Award No. 5365
Docket No. TE-5250

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Angus Munro, Referee.

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the New York, New Haven and Hartford Railroad, that:

(1) the Carrier violated the terms of the prevailing agreement between the parties when, effective April 5, 1949, it, without agreement, declared abolished the agent's position at Dover, Massachusetts and consolidated said position with the agent's position at Needham, Massachusetts under one agent who is required to divide his time during his regular tour of duty between these two agency stations resulting in the suspension of work during regular hours on both positions, Monday through Friday, each week; and,

(2) the agency position at Dover, Massachusetts shall now be advertised and filled in accordance with the provisions of Article 15 of the agreement; and,

(3) the senior employe who was deprived of work as a result of this violative act shall be compensated for all monetary losses sustained.

EMPLOYES' STATEMENT OF FACTS: An agreement bearing date of June 15, 1947, covering rules of working conditions and rates of pay is in effect between the parties to this dispute; copies of which are on file with your Board. At Page 49 of said agreement is listed the position of agent at Dover, Massachusetts, rate of pay, $1.025 (subsequently increased in amount equal to the national increases). This position has been in the agreement since the first agreement was made on this property and it has, for many years, been filled by one, H. E. Conway.

Effective with the close of business, April 5, 1949, the Carrier declared this agency position at Dover, Massachusetts abolished and, concurrently therewith instructed the agent at Needham, Massachusetts to take over the agency position at Dover, dividing his time between the two stations—consolidated.

Upon receiving advice that his position was abolished, Agent Conway, rather than leave Dover and exercise displacement rights against a junior employe, notified the carrier that he was retiring from service.

The Organization protested the consolidation of these two full time positions under one agent as being contrary to the intent and purpose of

stations, by persons covered by the Agreement, and no work is taken out of the Agreement, there was no violation thereof. Surely the Agreement was not intended to limit the Carrier in using employes in a manner calculated to obtain the best results, so long as emyployes under an agreement are given all work covered by its scope."

This decision was followed in Award 4053, Docket TE-4012.

In the instant case, following discontinuance of the agency, the little work for Dover patrons was given to another agent under our Agreement. This was proper for:

"It is too well settled by numerous decisions of the Board to be longer open to doubt, that carriers are free to abolish a position when sufficient work no longer exists to warrant continuance of the position." Award 896, Docket TE-829.

The work of a scheduled position was not transferred to an employe outside its scope. It follows that Award 3, Docket TE-24, and the numerous analogous cases that follow are here inapplicable.

The fact situation in this proceeding is like that in Award 1670, Docket TE-1537. There pursuant to an order of the Arizona Corporation Commission the Southern Pacific discontinued its agency at Winkelman and placed its business and accounts under the jurisdiction of adjacent Haydens station. There was no passenger business and less-carload freight was delivered by truck. The Commission's order required the Haydens agent to "serve as agent at Winkelman for a certain period of time each day to be discretionary with the Company which will adequately serve the public." The amount of business was comparable to that at Dover.

This Board decided that despite the prescribed daily visit by the agent:

". . . what really happened was that the Winkelman agency was abolished and Winkelman became a non-agency station, subject to the Commission's requirement that the Hayden agent should make one visit to Winkelman a day instead of at the carrier's uncontrolled discretion. It would seem to us a more strained interpretation of the facts to hold that the agency at Winkelman continued to exist with a mere reduction in hours."

This and the other decisions cited are authority that the discontinuance of the agency in this case was proper.

CONCLUSION: The evidence shows that the business at Dover is from any point of view insubstantial, averaging little more than one shipment a business day. This being so an agency is wholly unnecessary. Neither the applicable agreement as interpreted and applied on the property, nor the decisions of this Board require that the Carrier be burdened with this useless position. The claim is wholly without merit and should be denied in every particular.

OPINION OF BOARD: Petitioner alleged Carrier abolished the position herein referred to but that a substantial amount of the duties connected therewith remained and that Carrier directed one of its employes at a different location to perform said remaining duties in addition to the duties of his job.

