Award No. 9835
Docket No. TE-8944

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Raymond E. LaDriere, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

GULF, MOBILE AND OHIO RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Gulf, Mobile & Ohio Railroad, that:

1. The Carrier violates the Agreement between the parties when on July 1, 1955, it

(a) Failed and refused to place the position of Agent at West Point, Mississippi under the scope of the Agreement.

(b) Abolished the position of Telegrapher-Clerk at West Point, Mississippi.

(c) Substituted a position of Agent-Telegrapher in lieu of the two positions at a lower rate of pay, and,

(d) Later, failed within the prescribed time limits, to give its reasons in writing to the General Chairman for not allowing the claim.

2. Carrier now be required to,

(a) Restore the position of Agent at West Point, Mississippi, with the former rate of pay plus any subsequent increases, and bulletin in accordance with the applicable rules of the Agreement; and further, compensate the occupant of the position for the difference between the two rates for all time worked at the lower rate.

(b) Restore Telegrapher Shirley Johnsey to the position of Telegrapher-Clerk at West Point, Mississippi, and compensate her in accordance with the applicable rules of the Agreement for all time held off her regular assignment.

(c) Restore Telegraphers Hurt and Thomason to the positions from which displaced and compensate them in accordance with the applicable rules of the Agreement for all time held off their regular assignments.

(d) Compensate any other employes adversely affected in accordance with the applicable rules of the Agreement, and,

(e) Allow the claim as presented (account failure to comply with Article V).

3. A joint check of the Carrier's records be made to determine the hours and days worked by each claimant and the amounts due.

EMPLOYES' STATEMENT OF FACTS: The Agreements between the parties to this dispute are available to your Board and by this reference are made a part hereof.

While several rules of the Agreement are involved in the entire claim, the primary cause of the claim stems from Carrier's violation of a special or Memorandum of Agreement signed April 17, 1953, which we quote next below for your easy reference:

"It is agreed by and between the Gulf, Mobile and Ohio Railroad Company and its employes represented by The Order of Railroad Telegraphers, that;

The following agent positions not now covered by the Scope of the Agreement between the parties, namely;

Murphysboro
West Point
Stonewall
Dyersburg
Bells
Louisville
Columbia

shall as each become vacant subsequent to the effective date of this Agreement be placed under the Scope of the Agreement between the parties.

Effective date, June 1, 1953
Signed at Mobile, Alabama, April 17, 1953.

FOR THE EMPLOYES	FOR THE GULF, MOBILE & OHIO RAILROAD COMPANY
/s/ C. M. Barr General Chairman	/s/ T. A. Steel Contract Counselor"

West Point, the location involved in this dispute, is second on the list of stations named in the Memorandum, which means that the position of Agent at West Point automatically becomes a position under the scope of the Agreement whenever a vacancy occurs on the position subsequent to June 1, 1953.

On July 1, 1955, the position of Agent at West Point became vacant; it was not placed under the scope of the Agreement between the parties. Instead, the Carrier acting unilaterally substituted a position of Agent-Telegrapher. The position of Agent, West Point, carried a rate of $470.00 per month plus $67.00 additional allowance; the position of Agent-Telegrapher substituted by the Carrier was advertised on Bulletin No. 20, dated July 1, 1955, with a rate of $2.015 per hour.

was not necessary to do so if the employe assigned to the agency was qualified.

"It being a newly created position, the rate of pay is to be determined by Rule 7-19. The Carrier fixed the rate of pay at $1.39 per hour which was the rate paid on a similar position at Mansfield. An examination of the evidence shows that the position at Mansfield was comparable as to location, duty and responsibility as required by Rule 7-19. No position is pointed out by the Organization which better conforms to the requirements of the controlling rule. We think the position of the Carrier was correct in all respects.

"Claim denied."

CONCLUSION

The contract never contemplated that unnecessary employes would be employed. There is no need for two employes at West Point. One employe amply and satisfactorily performs all of the necessary duties. No complaint has ever been received that the agent-telegrapher is unduly burdened.

The contract between the parties contemplates and provides for the establishment of an agent-telegrapher position and the abolishment of the unnecessary telegrapher-clerk position.

The claim is not supported by contract or practice and is not in the interest of efficient and economical operation. The claim is without merit and should be denied.

