Award No. 11590
Docket No. TE-9761

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

John H. Dorsey, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY
MISSOURI-KANSAS-TEXAS RAILROAD COMPANY OF TEXAS

STATEMENT OF CLAIM: Claim of the Order of Railroad Telegraphers on the Missouri-Kansas-Texas Railroad Company, Missouri-Kansas-Texas Railroad Company of Texas, that:

Carrier violated and continues in violation of the Agreement between the parties when it transferred the work being performed by employes within the scope of the Agreement at Sedalia, Missouri, to employes outside the scope of the Agreement, and a separate Seniority District, and as a result of such violation beginning December 1, 1956, the Carrier shall:

(1) Make the employes of the positions existing at Sedalia, Missouri, prior to date of such violation, whole with respect to Rule 1, Rule 5, (c) and (d), and (e), Rule 7, (a) and (b), Rule 9, and Rule 26, and any other rules violated because of the initial violation on the part of the Carrier by this transfer of work.

(2) The names of the employes affected as of the date of this claim are Telegrapher-Clerk Elmer Paul, and Telegrapher-Clerk G. W. Anderson, and the occupant of the unassigned swing position that would have been filled had not this violation taken place; and such other employes adversely affected from time to time as a result of this violative action of the Carrier. The names of the employes to be supplied in the event the Carrier's action has forced the retirement or resignation of any employe.

EMPLOYES' STATEMENT OF FACTS: The Order of Railroad Telegraphers which will hereafter be referred to as "Employes" or "Telegraphers", having been duly designated as collective bargaining agent for its craft on the Missouri-Kansas-Texas Lines, which will hereafter be referred to as the "Carrier" or "Company", did, on the 1st day of September, 1949, enter into an agreement with the Carrier as to rules, and effective February 1, 1951, as to rates of pay and working conditions, which is in full force and effect, a copy of same being on file with your Board.

Clearly the railroad had the right to make the change it did here and the change made was in conformance with the agreement and not in violation thereof, and the Carrier respectfully requests the claim be denied.

DAMAGES

The damages requested in second paragraph of claim for alleged violation of agreement is to "make the employes of the positions existing at Sedalia, Missouri, prior to date of such violation, whole."

L. W. McCall, Elmer Paul, and G. W. Anderson were the employes assigned to the positions existing at Sedalia, Missouri, prior to date of alleged violation, namely November 30, 1956.

L. W. McCall resigned from the service December 1, 1956. He was paid in full for all services rendered. He has not been damaged and nothing could possibly be due him.

Elmer Paul took leave December 1, 1956, and resigned April 10, 1957. A man on leave is entitled to nothing and has not been injured. Paul is whole, has not been damaged, and is due nothing.

G. W. Anderson laid off sick December 1, 1956, took leave January 11, 1957, and resigned April 18, 1957. A man off sick and on leave is entitled to nothing under the agreement. He is whole, has not been damaged, and is due nothing.

Accordingly the Carrier respectfully requests that the claim be denied.

All data submitted in support of the Carriers' position have been heretofore submitted to the employes or their duly accredited representatives.

The Carriers request ample time and opportunity to reply to any and all allegations contained in Employes' and Organization's submission and pleadings.

Except as herein expressly admitted, the Missouri-Kansas-Texas Railroad Company and Missouri-Kansas-Texas Railroad Company of Texas, and each of them, deny each and every, all and singular, the allegations of the Organization and Employes in alleged unadjusted dispute, claim or grievance.

For each and all of the foregoing reasons, the Missouri-Kansas-Texas Railroad Company and Missouri-Kansas-Texas Railroad Company of Texas, and each of them, respectfully request the Third Division, National Railroad Adjustment Board, deny said claim, and grant said Railroad Companies, and each of them, such other relief to which they may be entitled.

(Exhibits not reproduced.)

OPINION OF BOARD: The parties involved in this dispute are parties to Agreement of May, 1936, Washington, D. C., referred to in the industry as the Washington Agreement.

