

Award No. 13559

Docket No. TE-12405

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Ross Hutchins, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

ATLANTIC COAST LINE RAILROAD COMPANY

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

1. Carrier violated terms of the Agreement between the parties hereto, when on the 15th day of June 1959, by unilateral action abolished positions of (second and third shifts) clerk-telegraphers at "FN" Telegraph Office, Florence, South Carolina.

2. Carrier further violated terms of the Agreement when on the 15th day of June 1959, and continuing thereafter, it caused and required the operators on second and third shifts "RA" Tower and "WG" Telegraph Office, Florence, South Carolina, to assume, undertake and perform part of the duties, and transferred the performance of copying and delivering manifold train orders and clearance Form A, communication of record to employes not covered by the Telegraphers' Agreement. That such consolidation of positions and in requiring the incumbents of second and third shift operator positions at "RA" Tower and "WG" Telegraph Office to divide their time between performance of the regular duties of position and duties of the position of second and third shifts "FN", which resulted in the suspension of work during regular hours on both positions.

3. The two telegrapher positions at "FN" Telegraph Office, Florence, South Carolina, and the work thereof shall be restored to the Agreement.

4. Carrier shall be required to compensate Mrs. E. I. Richards, D. G. Durant, Jr., and J. M. Campbell, one day's pay for each and every day they are prevented, suspended and withheld by Carrier from performing the services and duties of their regular assignments at "FN" Telegraph Office, in accordance with Article 8 of the Agreement. Rate of pay to be determined according to that prevailing on June 15, 1959, adjusted according to increases or decreases.

5. Carrier be required to compensate B. W. Atkinson, O. E. McAllister, G. D. Mitchum, B. A. Barnes, G. L. Smoak, A. K. Bigelow, and J. V. Holcumb, for all wages lost as a result of their being deprived of employment due to violative action of carrier in declaring abolished the second and third shift positions at "FN" Telegraph Office.

6. Carrier be required to compensate each and every named employe for any and all necessary expenses incurred proximately due to its wrongful vio-

lative action.

7. That any and all other employes adversely affected or who may hereafter be deprived of employment by such wrongful action, shall be compensated for any and all wages lost and be reimbursed for any necessary expenses.

EMPLOYEES' STATEMENT OF FACTS: There is in full force and effect a collective bargaining agreement entered into by and between Atlantic Coast Line Railroad Company, hereinafter referred to as Carrier or Management, and The Order of Railroad Telegraphers, hereinafter referred to as Telegraphers or Employees. The agreement was effective November 1, 1939, is on file with this Division and by reference is 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 the Carrier to handle such disputes and failed of adjustment. Under the provisions of Section 3, Railway Labor Act as amended, this Board has jurisdiction of the parties and the subject matter.

On the 24th day of May, 1937, in Case No. R-331, the National Mediation Board issued its certification of representation as follows:

"On the basis of the investigation and report of election, the National Mediation Board hereby certifies that The Order of Railroad Telegraphers has been duly designated and authorized to represent telegraphers, telephone operators (except switchboard operators), agent-telegraphers, agent-telephoners, towermen, levermen, tower and train directors, block operators, staffmen and such agents as are shown in the existing wage scale of the Atlantic Coast Line Railroad Company, for the purpose of the Railway Labor Act."

1. For many years prior to June 15, 1960, positions negotiated into Telegraphers' Agreement and covered thereby as to wages, rules, and working conditions, Florence, South Carolina, were:

- | | |
|------------------------------|-----|
| (a) Ticket Agent | (1) |
| (b) Telegraphers "FN" Office | (3) |
| (c) Telegraphers "WG" Office | (3) |
| (d) Telegraphers "RA" Tower | (3) |
| (e) Telephoners Yard Office | (3) |

2. The three positions at "FN" Office, located in the passenger station on the second floor, are particularly shown on page 26 of the agreement as follows:

"Florence	Dis. Office	1st T.*
Florence	Dis. Office	2nd T.*
Florence	Dis. Office	3rd T.*

* (page 19—Telegrapher)

