Award No. 6744
Docket No. TE-6765

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Jay S. Parker, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

BOSTON AND MAINE RAILROAD

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Boston and Maine Railroad that:

(a) the Carrier has violated and continues to violate the terms of the Union Shop Agreement, signed August 29, 1952, and effective September 15, 1952, when and because it has permitted and continues to permit certain employes occupying positions classified as General Agent (Minor) to continue thereon contrary to the provisions of the said Union Shop Agreement; and

(b) in consequence thereof any employe who occupied a General Agent (Minor) position on the 60th day following September 15, 1952, or since, and who has not become a member of The Order of Railroad Telegraphers shall, as a condition of continued employment, become a member in accordance with the provisions of Section 1, of said Union Shop Agreement.

EMPLOYES' STATEMENT OF FACTS: An Agreement bearing effective date of August 1, 1950, by and between the parties and referred to herein as the Telegraphers' Agreement, is in evidence; copies thereof are on file with the National Railroad Adjustment Board. In addition, an Agreement bearing effective date of September 15, 1952, by and between the parties and referred to herein as the Union Shop Agreement is in evidence; copies thereof are also on file with the National Railroad Adjustment Board.

The current Telegraphers' Agreement which became effective August 1, 1950, lists the following General Agent (Minor) positions with the then monthly rates of pay; said rates comprehend 208 hours of service per month:

Lynn	$399.61	Troy	$360.49
Salem	384.61	Keene	339.61
Gardner	375.01	Haverhill	378.81
Greenfield	353.81	Dover	334.61
Adams	354.61	Portsmouth	353.81
Northampton	339.61	Nashua	375.20

and during 1952 the General Agent (Minor) position at Waltham was included in the Telegraphers' Agreement on the same terms as those listed above.

These positions are not subject to this rule. To verify this fact, these positions are all monthly rated positions.

Article 39(c) reads:

"(c) The parties agree that the duties attached to monthly rated positions, under this Agreement, require that in filling them consideration must be given to qualifications or eligibilities separate and apart from the qualifications referred to in **Article 11(a)**".

Article 11(a) reads:

"(a) The right to a position covered by this agreement shall be based on qualifications and seniority; qualifications being sufficient, **seniority will govern**". (Emphasis added.)

These positions are excepted from this Rule 11(a).

As these positions are filled by appointment only from those who actually express their desire to be considered, then the Bulletin Rule (Article 12) is not applicable to these positions.

Furthermore, these positions are also excepted from the Overtime Rule.

Therefore, as the employes covering these positions are supervisory employes, and the majority of them are in the Boston and Maine Railroad Retirement Trust Plan (only extended to those in top supervisory positions), and the positions are not subject to displacement, in addition to not coming under the Bulletin Rule—in that they are not filled according to seniority, and are not subject to the Overtime Rule, the Organization has no justification for claim here whatsoever.

The claim is completely without merit and should be denied.

All data and arguments herein contained have been presented to the Organization in conference and/or correspondence.

(Exhibits not reproduced.)

OPINION OF BOARD: This claim involves two Agreements in force and effect between the parties, namely the Rules Agreement, effective August 1, 1950, and a Union Shop Agreement, effective September 15, 1952.

The controlling facts are not in dispute and can be stated in summarized form.

On January 13, 1953, the Organization gave written notice to Carrier that six employes, naming them, employed by the Carrier as General Agents (Minor), which positions are conceded to be monthly rated provisions coming within Article 39 of the Rules Agreements, had failed to comply with the terms of the Union Shop Agreement, because of failure to become members and pay dues, and requested that each of such employes be so notified in accord with the provisions of Section 5 (a) of the last mentioned Agreement.

Instead of giving the notice requested, Carrier, by the individual it concedes was the highest official designated by it to handle such disputes, advised the Organization in substance that the employes named therein were not subject to the Union Shop Agreement and that for that reason it declined and refused to give the notice as requested or any notice whatsoever. Thereupon the Organization brought the instant claim, as heretofore set forth at length in the record, to this Division of the Board.

Consideration of contentions advanced by the parties necessitates somewhat extended reference to portions of sections of the Union Shop Agreement, pertinent because of the nature of Carrier's action.

Section 1 of that instrument reads:

"In accordance with and subject to the terms and conditions hereinafter set forth, all employes of the carriers now or hereafter subject to the rules and working conditions agreements between the parties hereto, except as hereinafter provided, shall, as a condition of their continued employment subject to such agreements, become members of the organization party to this agreement representing their craft or class within sixty calendar days of the date they first perform compensated service as such employes after the effective date of this agreement, * * *".

Section 2 provides:

"This agreement shall not apply to employes while occupying positions which are excepted from the bulletining and displacement rules of the individual agreements but this provision shall not include employes who are subordinate to and report to other employes who are covered by this agreement. * * *".