The Facts

On September 1, 1956, Missouri-Kansas-Texas Railroad Company, herein called Carrier, served notice on Telegraphers, Petitioner herein, and its employes represented by that Organization which reads, insofar as here material:

> "You, and each of you, are hereby notified that effective ninety (90) days from September 1, 1956, or at 12:01 A. M., December 1, 1956, pursuant to and in accordance with the provisions of Agreement between participating carriers and participating organizations, dated Washington, D.C., May 21, 1936, and known as the Washington Agreement, the Missouri-Kansas-Texas Railroad Company and the Missouri Pacific Railroad Company will consolidate their telegraph and train order facilities at Sedalia, Missouri, and thereafter all telegraphing and train order work will be conducted by the joint employes of said Missouri-Kansas-Texas Railroad Company and the Missouri Pacific Railroad Company at the joint interlocker of said Railroads at Sedalia, Missouri.
>
> "Insofar as the effect of the coordination upon employes is concerned there will be on and after December 1, 1956, three joint Telegrapher-Towermen at Sedalia, Missouri, for the Missouri-Kansas-Texas Railroad Company and Missouri Pacific Railroad Company, and two positions of Telegrapher-Clerk at Sedalia, Missouri, will be abolished effective December 1, 1956."

At the same time the Missouri Pacific Railroad Company, herein referred to as M-P, served a like notice on Telegraphers and M-P employes within the scope of that organization's agreement with M-P.

Telegraphers have separate collective bargaining agreements with Carrier and M-P.

In furtherance of effectuating compliance with the Washington Agreement the General Chairman representing Carrier's employes, the General Chairman representing the M-P employes and officials representing Carrier and M-P conferred in an attempt to work out the details of the "coordination." The Carriers informed the General Chairmen that they would be agreeable to placing in effect any distribution of the work between employes, covered by the separate collective bargaining agreements, as could be agreed upon by the General Chairman.

Notwithstanding that the General Chairmen failed to reach an agreement as to distribution of work affected by the "coordination," Carrier and M-P effectuated the "coordination" on December 1, 1956. As a consequence the work performed for Carrier, prior to that date, by two Telegrapher-Clerks and a swing position was transferred to employes of M-P and Carrier abolished the positions.

Pertinent Provisions of the Washington Agreement

The following provisions of the Washington Agreement are pertinent:

"Section 2 (a).

> The term 'coordination' as used herein means joint action by two or more carriers whereby they unify, consolidate, merge or pool in

whole or in part their separate railroad facilities or any of the operations or services previously performed by them through such separate facilities.

"Section 5.

Each plan of coordination which results in the displacement of employes or rearrangement of forces shall provide for the selection of forces from the employes of all the carriers involved on bases accepted as appropriate for application in the particular case; and any assignment of employes made necessary by a coordination shall be made on the basis of an agreement between the carriers and the organizations of the employes affected, parties hereto. In the event of failure to agree, the dispute may be submitted by either party for adjustment in accordance with Section 13.

"Section 13.

In the event that any dispute or controversy arises (except as defined in Section 11) in connection with a particular coordination, including an interpretation, application or enforcement of any of the provisions of this agreement (or of the agreement entered into between the carriers and the representatives of the employes relating to said coordination as contemplated by this agreement) which is not composed by the parties thereto within thirty days after same arises, it may be referred by either party for consideration and determination to a Committee which is hereby established, composed in the first instance of the signatories to this agreement. Each party to this agreement may name such persons from time to time as each party desires to serve on such Committee as its representatives in substitution for such original members. Should the Committee be unable to agree, it shall select a neutral referee and in the event it is unable to agree within 10 days upon the selection of said referee, then the members on either side may request the National Mediation Board to appoint a referee. The case shall again be considered by the Committee and the referee and the decision of the referee shall be final and conclusive. The salary and expenses of the referee shall be borne equally by the parties to the proceeding; all other expenses shall be paid by the party incurring them."

The Collective Bargaining Agreement

It is undisputed that the three positions abolished by Carrier on December 1, 1956, came within the scope rule of the existing collective bargaining agreement between Carrier and Petitioner herein. It is well established that when the agreement so provides — construing the agreement **in vacuo** — the Carrier may not unilaterally abolish such positions and transfer the work to employes of another carrier, without breaching the agreement. See, for example, Awards Nos. 951, 1527 and 4698. If Carrier has a defense to such an action it must be founded in a superseding contract between it and the collective bargaining agent of the employes.

