Award No. 5384

Docket No. TE-5264

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Alex Elson, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

ERIE RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Erie Railroad, that:

(1) The carrier violated the terms of the agreement between the parties when on July 4, 1949, without negotiation or agreement, it theoretically abolished the full-time positions of agent-operator at Wellsburg, New York and Chemung, New York; and, improperly joined these two positions into one position of agent-operator, and thereafter required the regular assigned incumbent of the agent-operator position at Wellsburg to perform dual agent-operator's service—part time at Wellsburg and part time at Chemung—daily, except Sundays and holidays;

(2) The carrier shall restore the agent-operator positions at Wellsburg and Chemung, New York to their former individual status; and,

(3) Employes adversely affected by this violative act shall be reimbursed for all monetary loss they sustained since July 4, 1949.

EMPLOYES' STATEMENT OF FACTS: An agreement bearing date of January 1, 1939 is in effect between the Erie Railroad Company and The Order of Railroad Telegraphers, copy of which is on file with the National Railroad Adjustment Board.

Prior to July 4, 1949, there existed a position of agent-operator at Wellsburg, New York, held by D. A. Hoff, rate of pay $1.28 per hour and, at the same time, there existed a position of agent-operator at Chemung, New York, held by Mrs. I. C. Stanford, rate of pay $242.83 per month.

Wellsburg and Chemung are two separate stations located on the Susquehanna Division of this carrier, serving two separate communities. They are approximately six miles apart. The positions, (agent-operator at these two stations) are covered by the agreement, and are listed at page twenty of said agreement as two separate and distinct positions, with no relation to each other.

Effective July 4, 1949, the carrier, without conference or agreement, declared, theoretically at least, those two positions abolished, and in lieu thereof created one dual position embracing the duties of both positions, and required the agent-operator from the Wellsburg station to commute between Wellsburg and Chemung each day, except Sundays and holidays, to

and no reports are made in connection with passenger service from either of these stations. No train orders or other service such as might be performed by agent-telegraphers are required at either of these stations. The territory involved is all double-track, automatic signal.

2. There is no agreement rule which guarantees the continuance of any agency. Rule 4 of the agreement contemplates that a position must have 8 consecutive hours work exclusive of meal period.

3. The agreement contains no guarantee rules and stations are listed in the back of the agreement as information and are not part of the contract because the listings are back of the signatures of the contract. When this agreement was entered into the Telegraphers' Committee fully understood that this agreement did not guarantee the continuance of any number of station agents and did not restrict the Carrier from combining stations where such action was justified.

4. General Chairman McCann is now attempting to say that no stations can be combined except by "mutual agreement." While in the past these matters have been discussed with the local chairmen and in most cases the Chairman was in agreement, certainly that is no foundation to now hold that the Telegraphers' organization by the simple device of failing to agree to a combination of stations will, in effect, establish guarantees for the continued maintenance of such agencies as no longer can be justified.

5. The facts show that there is no justification for the continued maintenance of an agent at Chemung. Actually there is less than an average of one hour's work per day and this is taken care of by the agent from Wellsburg.

6. For the Board to hold that this Carrier must pay two agents for performing a combination of less than an average 4 hours work per day would be unreasonable and would compel Carrier to retain and pay employes not needed and performing no useful service.

(Exhibits not reproduced.)

OPINION OF BOARD: This Board is called upon to rule whether the Carrier may consolidate two agencies, abolish a position at one agency, and require the employe at the other agency to perform the work of both agencies.

The facts as to the alleged violation are not in dispute:

1. Up to July 4, 1949, two separate agent-operator positions were maintained at Chemung, New York and Wellsburg, New York, approximately 6 miles apart. These positions are shown on page 20 of the current Telegraphers' Agreement, dated January 1, 1939.

2. Sometime prior to July 4, 1949, the Carrier had made a study of the business handled at each station and had come to the conclusion it was no longer economically feasible to maintain the Chemung agency as it had.

3. The Carrier's representative communicated with the local representative of the employes and advised him of the Carrier's plan to abolish the position of agent-operator and to require the agent at Wellsburg to do the work of both. The employe's representative suggested the retention of the incumbent of the Chemung position at a salary of $50 or so a month. The Carrier declined this suggestion.

4. On July 2, 1949, the General Chairman of the employes wrote to the Superintendent of the Carrier protesting the change.

5. On July 4, 1949, the position of the agent at Chemung was abolished, the agent at Wellsburg took over the duties at Chemung, spending 4 hours at Chemung and 4 hours at Wellsburg, until August 7, 1950, when the New York Public Service Commission authorized demolition of the Chemung station.