Section 5 (a) reads:

"Each employe covered by the provisions of this agreement shall be considered by a carrier to have met the requirements of the agreement unless and until such carrier is advised to the contrary in writing by the organization. The organization will notify the carrier * * * of any employe who it is alleged has failed to comply with the terms of this agreement and who the organization therefore claims is not entitled to continue in employment subject to the Rules and Working Conditions Agreement. * * *. Upon receipt of such notice, the carrier will, within ten calendar days of such receipt, so notify the employe concerned in writing * * *. Copy of such notice to the employe shall be given the organization. An employe so notified who disputes the fact that he has failed to comply with the terms of this agreement, shall within a period of ten calendar days from the date of receipt of such notice, request the carrier in writing * * * to accord him a hearing. Upon receipt of such request the carrier shall set a date for hearing which shall be held within ten calendar days of the date of receipt of request therefor. Notice of the date set for hearing shall be promptly given the employe in writing * * *. The receipt by the carrier of a request for a hearing shall operate to stay action on the termination of employment until the hearing is held and the decision of the carrier is rendered.

"In the event the employe concerned does not request a hearing as provided herein, the carrier shall proceed to terminate his seniority and employment under the Rules and Working Conditions Agreement not later than thirty calendar days from receipt of the above described notice from the organization, unless the carrier and the organization agree otherwise in writing."

Summarized subdivision (b) of Section 5 requires a hearing and decision by the Carrier at local level; permits an appeal to the Carrier's designated officer by the aggrieved party, either employe or Organization; directs a decision on such appeal and provides such decision shall be final and binding unless within ten days from the date thereof the Organization or the involved employe requests the selection of a neutral person to decide the dispute as provided in Section 5 (c).

Section 5 (c) contains procedural provisions for selection of the neutral arbitrator by agreement of the three interested parties (Carrier, Organization and employe) or, in the event of their failure to agree, for his selection by the National Mediation Board, also the hearing before the arbitrator after he has been selected. And finally such section provides:

> "Any decision by such neutral arbitrator shall be made within thirty calendar days from the date of receipt of the request for his appointment and shall be final and binding upon the parties."

At the outset Carrier raises two jurisdictional questions. The first is bottomed upon the proposition the claim has not been progressed as required by Section 2, Second; of the Railway Labor Act. It may be conceded the claim was not progressed in the usual manner. Nevertheless the record discloses it was presented to and denied by the Carrier's highest reviewing official without that question being raised. In fact it was not until Carrier filed its reply, long after the filing of its ex parte submission, that any such challenge was made. Assuming, without deciding, the claim was not handled on the property in strict accord with the section of the Act relied on Carrier is not now in position to complain upon that basis. On the contrary under the related circumstances it is to be regarded as having waived any objection it might have theretofore raised to the manner in which the claim was progressed at the lower level.

The second jurisdictional contention advanced by Carrier is that this Division has no right to construe the Union Shop Agreement. We do not agree. Stripped of all excess verbiage this controversy is here because the Carrier takes the position that since it believes such Agreement has no application under the confronting facts and circumstances it can arbitrarily refuse to take the steps required under its terms to ultimately and finally determine that very question. So it becomes perfectly obvious the record presents a dispute growing out of the interpretation and application of an Agreement, to which all parties agreed, concerning the force and effect to be given its agreed on rules and/or terms, and provisions. Thus, contrary to Carrier's contention, it becomes clear that we not only have power to construe the Union Shop Agreement but, under Section 3, First (1) of the Railway Labor Act, it is our duty to do so for the purpose of determining whether Carrier's action in refusing to give the Organization's requested notice resulted in a violation of its terms. Resort to the Agreement immediately discloses that to hold otherwise would mean that by such action Carrier could defeat the intent and purpose of such Agreement. Otherwise stated by refusal to give notice at the involved stage of the proceeding upon the property on the ground relied on Carrier could make other and subsequent terms of the Agreement wholly unoperative. No such incongruous result is contemplated by the Railway Labor Act or by existing provisions of the Union Shop Agreement. On the contrary, and we now include the merits of the controversy, such Agreement in clear and unequivocal terms required Carrier to give the notice requested by the Organization and thereafter follow the procedure outlined by its subsequent terms and provisions. It necessarily follows Carrier's action resulted in a violation of the Agreement and requires a sustaining Award directing it to comply with the Union Shop Agreement by promptly giving the affected employes the notice requested by the Organization on January 13, 1953, and by thereafter proceeding in accord with the express directions of such Agreement.

The conclusion just announced does not mean that Claim (b) can be sustained or even considered at this time. Reference to the heretofore quoted and mentioned provisions of the Union Shop Agreement discloses that the parties themselves made that action impossible when they placed ultimate decisions of the question therein involved in the hands of an arbitrator by expressly agreeing, as they had a right to do, that "Any decision by such neutral arbitrator . . . shall be final and binding upon the parties." Such decision, it may be added, would have been for this Division of the Board had the parties not seen fit to agree otherwise.

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

That both parties to this dispute waived oral hearing thereon;

That the Carrier and 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 as indicated in the Opinion Carrier was guilty of violation of the Agreement and should be and is directed to comply with the Union Shop Agreement by promptly giving the involved employes the notice requested by the Organization on January 13, 1953, and by thereafter proceeding in accord with the clear and express directions of such Agreement.

AWARD

Claim (a) sustained to the extent indicated in the Opinion and Findings. Claim (b) remanded in accordance with the Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 5th day of August, 1954.