The Washington Agreement

The Washington Agreement, to which the parties involved in this dispute are signatories, details a procedure, which if adhered to, supersedes the collective bargaining agreement and permits a carrier to transfer work to an-

other carrier to effect a "coordination" as that term is defined in Section 2(a) of the Washington Agreement.

Contentions of the Parties

Petitioner contends that Carrier failed to comply with Section 5 of the Washington Agreement in that it made an assignment of employes which was not on the basis of an agreement between the carriers and the organizations of the employes affected by the "coordination." Therefore, Carrier having failed to comply with the Washington Agreement, the provisions of the collective bargaining agreement prevail and must be honored.

Carrier, admitting that the transfer of the work was made to M-P employes in the absence of agreement between the carriers and the organizations of the employes affected, contends that any dispute concerning compliance with Section 5 of the Washington Agreement can only be resolved by recourse to the arbitration procedure detailed in Section 13 of that Agreement.

Resolution of the Issues

It is uncontroverted that the action taken by Carrier in the abolishment of positions and transfer of the work to M-P employes was a "coordination" within the meaning of that term as defined in Section 2 (a) of the Washington Agreement. The issue narrows as to whether a carrier may derogate the existing collective bargaining contract in the absence of fully complying with the procedures and obligations attendant to a "coordination" imposed by the Washington Agreement.

As we read Section 5 of the Washington Agreement it imposes an absolute bar to carrier making an assignment of employes necessary to a "coordination" unless it is done on the basis of an agreement between the carriers and the organizations of the employes affected. If the parties fail, through negotiations, to reach the indispensable agreement, which is a condition precedent to any assignment of employes, the burden is upon the carrier to have the dispute resolved by submitting it for adjustment in accordance with Section 13. It is the Carrier who seeks the privilege of effecting a "coordination" with the protections afforded by the Washington Agreement. Therefore, it is the Carrier who must fully comply with the mandates of the Washington Agreement to establish it as a defense to what, otherwise, would be a violation of the collective bargaining agreement.

Where, as in this case, the carriers and organizations of the employes affected failed, through negotiations, to reach an agreement as to the assignment of employes made necessary by the proposed "coordination," Carrier was not free to arbitrarily assign employes, as it unilaterally chose, and realize compliance with the Washington Agreement. Carrier had a remedy under Section 13 of the Agreement. Until that remedy was exhausted and Decision issued, Carrier was not free to effectuate the "coordination." Such a Decision may have directed the carriers to make an assignment of employes entirely different than that which Carrier unilaterally and arbitrarily did.

Carrier having failed to comply with the Washington Agreement we find that Agreement is not a defense to Carrier's violation of the collective bargaining agreement. See and compare the following Decisions of referees appointed pursuant to Section 13 of the Washington Agreement: Docket No. 57, Docket No. 70 and Resubmitted Docket No. 70.

We find Carrier's alleged defense of mootness is without merit.

Carrier's allegations concerning the employer-employe relationship as between Carrier and Claimants, after December 1, 1956, and Claimant's availability for employment have been considered. These are factors that are addressed to computation of and compliance with a monetary award. The raising of such issues in the Submissions is premature.

We find that Carrier violated the collective bargaining agreement as alleged in the Claim. We will award to Claimants Elmer Paul and G. W. Anderson that amount of money which will make each of them, respectively, whole for such loss of wages as each may have suffered because of the violation in the period from December 1, 1956 to the date of this Award. This is to be computed on the basis of what each Claimant, respectively, would have earned, during the aforesaid period, absent the contract violation, less what he earned and less such amount received from Carrier purportedly in satisfaction of the requirements of the Washington Agreement.

Other than as set forth in the preceding paragraph we will deny the Claim.

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 the Carrier violated the collective bargaining agreement.

AWARD

Claim sustained in part and denied in part as prescribed in the Opinion, above.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 11th day of July 1963.