Under the facts of record herein the Board finds the work or duties continued to exist to a substantial degree and were being performed at the Dover location. By way of supporting our conclusion of a "substantial degree" we must first say we do not think either the amount of work, a certain kind of work, or the time necessary to perform work, considered separately or as a whole to be controlling although the weight each factor is deserving of will no doubt vary in each individual case. For example, the act of unlocking the station door in order that Carrier's patrons may have access thereto, while perhaps the duties of an agent, is, we think,

practically nil. We place in another category such items as preparing bills and freight arrival notices, collections, receipts, preparing daily car reports, and examining car seals. Each of said acts may be of a minimum amount and all may be susceptible of being performed in "no time at all" but they are basic. We are not considering the question of Carrier's authority either to abolish the position and work or to consolidate agencies; we have the question of consolidating positions.

Together with the above and foregoing we have the question of economy. Assuming Carrier's allegation that to continue the position we are here concerned with "would be an indefensible economic loss" to be correct, would that point justify or furnish a basis upon which the Board could deny the claim herein? We do not think so. The right of Carrier to conduct its operations as it chooses is not absolute. It must respect the Schedule it entered into with Petitioner and while the same is in force Carrier will be governed in its conduct by the terms and provisions thereof.

This Board has many times held Carrier may not unilaterally do what was here attempted, see Awards 388, 434, 496, 556, and 1296.

Carrier next contended in event the Board found work of the position in question continued to exist subsequent to the act or condition hereinabove described on the part of Carrier, then such act ceased to exist subsequent to September 1, 1949, by reason of the Schedule effective as of said date omitting the location herein involved from the wage scale attached thereto and consequently claim herein abated on the above date.

We note the previous Schedule referred to various classes of work without mention of a wage scale or location of work. The current Schedule with reference to the type of position we are here concerned with does make mention of an attached wage scale.

The contention of Carrier is overruled in that, (1) the contract of employment existing between Carrier and an employe must and does contain a definite subject matter which may arise by express provision thereof or by necessary implication and which provision is that the class of craftsman of which said employe is a member will have the exclusive right to perform the work referred to in said contract, and, (2) the previous Schedule did expressly include the work we are concerned with and we cannot read into the current Schedule an exclusion of work Petitioners have the exclusive right to perform by reason of an omission of location. We find the Schedule to be ambiguous and in such instances it is proper to resort to such evidence as the submission may contain for enlightenment.

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 Employes involved in this dispute are respectively Carrier and Employes 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 Carrier violated the Schedule as alleged.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 17th day of May, 1951.

DISSENT TO AWARD NO. 5365, DOCKET NO. TE-5250.

In this Opinion the majority concluded that "* * * the work or duties continued to exist to a substantial degree and were being performed at the Dover location."

To support opinion "substantial degree" of work the Organization simply asserted the work was done at Dover. Carrier vigorously denied it. The Organization offered no proof to support its assertion. A claimant coming to this Board assumes the burden of proof before he is entitled to prevail. Where directly conflicting assertions of decisive facts relied on are so divergent this Board should not decide but should remand to parties to determine the facts.

Also in support of Opinion Awards 388, 434, 496, 556 and 1296 are cited as controlling. Review of these Awards will demonstrate that they are neither comparable nor controlling.

This Award orders that "the agency position at Dover, be advertised and filled, etc." in direct contravention of many awards of this Board that it will not direct the establishment of positions. Also without evidence as to present day needs at Dover.

A companion Docket, TE-5294, involving the same parties and the same agreements and practices, was denied by this Board by Award 5318 which held in part:

> "* * * it is well settled Respondent could have abolished the job and apportioned its duties among the remaining members of the craft without doing violence to the Schedule."

The record in this Docket, TE-5250, Award 5365, shows that the agency at Dover was abolished and the remaining duties assigned to agent at Needham, a member of same craft (Telegraphers). Without a showing of distinguishing rules or practices the Opinion and sustaining Award 5365 is clearly in sharp contrast with Opinion and denial in Award 5318.

The Award ignores decisions by the Telegraphers System Board (consisting of equal Carrier-Telegrapher representation) which denied claims involving like circumstances and rules. This Board has held that interpretations by such System Boards are equally binding upon this Board.

For these reasons we dissent.

(s) R. M. Butler
R. H. Allison
A. H. Jones
C. P. Dugan
J. E. Kemp