

Award No. 12932
Docket No. TE-11521

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

John J. McGovern, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

LEHIGH VALLEY RAILROAD COMPANY

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

1. Carrier violated the terms of the effective Agreement between the parties hereto when at the end of tour of duty Monday, December 2, 1957, it arbitrarily declared abolished the clerk-telephoner position at Irvington, New Jersey, without in fact discontinuing the work previously performed by the clerk-telephoner at the point and transferred the work of that position by assigning the performance of same to employes not covered by the Telegraphers' Agreement.

2. The clerk-telephoner position at Irvington shall be reestablished and the work performed by the occupant of that position through December 2, 1957, be restored to the Telegraphers' Agreement and be performed by an employe coming within the scope of such Agreement.

3. The senior idle telegraph service employe of the New York District, extra in preference, (day-to-day basis) will be allowed a day's pay (8 hours) at the rate of the Irvington clerk-telephoner position beginning December 3, 1957 and continuing each day thereafter Monday through Friday of each week until the Irvington clerk-telephoner position is reestablished and the work returned to those of our class or craft rightfully entitled to perform it.

4. R. N. Ferchak, who was improperly removed from his clerk-telephoner position at Irvington, shall be restored to his Irvington position and shall be made whole with respect to wages and away from home allowances for each day beginning with the date his Irvington position was improperly declared abolished and continuing each day thereafter during the period that position rightfully belongs to him in accordance with provisions of the Telegraphers' Agreement.

5. J. M. Coleman, who was displaced from his Newark, New Jersey, second trick towerman telegrapher position by R. N. Ferchak, shall be made whole with respect to wages and away from home allowances beginning with the date he was displaced and continuing each day thereafter until the date of his resignation, December 24, 1957.

EMPLOYES' STATEMENT OF FACTS: There are in full force and effect collective bargaining agreements entered into by and between Lehigh Valley Railroad Company, hereinafter referred to as Carrier or Management, and The Order of Railroad Telegraphers, hereinafter referred to as Employees or Telegraphers. The Agreement was effective February 1, 1948. This Division has copy of the printed Agreement and it is, by reference, made a part of this submission as though set out herein word for word.

The dispute submitted herein was handled on the property in the usual manner through the highest officer designated by Carrier to handle such disputes and remains unadjusted. Under the provisions of the Railway Labor Act, as amended, this Division has jurisdiction of the parties and the subject matter.

1. Irvington, New Jersey is a city of 59,201 population (1950 census). It is located on a branch line of the Carrier called the Irvington Branch Line, about three miles distant from Hillside, New Jersey, located on the main line of the Carrier.

2. Hillside, New Jersey is a city of 21,007 population (1950 census), located on the main line of the Lehigh Valley Railroad, 11.1 miles west of Jersey City, New Jersey.

3. Both Hillside and Irvington are located on the New York Operating Division of the Lehigh Valley Railroad Company. Both are located on the New York Seniority District under the provisions of the Telegraphers' Agreement.

4. At all times involved herein, the agent of the Carrier at Irvington was an excepted position not covered by the provisions of any collective bargaining agreement. During all the times involved herein, the agent at Irvington was the supervising agent and in charge also of the Carrier's station facility at Hillside.

5. Prior to November 1, 1943, there were two positions at Hillside covered by the provisions of the then prevailing Telegraphers' Agreement. They were classified as follows:

Assistant Agent

Clerk-Telephoner

Both of the positions classified as above set out were subject to all of the rules of the Telegraphers' Agreement and filled by employees holding seniority under our Agreement rules.

6. Prior to November 1, 1943, there were no positions covered by our Agreement at Irvington.

otherwise and assume jurisdiction, the Carrier submits the class of employee assigned to perform only clerical work at Irvington as outlined herein and for the reasons stated can now no longer be entitled to the consideration that was previously given for maintaining such a position at Irvington. To sustain the claim and require this to be done would be in contravention of the provisions of the agreement with the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, and involve the Carrier in a further dispute with that organization.

Under the facts and circumstances and for the reasons set forth herein above, the Carrier requests the Board not to assume jurisdiction in this dispute and to dismiss same. However, should the Board assume jurisdiction, it is the Carrier's position that the claim is unjustified and not supported by the evidence, the practice or meaning and intent of the rules of the Telegraphers' Agreement, and respectfully requests that the Board so find and deny the claim in its entirety.