Carrier reserves the right to make an answer to any further submission of the Petitioners.

(EXHIBITS NOT REPRODUCED)

OPINION OF BOARD: On April 17, 1953, the parties made a special agreement to the effect that the agent positions at several places, including particularly West Point, Mississippi, as each becomes vacant subsequent to the date of the agreement, shall be placed under the scope of the agreement between the parties.

On July 1, 1955, the position of agent at West Point became vacant by the retirement of the Agent and the Carrier abolished the same and also abolished the position of the Telegrapher-Clerk and created a new position of Agent-Telegrapher. The former agent received $470.00 per month plus an allowance of $67.00 whereas the new position was bulletined at $2.015 per hour.

At the outset we are met by the claim of employes that the Carrier failed within the prescribed time limits to give its reasons to the General Chairman for not allowing the claim.

Article V, Section 1 (a) of the August 21, 1954 Agreement provides that should any

"claim or grievance be disallowed, the Carrier shall within 60 days from the date same is filed, notify whoever filed the claim or grievance (the employe or his representative) in writing of the reasons for such disallowance. If not so notified, the claim or grievance shall be allowed as presented, * * *"

and Section 1 (c) provides that the same requirements shall govern in "appeals taken to each succeeding officer", etc.

On September 3, 1955, the General Superintendent of Carrier wrote fully as to reasons in declining the claim; the General Chairman of Employes then on October 28, 1955 appealed the claim to the highest officer of Carrier designated to handle such matters and said in part:

> "Claim of the General Committee of the Order of Railroad Telegraphers on the Gulf, Mobile and Ohio Railroad that the Carrier violated the Special Agreement signed at Mobile, Alabama April 17, 1953, when
>
> "1. By unilateral action it abolished the position of Agent at West Point, Mississippi, and in lieu thereof created a position of agent-telegrapher at a reduced rate of pay, and * * * * *"

On November 3, the Carrier wrote the General Chairman stating that:

> "This will acknowledge receipt of your letter dated October 28, 1955, your File C-255-24, regarding a claim at West Point, Mississippi.
>
> "After considering the facts in this case, we do not see where there has been any violation of the agreement and the claim is respectfully declined."

On July 16, 1956, about eight and one-half months thereafter, the General Chairman wrote the Carrier stating that his letter of November 3, 1955, did not comply with Article V of the August 21, 1954 Agreement and demanding settlement; the Carrier replied maintaining that compliance was made with the contract.

From the awards offered and read it is clear that the basis for upholding this so called "Cut-off" rule has varied considerably; for instance those cases in which there was no disallowance at all such as Award 9492 (Rose), Award 2652, 2nd Division (Whiting), Award 8412 (Daugherty); or those in which no action was taken within the time limit (usually 60 days) for example Award 3280 (Carey), 2nd Division, Award 8318 (Daugherty); or those in which there is a simple curt denial, such as "Claim denied", Award 9205 (Stone), or "Claim is denied" Award 9253 (Weston), or "Per our conference claim is denied" Special Board of Adjustment 167 Award 18 (Stone).

In the Award in Docket 15 (Lynch) Special Board of Adjustment 287, the claim was presented July 30, 1956, but the date it was declined does not appear. However, the "Cut-off" provision was sustained. The wording used there was "As a result of this investigation your claim is declined". This is the strongest authority for the Employes that has come to our attention.

On the other hand, in support of the Carrier's position, there is Award No. 2 (Stone) of Special Board of Adjustment 186, where it was pointed out that the only reason stated in making the claim was that "it was a violation of the Scope Rule" of the Telegraphers Agreement, without any statement as to the grounds for such contention, and "in such case we think the answer of the Superintendent that he could not see any violation was sufficient compliance with the rule".

In Special Board of Adjustment 186, Award No. 6, it was held: "Upon receipt of this claim the Superintendent declined the claim with the statement

'The carrier does not agree that there is any violation of any article of the current telegraphic agreement' " and the Board said that this "Satisfies" the requirements of the rule.

In Award 9615 (Rose) it was said by this Division November 2, 1960, that the General Chairman's letter as well as the response of the Carrier's Vice President must be considered and read together, and after doing so it was held that an impartial reading "leads us to the conclusion that the timely responding letter reasonably conveyed notice that the claim was not allowed".