3. Prior to June 15, 1959, the positions were owned, having been acquired through the exercise of seniority as provided for in the agreement as follows:

1st shift (8:00 A.M. to 4:00 P.M.) Mrs. E. Short (Seniority July 26, 1942); assigned work days Wednesday through Sunday with assigned rest days of Monday and Tuesday.

strike, resulted in train dispatchers handling train orders on a temporary basis, and decision was rendered on the basis of train dispatchers having performed work outside of the scope rule of their agreement. That is not the issue involved in the instant claim. In Award 5253, involving the Order of Railroad Telegraphers and the Kansas City Southern Railway Company, it might appear on the surface that the situation there was somewhat parallel to that which occurred at Florence on June 15, 1959. However, a careful reading of the submission quickly discloses that there was not involved any question of train dispatchers handling train orders; rather, that the question with respect to train orders was related to members of operating crews carrying train orders to other crews. Therefore, none of the awards cited by the organization and relied upon by it have any applicability to this dispute.

This entire claim involves a rather simple issue, i.e., whether train dispatchers may handle train orders and, even to the most uninitiated, a reading of Article 20 will clearly reveal that it was contemplated that telegraphers and train dispatchers would handle train orders and that the remainder of that article has no applicability when train orders are handled by train dispatchers. If it had been intended to exclude train dispatchers from the preparation and handling of train orders, the three words, "and train dispatchers," would have been omitted from Article 20, but that was not done. There has been no exclusive reservation of train order work to telegraph operators, and it is abundantly apparent from a reading of the entire Telegraphers' Agreement that nothing in it contemplated eliminating train dispatchers from handling train orders.

The other work, which was formerly performed by the second and third trick telegraphers at "FN" Office, that of handling telegrams, messages, etc., was transferred to employees under the coverage of the agreement, so there can be no successful charge made that the work was transferred outside the scope of the agreement. Surely it cannot be successfully argued that the mere transferring of telegraph work from one telegraph office to another, within the same seniority district (in fact, within the same city), constitutes a violation of the agreement.

In its Statement of Claim, the organization named several claimants. While carrier feels that there is no sustainable claim here involved and feels confident that your Board will so hold, it calls attention to the fact Claimant Campbell resigned on July 14, 1960, and Claimant Smoak resigned on May 1, 1960.

(Exhibits not reproduced.)

OPINION OF BOARD: There had been negotiated into the Telegraphers' Agreement three tricks or positions at FN. The Carrier abolished the second and third trick at FN effective 8:00 A. M. June 15, 1959.

The law is settled that when positions have been negotiated into an Agreement those positions may not be unilaterally eliminated by the Carrier if a substantial part of the work remains. Award Nos. 6451, 6944, 12903, 13190. The Carrier has cited many awards, but not one of them is contrary to this holding and several sustain this proposition. As the positions eliminated in this docket were negotiated into the Agreement the question we must answer is whether or not a substantial part of the work has been eliminated.

There is voluminous evidence presented by the Claimants to show that there has been no change in the work performed. This proof has two shortcomings. First, a showing should be made of the work required when the posi-

tion was created and when abolished rather than before and after abolished. Secondly, the proof should be translated to hours rather than items. However, in spite of these shortcomings and in the absence of any proof on the part of the Carrier the position of the employees must be sustained.

The Carrier apparently proceeded on the property on the theory that they had an absolute right to abolish these positions. Such is not the case. The right to abolish positions negotiated into the Agreement is clearly conditional upon the duties of the position being abolished. See Award 6944 (Messmore) cited by both the Carrier and Claimant.

The claim contains 7 numbered paragraphs. Paragraphs 3 through 7 both inclusive seek relief of various forms.

"3. The two telegrapher positions at 'FN' Telegraph Office, Florence, South Carolina, and the work thereof shall be restored to the Agreement."

This Board has no authority to restore positions. It would seem that lacking authority to restore positions this Board would lack authority to restore the work of the position. The relief requested in Paragraph numbered 3 of the claim is denied.