OPINION OF BOARD: The position of Clerk-Telephoner at Irvington, New Jersey, was abolished by the Carrier effective December 2, 1957. The Petitioner alleges that this action was in violation of the basic Agreement, in that, although the position was abolished, the work comprising the position remained, and was in fact transferred to employees outside of the Agreement. The Petitioner further maintains that this position was the subject of another dispute involving this Carrier and the Clerical Union, that the Carriers' position in that dispute was in direct contradiction to the position it now maintains; that subsequent to this previous dispute, the current Agreement was negotiated, that as a result of which the position in question was negotiated into the Agreement; that the principle of past practices is controlling in this case, because as they contend, when a contract is negotiated in the face of past practices, and these practices are not changed by the terms of the contract they are just as enforceable as the explicit terms of the contract itself.

Throughout the record, the Carrier has consistently maintained that this Division did not possess jurisdiction in this matter, because the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees should have been made a party to this dispute. This issue however has just recently been settled, proper notice having been given, disclaimer filed and hearing held on August 4, 1964, thus clearing the way for this Board to dispose of the principal issues now confronting it.

The historical background of the position succinctly stated, is that on or about November 1, 1943, a transfer of some of the station work at Hillside, New Jersey was made to Irvington, two of the Carriers' stations located within three miles of each other. At the time of the transfer of the work, there were two positions at Hillside, both of which were occupied by employees subject to the Telegraphers' Agreement. The Carrier alleges that despite the fact that in transferring this work there were no telegraphers' or telephoners' duties to perform at Irvington which could be considered as exclusively within the province of the telegraphers, nevertheless, since the work transferred from Hillside had been performed by an employee under the Telegraphers' Agreement, one of these two employees was transferred to Irvington while the second employee was retained at Hillside.

The Carrier contends that all of the work that was performed at Irvington by the position coming under the Telegraphers' Agreement since Novem-

ber 1, 1943, was strictly clerical, and that the occupant of the position was never required to perform telegrapher or telephoner duties, to handle messages, or communications of record. It further alleges that because of a reduction in the volume of work required, it was sound judgment to abolish this position and that whatever clerical work remained at the Station was to be performed by the clerical employees left at Irvington. Because of the Carrier's contradictory position taken in the previous case with the clerks, the Petitioner urges us to adopt and apply the principle of estoppel.

In the instant case, we are faced with a broad general Scope Rule, which reads as follows:

"RULE 1. SCOPE

"This agreement will govern the working conditions and rates of pay of:

* * * * *

Clerk-Telephoners

* * * * *

This rule, as has often been said of similar rules in awards of this Board, does not nor does it purport to define the particular work covered by the Agreement. Confronted with a broad Scope Rule, the Petitioner must show that the work in question belongs to him exclusively by virtue of custom, practice and tradition. It may well be argued that practice over the past several years on this position has demonstrated that degree of exclusivity commensurate with a sustaining award. However, by way of analogy, one schooled in the field of logic differentiates between what is referred to as inductive vs. deductive reasoning. The former applies to a situation where because of an isolated instance, one spuriously draws a conclusion general in nature. Here in this case, there is no question that a practice has continued in this particular position for several years, but Petitioner must go beyond this to show by a preponderance of evidence that this type of work has been done exclusively on a system-wide basis. We find that the Petitioner has not satisfied its burden of proving a system-wide practice by Carrier, which is an essential element of proving the claim. Further, we are unable to find any explicit provision of the current contract which precludes the Carrier from abolishing the position. The Petitioner advances the argument that Rule 34 of the contract imposes such a restriction. However, this rule applies to a revision of the Agreement and not the abolishment of positions. It is our judgment that the Carrier has neither directly or indirectly attempted to revise this Agreement. It simply, in the exercise of sound, managerial judgment abolished the position because of a reduced work load. The numerous decisions of this Board sustaining the authority of the Carrier to exercise its managerial prerogatives, such as it did in this case, are controlling. We, in view of the foregoing reasons deny the claim.

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

That the parties waived oral hearing;

That the Carrier and the Employees involved in this dispute are respectively Carrier and Employees 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 Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 28th day of September 1964.