Following the suggestion of the above award we refer to the statement of claim in letter set out above from which we see that Employes allege Carrier (a) violated the Special Agreement of April 17, 1953, and (b) abolished the position of agent at West Point, and (c) created the position of Agent-Telegrapher at reduced pay.

Now if we look at Carrier's letter we find (a) that Employes' claim letter of October 28, 1955 (and file number) is referred to and acknowledged with its charge of Violation of the Special Agreement, of abolishing the position of agent and creating the position of agent-telegrapher, and in answer thereto it is thoughtfully said:

> "After considering the facts in this case, we do not see where there has been any violation of the agreement and the claim is respectfully denied."

Such response is exactly the equivalent of saying that the agreement was not violated by abolition of the Agency or creating the new position.

In reviewing the awards which have sustained this or similar cut-off provisions, it is interesting that nearly all of them involve relatively small amounts of money, less than a hundred or a few hundred dollars; of course the principle embraced is the same in such cases as in the present one where many tens of thousands of dollars are sought, but no one will deny that in the latter situation there probably is greater urgency and anxiety to rule correctly on the part of all concerned.

After careful consideration we have come to the conclusion that Employes in seeking mandatory allowance under Article V are asking the Board to go further than we have ever gone, or are willing to go on the facts presented here; that, on the contrary, the denial and the reasons given are sufficient compliance with the Rule and therefore we must proceed with the case on the merits.

When F. D. Montgomery, the Carrier's Agent at West Point, Mississippi, who was not covered by the Telegraphers' Agreement, retired on July 1, 1955, after 58 years of service, the Carrier abolished the position of Agent and the only other position which was Telegraph-Clerk. At the same time the Carrier established and bulletined a new position of Agent-Telegrapher which was awarded to the senior applicant and covered by the Telegraphers' Agreement.

This change had been contemplated for some time because the business handled at West Point had decreased to the extent the Carrier was of the opinion that a separate position of Agent was no longer justified, but action had been deferred because of Mr. Montgomery's long service until his retirement.

The General Chairman of the Employes was advised of the proposed change in conference with Carrier's representative on June 6 and June 14, 1955, and he took the position that the monthly rate which had been paid to Mr. Montgomery should apply to the Agent-Telegrapher's position when placed under the agreement but that the position should have a five-day work week of eight hours per day.

Employes allege that Carrier, by its action, violated a Special Agreement of April 17, 1953, reading:

> "The following Agent positions not now covered by the Scope of the Agreement between the parties" (naming West Point among others) "shall as each becomes vacant subsequent to the effective date of this Agreement be placed under the Scope of the Agreement between the parties."

The Carrier asserts that it was simply exercising a prerogative of management to abolish jobs found to be uneconomical to operate and such action did not violate the agreement.

In Award 8061 (McCoy) an agreement covering the Agency at Gettysburg, Pennsylvania was involved. Much the same situation existed as at West Point, in that the Agent had served for over seventy-one years and action was deferred until his retirement. However at Gettysburg there were a number of employes, members of the Clerk's Agreement, who continued to do the work after the position of Agent, which was under no agreement, had been abolished. At West Point the only position other than the Agent was a Telegrapher-Clerk. After these two positions were abolished all of the work then continued to be performed by the newly created Agent-Telegrapher who is covered by the Telegraphers' Agreement, so that there is no question in this case as there was there, of allocating the work to another craft.

The Gettysburg Agreement provided, after listing stations, including Gettysburg,

> "When these positions are vacated by present incumbent for any reason, they will then be subject to advertisement and rates will be adjusted to conform with rates on similar positions on their seniority districts."

In denying the claim this Division of the Board (Award 8061) said:

> "The Brotherhood contends that in failing to advertise the position of Agent at Gettysburg, and fill it with the appointment of an employe on the Telegraphers' seniority roster, the Carrier violated Rule 29. In other words, it construes the language above quoted from Rule 29 as an absolute and unequivocal agreement to continue the position and to fill it.
>
> "We do not so read the provision in question. By its terms, all it provides is that the position 'will then be **subject** to advertisement * * *' (Emphasis ours). All the other positions listed in Rule 29, of which there are over a hundred, are by virtue of the Scope Rule and the Seniority Rules **subject** to advertisement. The same situation exists with respect to other unions under other agreements. Yet that fact has never been held to prevent the Carrier from abolishing a position. All that the provision of Rule 29 did was to provide for

future coverage, and a method of fixing rates when such coverage took effect. There is nothing to indicate an intent to guarantee the continuation of the position contrary to all established practice. (Emphasis ours.)