"4. Carrier shall be required to compensate Mrs. E. I. Richards, D. G. Durant, Jr., and J. M. Campbell, one day's pay for each and every day they are prevented, suspended and withheld by Carrier from performing the services and duties of their regular assignments at 'FN' Telegraph Office, in accordance with Article 8 of the Agreement. Rate of pay to be determined according to that prevailing on June 15, 1959, adjusted according to increases or decreases."

This is a proper measure of relief, but is subject to deduction by all other earnings from June 15, 1959, and thereafter so long as the violation of the rights of these Claimants to these positions has or shall continue.

"5. Carrier be required to compensate B. W. Atkinson, O. E. McAllister, G. D. Mitchum, B. A. Barnes, G. L. Smoak, A. D. Bigelow, and J. V. Holcumb, for all wages lost as a result of their being deprived of employment due to violative action of carrier in declaring abolished the second and third shift positions at 'FN' Telegraph Office."

The members listed in this paragraph were the employees "bumped" by the employees listed in the preceding paragraph. Accordingly, recovery will be allowed to the employees listed in paragraph numbered 5 for the sum they would have received in the position from which they were bumped reduced by any and all wages they did receive from June 15, 1959 and thereafter so long as the violation of the rights of these Claimants to these positions has or shall continue.

Following issuance of the proposed award, the Carrier requested reargument. This paragraph has been added following the reargument and while all issues were reargued, this paragraph relates to Claim No. 5 only. The Carrier points out correctly that none of the employees in Claim No. 4 bumped any of the employees in Claim No. 5. Richards displaced Weeks, who is not a Claimant, Weeks displaced Mitchum. All the other Claimants including Durant and Campbell apparently went to the extra Board. Accordingly, the Claimants in

Claim 4 did not take the positions of the Claimants in Claim 5. At least not in all cases. The Claimants contended in their submission on the property that the men named in Claim No. 5 lost wages by reason of their being deprived of employment due to violative action of the Carrier. The Carrier denied the violative action, but not the loss of work. Carrier cites Award 11590 (Dorsey) which is 50 pages long, and which we have reviewed. However, the problems we are here considering do not appear to have been before the Board in that case, and if they were they were not discussed. Award 11586 is also cited by the Carrier. In Award 11586, this Board denied a claim like Claim No. 5. However, the claim in 11586 is dismissed in one place and denied in another and no where discussed by the Employees, Carrier or Board. We, therefore, cannot say why it was denied. We are not advised why Claim No. 5 in this award should be denied other than the difficulty of determining the amount due. We can say that we will not deny these Claimants their right to recover because of supposed or real difficulty in determining the amount due. The measure of damages is set out above.

"6. Carrier be required to compensate each and every named employe for any and all necessary expenses incurred proximately due to its wrongful violative action."

The relief which the employees seek in paragraph numbered 6 are special damages which the employe must plead and prove with particularity. Having failed to either plead or prove any special damages the relief prayed for must be denied.

"7. That any and all other employees adversely affected or who may hereafter be deprived of employment by such wrongful action, shall be compensated for any and all wages lost and be reimbursed for any necessary expenses."

This prayer for relief is too vague and cannot be sustained.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to the dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

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 violated.

AWARD

Claim sustained in part in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 30th day of April 1965.

**CARRIER MEMBERS' DISSENT TO AWARD 13559, DOCKET TE-12405
REFEREE ROSS HUTCHINS**

The Carrier maintained at Florence, S. C., first, second and third trick telegrapher positions at three offices ("RA" tower, "FN" passenger station, and "WG" yard) all within the same seniority district and in close proximity to one another. In 1959, carrier abolished the second and third trick telegrapher positions at the passenger station. Thereafter train dispatchers, on duty at Florence passenger station, handled train orders for passenger trains, and the small amount of remaining telegraph work was assigned to the telegraphers at "WG" and "RA."

This claim was sustained in spite of these unrefuted facts:

(1) The telegrapher positions were not negotiated into the agreement of November 1, 1939, and this Board's Awards 6944 and 11120 decided after Award 6451 so held.

