Award No. 1785
Docket No. TE-1631

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Herbert B. Rudolph, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

MISSOURI-KANSAS-TEXAS RAILROAD CO.

STATEMENT OF CLAIM: Claim of the General Committee of the Order of Railroad Telegraphers on Missouri-Kansas-Texas Railroad, that work covered by the Telegraphers' Agreement shall be performed by employes under said Agreement; that the Carrier in declaring abolished the agency at North McAlester, Oklahoma, a position covered by the Telegraphers' Agreement, while in fact only transferring the duties and work thereof to employes not under said Agreement, did not abolish the North McAlester agency in fact; that the North McAlester agency shall be restored and the incumbent agent, W. A. Ley, reinstated thereto and reimbursed for all wage loss at the rate of the position retroactive to January 1, 1941, the date the position was improperly abolished.

EMPLOYES' STATEMENT OF FACTS: An agreement bearing date August 1, 1928, subject to Supplements No. 1 dated November 25, 1933, and No. 2 dated November 4, 1940, as to rules of working conditions, and bearing date of August 1, 1937, as to rates of pay under general Mediation Case A-395, is in effect between the parties to this dispute.

The position of freight agent at North McAlester, Oklahoma is covered by said agreement and rated at $245.15 per month, with no assigned hours of service.

The position of freight agent at North McAlester is located one mile north of the McAlester freight agency position. The position of freight agent at McAlester is not covered by the Telegraphers' Agreement, and is listed in Article 1-(b) of said Agreement as an excluded position.

Effective January 1, 1941, the Carrier declared the freight agency at North McAlester abolished, and the accounts of the agency were transferred to the excluded freight agency at McAlester and maintained there separate and apart from the accounts of the McAlester agency.

Upon the freight agency at North McAlester being declared abolished, the incumbent agent, W. A. Ley, was removed by the Carrier.

POSITION OF EMPLOYES: The prevailing Telegraphers' Agreement contains the following articles which we invoke in this dispute:

"Article I

Employes Included

"(a) These rules and working conditions will apply to Agents, Freight Agents, or Ticket Agents, Agent Telegrapher, Agent Telephoners, Relief Agents, Assistant Agents, where they have charge of

matters dehors the record in an action other than that in which it was rendered. In other words, if the action or proceeding has an independent purpose and contemplates some other relief or result, although the overturning of the judgment may be important or even necessary to its success, then the attack upon the judgment is collateral.

The authority vested in the Corporation Commission of the State of Oklahoma to determine the status of station and agency of North McAlester, Oklahoma, as a public convenience and necessity and to order the station closed was invoked in a proper proceeding by the carrier. Judgment as shown by exhibit A issued accordingly. It will be noted that the judgment was ordered because of the high unnecessary expense or loss caused the carrier by the maintenance of this agency.

Appeal from this decision is only to the Supreme Court of Oklahoma as stated in Article 9, Section 20, of the Constitution of State of Oklahoma, and as determined by the Supreme Court of Oklahoma in Southern Oil Company versus Yale Natural Gas Company, 89 Okla. 121, 214 Pac. 131, affirmed 266 US 583, 45 S. Ct. 97, 69 L.E. 453.

There is no grant of jurisdiction in the railway labor act to the National Railroad Adjustment Board to hear and determine the status of a station or agency as a public convenience and necessity, for which reason the Board is precluded from considering the relief requested by the petitioner.

Further, inasmuch as the order of the Corporation Commission of Oklahoma finally determined the rights of all parties to this action, as shown in Exhibit A, there is pending no unadjusted dispute upon which the jurisdiction of the Board may attach.

The relief requested by the petitioner is a request that this Board order the carrier to disregard and violate the order of the Corporation Commission of Oklahoma, and as a matter of law, constitutes an illegal collateral attack upon the said order of the Corporation Commission of Oklahoma.

As the request of the petitioner is a collateral attack on said order of the commission, and as the Board is without jurisdiction to hear and determine the matter, the carrier respectfully requests that the claim be dismissed.

While the carrier denies any violation of the agreement with the organization or its employes, this carrier states that any action which plaintiff may have had is barred by the statutes of limitations as provided in 28 United States Code Annotated Sections 724 and 725; Oklahoma Statutes of 1931, Chapter 2, Article I, Section 101; Illinois Revised Statutes of 1937, State Bar Association Edition, Chapter 83, page 1973, Section 21; and Talbot v. Wright No. 13733 Federal Cases.

Except as herein expressly admitted by the Carrier, the carrier denies each and every, all and singular the allegations of the employes submissions and respectfully requests that the petitioner be placed on strict proof of each and every, all and singular the allegations contained in said submissions.

OPINION OF BOARD: Under authority of the Corporation Commission of Oklahoma, the Carrier on January 1, 1941, abolished its agency at North McAlester and dismantled the station building, and no agency work, freight or ticket, is performed at North McAlester.

The facts of record disclose that for several years prior to 1941 the agency work at North McAlester had fallen off to a point where very little, if any, actual agency work was being performed at this point; this fact the General Chairman recognized in his letter of December 29, 1940, wherein he states, "The agency, as you know, has not existed except in name only for several years." Employes, however, contend that for a number of years work of this agency has gradually been taken over by others not covered by their agreement, and seek to have such work now restored to North McAlester. It appears

that more than 10 years ago certain clerks were transferred from North McAlester to McAlester. These positions, of course, are not covered by the Telegraphers' Agreement, but claimant contends that by transferring these positions there was also transferred to McAlester, not covered by their agreement, the duty of supervising these clerks, which supervisory work belonged to the North McAlester agent. Claimant has stood by for more than 10 years without protesting the arrangement. While delay in asserting a claim does not bar a claim for a continuing violation of an agreement, nevertheless, such delay is cogent evidence, and in this instance convincing evidence, of the fact that there was no violation of the Telegraphers' Agreement by transferring these clerks covered by a separate agreement. See Award 654 disclosing facts somewhat similar to those presented in this Docket.

Claimants also contend that certain yardmaster work being performed by the agent at North McAlester was transferred. Admittedly the agent was doing this yardmaster work for the sole reason that there was not agency work to justify the position, and we are convinced that when the need for an agency disappeared the Telegraphers' Agreement was not violated by returning this work to the yardmen from whence it came.

Apart from the two above contentions of claimants, we can see no distinction between the controlling facts presented in this docket and those in Award 1305, and we hold that award to be controlling here.

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 no violation of the Agreement has been shown.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 24th day of April, 1942.