.

The conflict in the decisions of this Division as to the meaning and effect of rules similar to Article 6 (h) was recently reviewed in Award No. 942 and will not be repeated here. The rule in this case is the same rule considered in Award No. 942. There it was held that where the complaint was filed more than thirty days after the practice as to which complaint was made had disappeared the rule operated as a bar to the claim for compensation.

The decisions of this Division are all in agreement that rules of this character do not bar complaints at any time concerning continuing violations of agreements. The action of carrier in the instant case is a continuing violation of the current agreement and the Board, in conformity with its prior decisions, holds that Article 6 (h) does not bar the filing of a claim at any time charging such a violation of the agreement.

As pointed out above this Board held in Award No. 942 that the rule here under consideration operated as a bar to a claim that had been filed more than thirty days after the cause for complaint had disappeared. The Board, however, pointed out that it did not have before it in that case and did not pass upon the question as to whether the rule would operate as a cut-off rule against a claim for a continuing violation of an agreement.

The rule provides that where grievances are not taken up with the proper officials within thirty days **redress will be waived**. The rule is in no sense a cut-off rule such as the Board held the rule before it in Award No. 595 to be. The rule in the instant case, if applicable, is a bar to any claim for reparation. The Board has held that the rule is not a bar to a claim charging a continuing violation of the agreement. The grievance in this case is the claim of a continuing violation of the agreement. Reparation is merely the penalty imposed for the violation. It is, therefore, the Opinion of the Board that upon the facts of this case the claim for reparation is not barred by Article 6 (h) of the agreement. The claim will be sustained.

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;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the action of the carrier in the instant case contravenes the terms of the prevailing agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 27th day of September, 1939.