(2) The telegrapher positions in dispute were maintained at three offices in Florence, South Carolina, all within the same seniority district.

(3) The abolition of the second and third trick telegrapher, the shifting of train order handling for passenger trains to train dispatchers, and the reassignment of the residual telegrapher work was within the same seniority district.

The Opinion does not deal with the issues in dispute, nor does it mention any rule as supporting the conclusion that the Agreement was violated. Instead, the Referee cites Award 6451 and proceeds on the wholly erroneous theory that telegrapher positions in existence as of November 1, 1939, were "negotiated into the agreement of November 1, 1939" and may not be unilaterally abolished by the carrier.

The wage scale merely lists the locations and rates of pay of telegrapher positions which were in existence when the parties negotiated the agreement effective November 1, 1939. The effective agreement itself does not freeze or guarantee the continuance of any positions, nor does it require the carrier to negotiate with respect to their abolishment. As a matter of fact, in Article 12 the parties specified the agreed-upon procedure to be followed by the carrier when additional positions are established and when existing positions are abolished. In deciding disputes, this Board has no authority to revise the agreement or to impose any conditions beyond those contained in the agreement as negotiated by the parties themselves.

It is well-settled that it is the prerogative of the carrier to determine the number of employes and positions necessary to its operations and, as in the Agreement before us, no rule requires the carrier to maintain unneeded positions. The awards of this Division are legion in number upholding the carrier's right to abolish unneeded positions and the fact that a position is listed in the wage scale is no prohibition to the carrier's right to abolish such positions—see Awards 5803, 7073, 8215, 9777, 9778, 10237, 8537, 10914, 11294, 11660, 11836, 12349, 12377, 12486, 12757, 12932, 13243, 13323, among numerous others, all of which involved Telegraphers' Agreements.

As to the type of remaining work, the referee disregards the fact that this

dispute primarily involved the "handling" of train orders by train dispatchers. In finding that the agreement was violated, the conclusion is inescapable that the referee did not interpret or even consider Article 20 which plainly provides that " * * * train dispatchers will be permitted to handle train orders * * * " or denial Awards 6650 (Rader), 6676 (Bakke), 9217-18 (Hornbeck), 9914 (Begley), 10237 (Carey), 10672 (Ables), 10914 (Boyd), 11244 (Moore), and 11708-9 (Dolnick), on which carrier relied. Further, we fail to understand how any violation could result when the remaining telegraph work was assigned to employes covered by the agreement in the same seniority district. In sum, the re-assignment of the remaining work was not violative of any rule in the agreement.

As to the amount of remaining work, the referee found that claimants' proof had two shortcomings. Instead of denying the claim because of petitioner's failure to meet its burden of proof, the referee erroneously shifted the burden of proof to the carrier with the incredible assertion "However, in spite of these shortcomings and in the absence of any proof on the part of the Carrier the position of the employes must be sustained." Although the burden of proof was not on carrier to supply the shortcomings, the evidence of record does not support the referee's conclusion. It was carrier's position from the outset that the workload of second and third trick telegraphers at Florence passenger station was extremely light when those positions were abolished; that during the many years since the positions were established there had been a continuing decrease to the point that there was no longer a sufficient amount of work to justify their continuance. Operators on duty in "WG" and "RA" could readily perform the telegraph work. Carrier further supported its position with the unchallenged statement that "The preparing of train orders and clearing of trains, formerly performed by telegraphers in 'FN' Office, now consumes approximately 20 minutes per day of the time of the Charleston Division train dispatchers (South end) and approximately 30 minutes per day for Charleston Division train dispatchers (West end)."

For the reasons stated, we respectfully submit that Award 13559 is patently erroneous, and we vigorously dissent.

/s/ R. A. DeRossett
R. A. DeRossett

/s/ W. F. Euker
W. F. Euker

/s/ C. H. Manoogian
C. H. Manoogian

/s/ G. L. Naylor
G. L. Naylor

/s/ W. M. Roberts
W. M. Roberts