"If business should increase at Gettysburg, so that need arises for an Agent there, there is no question that the position will be within the coverage of this Agreement, by virtue of Rule 29. But there is nothing in the Agreement which requires the Carrier to fill an unneeded position."

The Award further points out that if the position of Agent were filled he would either have nothing to do (said to be "too absurd for this Board to consider") or work would have to be taken from the Clerks which would be a clear violation of the Clerks' Agreement. The same situation exists here. If the Agent's position were restored, work would have to be taken from one under the Telegraphers' Agreement (a clear violation) or the agent would have no work to do.

In the record it appears that both the new appointee and the interim employe who filled the position after its creation and until the new appointee was selected, have never found the work of the position of Agent-Telegrapher burdensome or more than they individually could do. This in itself is some strong indication of justification for the action of the Carrier. The Special Agreement contains no provision against the abolition of an office where circumstances justify. Moreover in this case, as distinguished from the Gettysburg case, where no Agent was appointed and the work went over to the Clerks' Agreement, here all of the work is now under the Telegraphers' Agreement. Isn't this of itself substantial compliance with what the Agreement was meant to do?

In Award 7359 (Larkin) this Board held that a provision forbidding changes in classification of positions or rates of pay "does not say that the Carrier cannot abolish a position without agreement" of the parties.

Reference is made in support of the above to Award 4446 (Wenke), Award 6945 (Messmore), Award 8015 (Cluster), and Award 4824 (Carter) which latter award also approves the method used by Carrier herein in arriving at the compensation to be paid the new Agent-Telegrapher.

It is therefore our conclusion that the position of Agent and that of Telegrapher-Clerk under the circumstances were properly abolished as there was no agreement binding the Carrier not to do so; that in creating the new position of Agent-Telegrapher and fixing the compensation therefore the Carrier acted within its rights, that the new position was bulletined and assigned and all other steps taken in conformity with the agreement of the parties.

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 there has been no violation of any Agreement by the Carrier.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 17th day of February 1961.

DISSENT TO AWARD 9835, DOCKET TE-8944

This award erroneously excuses the Carrier's failure to comply with the requirement that it notify the aggrieved employe or representative of its reasons for disallowance of a claim merely because enforcement of the provision would be costly.

That, it seems to me, is about the most weird reasoning I have ever encountered. In the nature of things the way of the transgressor was never meant to be made smooth. Furthermore, when an agreement makes a specific and unambiguous provision in favor of the employes the amount of money involved is just as important to the employes as it is to the employer. By making the choice it did here the majority placed this Board in the position of taking sides. Surely Congress never intended any such result when it provided for decisions on an impersonal, impartial basis.

On the merits the decision is equally erroneous, and demonstrably fallacious in its conclusions. However, since other disputes involving the same issues are being progressed, as shown by the record, I shall reserve comment on this portion of the award until the additional cases come up for handling. "Sufficient unto the day is the evil thereof."

J. W. Whitehouse
Labor Member

REPLY TO LABOR MEMBER'S DISSENT TO AWARD NO. 9835, DOCKET NO. TE-8944

The Labor Member's Dissent is an unconscionable attempt to misrepresent facts. Insofar as Article V is concerned, it is, as the Dissent admits, clear and unambiguous and simply requires notification of "reasons" for disallowance of claims. Award 9835 unalterably and correctly concludes that the "reasons" given by Carrier in this case "are sufficient compliance with the Rule" and properly denies Petitioner's arguments that something more was intended or required thereby.

Insofar as the merits of the claim itself are concerned, Award 9835 correctly follows sound precedent in reemphasizing Carrier's right to abolish

unnecessary positions and in rejecting unsound and unsupported allegations for the perpetuity thereof.

/s/ **R. A. Carroll**

/s/ **P. C. Carter**

/s/ **W. H. Castle**

/s/ **D. S. Dugan**

/s/ **J. F. Mullen**