6. On December 9, 1949, Mrs. Stanford, who had held the position of Agent at Chemung, resigned.

The employes concede that under their Agreement the Carrier may abolish positions unilaterally if no work remains, and there is no further necessity for the position. They contend that in this case the position could not be abolished because work still remained to be done. They admit that once the New York Public Service Commission authorized demolition of the station at Chemung, the position of agent at Chemung could be abolished. But they argue that the fact that the agent at Wellsburg continued to come to Chemung to perform work there during the period from July 4, 1949 to August 7, 1950, shows there was work to be performed. In essence the holding in this case turns on whether the Carrier could unilaterally abolish a position although work remained to be done and assign that work to another employe under the Agreement.

The employes contend that such action could not be taken unilaterally. They rely on the Agreement.

They also rely on the Wage Schedule, and in particular the fact that the positions in question are listed on page 20 thereof as follows:

WAGE SCHEDULE

(Page 20)

Susquehanna Division

	Office	Position	No. of Employes	Rate
CHEMUNG (1)	CH	AO	1	120.43
WELLSBURG (3)	UR	AO	1	.68

(Wage rates subsequently increased per national wage movements)

NOTES

(Page 31)

(1) Monthly rate covering assignment of 8 hours per day, 6 days per week.

(2) Monthly rate covering all services performed.

(3) Intermittent service.

(4) One employe performing service at two stations.

(Others omitted account inapplicable in the instant case.)

On the basis of the above provisions, they put their case as follows:

> "The Scope rule and the Basic Day rule, plus the Suspend work rule and the Wage Scale, make it clear that it was intended that there would be employes assigned to fill each individual position listed on a full time basis—there would be employes (agents) at both Wellsburg and Chemung. It cannot be denied that each of the positions involved in this dispute are separately and individually listed in the agreement; it follows, therefore, that so long as agents duties are in evidence, the organization is entitled to represent an employe and a position for the full eight hours on each day at each location."

The Carrier on the other hand vigorously denies that the provisions relied upon by the employes constitute a guarantee of positions. They point to the absence of a guarantee provision in the Agreement. They also point to a paragraph appearing on page 32 of the Agreement at the end of the schedule of positions which reads as follows:

> "Designation of positions is shown as information only and is subject to change as conditions may require."

The Carrier states that the positions listed in the schedule have been unilaterally changed over the years and certain positions have been changed since the Agreement was made in 1939, and that the scope rule and the other provisions relied upon by the employes contain no suggestion of a guarantee.

The parties have argued at length the question whether the schedule on pp. 12-32 of the printed Agreement is part of the Agreement. The Carrier stresses the fact that the schedule follows the signatures of the parties. This circumstance is irrelevant in this proceeding. Signatures to an Agreement are helpful in establishing as evidence the existence of the Agreement. Signatures are also necessary in order to meet the requirements of the Statute of Frauds. But in this case there is no dispute that the schedule exists and that it was attached to the parties' Agreement. The question that is pertinent is whether under the Agreement taken as a whole the parties intended that the employes should have any rights in the positions shown in the schedule.

An analysis of the entire Agreement shows the following:

1. Under Rule 1, the scope rule, there can be no question that the schedule of positions (pp. 12-32) was incorporated in the Agreement of the parties for the purpose of showing the wages to be paid to employes. There can also be no question that the positions listed in the schedule are necessary in order to identify the positions held by employes and the wage rate attached to the positions.

2. There can be no question that the schedule itself is the end result of collective bargaining in that it contains the wage rates attached to the particular positions.

3. Under Rule 1(a), specific reference is made to the fact that positions are **held by** employes and that these positions are the positions included in the wage scale, i.e., the schedule on pp. 12-32. This is apparent from the language of Rule 1(a) which is set forth below with the significant words emphasized:

> "RULE 1. Effective August 1, 1923, the following rates of pay, rules for overtime and working conditions will govern **positions held by telegraphers** and telephone operators (except switchboard operators), **agents included in the wage scale,** agent telegraphers, agent telephoners, towermen, levermen, tower and train directors, block operators, **and others whose positions are included in the wage scale.**"

4. Rule 2(a) does not exclude the claim that the employes have rights in the positions specified. It provides that when the work or conditions of a position in the wage schedule is materially changed, the rate of pay will be adjusted to conform with rates paid for similar work at other points on that particular seniority district, after a conference with the representatives of the employes.

Under this rule while the Carrier may make a change in the absence of an Agreement after a conference with the employes, the existence of the conformity standard would give the employes the right to challenge the action if in their opinion the rate did not conform with rates paid for similar work in the particular seniority district. Rule 3 gives the employes similar rights as to new positions.

5. Rule 13(a) makes specific reference to positions governed by the Agreement. The third sentence thereof reads as follows:

> "Seniority will date from the last date employes entered a class of service or a position covered by this agreement." (Underlining ours.)

6. Rule 13(b) and (c) make specific reference to certain positions listed in the schedule, in protecting the seniority of senior employes.

7. Rule 20(a) makes specific reference to positions in the schedule. The first sentence thereof reads as follows:

> "Rule 20. (a) Employes voluntarily leaving the service of their Department to accept positions not covered by this schedule, will forfeit their seniority after an absence of ninety (90) days, except employes promoted to official positions of a temporary nature, who will be given a leave of absence by the Superintendent not to exceed one year." (Underlining ours.)

In our opinion, the schedule attached to the parties' Agreement, pp. 12-32 of the printed Agreement, is part of the Agreement. We are not impressed with the Carrier's contention surrounding the words which appear at page 32, "Designation of position is shown as information only and is subject to change as conditions may require." All of the schedule attached serves as informative material to the parties. The key question is whether the word "change" appearing therein means a change made unilaterally or as a result of collective bargaining. Since the schedule was the result of collective bargaining, we believe that changes made must likewise result from collective bargaining, except as other provisions of the Agreement permit the Carrier to unilaterally abolish positions or reduce the work force when work no longer exists to be performed.

It is our opinion that under Rule 1(a), the employes coming within that rule held the positions listed in the schedule and that such positions were protected by the seniority rules of the Agreement. We do not hold that there is a guarantee of positions. The Agreement of the parties as mutually construed and as suggested by the practice of the parties, authorizes the Carrier to abolish positions when no work remains to be done in the position. But so long as there is work to be performed in the position, the seniority rights of an employe to the position attaches to that work. It is axiomatic that seniority rights may not be destroyed unilaterally.

Two other contentions of the Carrier go to the collective bargaining background of the parties and the practice of the parties. In view of our opinion that the language of the Agreement supports the claim herein, ordinarily we would have no occasion to consider these contentions. However, in view of the great emphasis placed on these contentions by the Carrier, we feel that their evaluation is indicated.

First: Carrier refers to the Agreement of 1917 which included scope and terminating articles reading as follows:

"ARTICLE I

> Effective October 1, 1917, the following rules will govern the service of employes required to perform the duties of a telegrapher (whether termed agent, assistant agent, or clerk) and telephone operators connected with the movement of trains; also such exclusive agents and others whose positions are included in the wage scale."

(Terminating clause)

> "The above rules and wage scale shall be effective October 1, 1917, and shall continue in force for one year from that date, and

thereafter subject to thirty days' notice in writing by either party to the other, requesting a change in the same.

New York, September 29, 1917

For the Railroads:
A. J. Stone, Vice President.

For the Telegraphers:
E. J. Hesser, Chairman
Telegraphers' Committee"

(Underscoring Added)

The Carrier states that when the 1923 Agreement was signed it declined "to again incorporate into an agreement the wage scale or a guarantee rule or to guarantee to continue the freezing of positions" and that the Carrier offered to compile the list and print the list behind the Agreement. The scope rule and termination language of the 1923 Agreement and subsequent Agreements are identical with the present Agreement. We have examined the 1917 provisions above set forth. We cannot see any substantial difference so far as guarantees are concerned between these provisions and the present Agreement. There is no specific guarantee in the 1917 Agreement. The Carrier places great weight on the fact that in the termination paragraph the words "and wage scale" are included. We cannot follow this contention. The absence of the words "and wage scale" in the present termination paragraph and the substitution of the broad language, "This Agreement", does not mean that the wage scale fails to continue in effect.

Under numerous awards of this Board, we must disregard the assertions of the Carrier as to the oral conversations which preceded the making of the 1923 Agreement. Instead we are required to look to the Agreement.

Second: The Carrier contends that there has been an established practice going back many years permitting the Carrier to unilaterally combine positions. The employes deny such a practice. The record made before us is inconclusive; instances of unilateral action taken by the Carrier are offset by instances of mutual agreement referred to by the employes. In any event, even if a practice were shown, this Board would be compelled to follow the Agreement of the parties.

Finally, Carrier views with great alarm a sustaining award. This Board in numerous cases has upheld claims similar to the one before us: Awards 233, 234, 388, 434, 496, 556, 1302, 3364, 3659, 4576, 5365, and others. The fact that this Board has consistently upheld claims of this character should relieve the Carrier of its expressed anxiety about the disastrous consequences which would follow a sustaining award.

That part of the claim which asks that this Board restore the agent-operator position at Chemung will be denied because of the action of the New York Public Service Commission authorizing closing of the station. The only monetary claim this Board will recognize is that of the incumbent of the position of agent-operator at Chemung on July 4, 1949, when the position was abolished. The Carrier should pay her for the period from July 4, 1949, to the date of her resignation, December 9, 1949.

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

The Carrier violated the Agreement.

AWARD

Claim (1) sustained. Claim (2) denied. Claim (3) sustained as to compensation for period from July 4, 1949 to December 9, 1949 in accord with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 11th day of July, 1951.