

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

David Dolnick, Referee

PARTIES TO DISPUTE:

**TRANSPORTATION-COMMUNICATION EMPLOYEES UNION
(FORMERLY THE ORDER OF RAILROAD TELEGRAPHERS)**

**THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY
— EASTERN LINES —**

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on The Atchison, Topeka & Santa Fe Railway, that:

1. The Carrier violated the terms of the Agreement between parties when, on August 28, 1958, it unilaterally declared abolished the position of first trick telegrapher-clerk position at Olathe, Kansas, and assigned the work of this position to the reclassified position of agent-telegrapher and to a newly established clerical position not covered by the Telegraphers' Agreement.

2. The work comprising the position of the first trick telegrapher-clerk at Olathe, Kansas, shall be restored to the Agreement.

3. Carrier shall now be required to compensate E. L. Vohs for 8 hours' pay at the rate of the first trick telegrapher-clerk position at Olathe each work day, in addition to pay at the time and one-half rate for work performed outside the assigned hours of the first trick telegrapher-clerk position at Olathe; and further Carrier shall compensate W. B. Kramer for 8 hours' pay at the rate of the second trick telegrapher-clerk position at Olathe each work day, in addition to pay at the time and one-half rate for work performed outside the assigned hours of the second trick telegrapher-clerk position at Olathe, plus actual expenses incurred on each day he works at a station other than Olathe; and further Carrier shall compensate L. E. Smith for 8 hours' pay at the rate of the third trick telegrapher-towerman position at Holliday, Kansas, each work day, in addition to pay at the time and one-half rate for work performed outside the assigned hours of the third trick telegrapher-towerman position at Holliday, Kansas, plus actual expenses incurred on each day he works at a station other than Holliday.

EMPLOYEES' STATEMENT OF FACTS: Agreement between the parties, bearing effective date of June 1, 1951, is in evidence.

transferring the clerical work to a newly established clerical position.

This is to advise that your decision is not satisfactory and the claim will be appropriately appealed.

Yours truly,

/s/ A. W. Barraclough
General Chairman"

OPINION OF BOARD: Prior to August 28, 1958, the station force at Olathe, Kansas, consisted of an Agent and two Telegrapher-Clerks. The Agent was assigned to work from 7:30 A.M. to 4:30 P.M., the first trick Telegrapher-Clerk from 8:00 A.M. to 4:00 P.M. and the second trick Telegrapher-Clerk from 4:00 P.M. to 12:00 midnight, all covered by the Telegraphers' Agreement.

Effective that date, Carrier changed the Agent's classification to that of Agent-Telegrapher with assigned hours of 7:30 A.M. to 3:30 P.M., abolished the first trick Telegrapher-Clerk position, established a Clerk position, covered by the Clerks' Agreement, with assigned hours of 8:00 A.M. to 5:00 P.M. and assigned the second trick Telegrapher-Clerk to work from 3:30 P.M. to 11:30 P.M.

Petitioner contends that Carrier violated the Telegraphers' Agreement when it transferred to a Clerk, under the Clerks' Agreement, work which rightfully belongs to the Agent and to the occupant of the first trick Telegrapher-Clerk position which was abolished.

Carrier urges (1) that the Clerks' Organization is a necessary party to this proceeding and must be given notice thereof as prescribed in Section 3, First (j) of the Railway Labor Act, as amended; (2) that the Carrier is not restricted under the Telegraphers' Agreement to determine how and in what manner operations are to be performed and conducted in the interest of economy and efficiency; (3) that this Division has no right to restore the abolished position; (4) that because the Scope Rule is general in nature the Petitioner has failed to prove by a preponderance of evidence that by custom, practice and tradition the involved work is reserved exclusively to employees covered by the Telegraphers' Agreement; (5) that Awards 13760, 13761, 13074 and 13075 are "palpably erroneous"; and (6) that the proper measure of damages, if any, is not monetary damages in the nature of a penalty, but rather that the injured "party be made whole for any wage losses suffered".

1. Notice prescribed in Section 3, First (j) of the Railway Labor Act, as amended, was given to the Clerks' Organization and that Organization filed an acknowledgement but has elected not to participate as a party to this proceeding.

2. Generally, Carrier has every right to determine how and in what manner its operations are to be performed and to select the number and class of employees it needs to efficiently and economically operate its business, providing that this determination does not violate any express or implied understandings contained in the rules of the collective bargaining agreement. The basic element of such an agreement is to assure employees

of the craft, therein covered, that the work of their craft will be preserved for them. Carrier may not unilaterally transfer the work of employees of one craft to employees of another craft unless the express or implied right to do so is preserved in the terms of that agreement. Whether Carrier has the right to do so in the instant case will be discussed later.

3. It is a well established principle of this Division, as well as other Divisions of this Board, that we may not order an abolished position to be restored. We may only restore work which was improperly removed from the craft of employees covered by the Agreement.

4. There is little doubt that the Scope Rule of this Agreement is general in nature. In the absence of specific job descriptions or definitions, Petitioner needs to prove by a preponderance of evidence that the work of the Agent and Telegrapher-Clerk belongs exclusively to them by custom, practice and tradition. This the Petitioner has done; the proof has been met by a preponderance of evidence.

The record shows that clerical work had always been performed by the Agent and by the Telegrapher-Clerks. Only when an increase in business also increased the amount of clerical work was a clerical position established. And conversely when business decreased and the amount of clerical work necessarily also decreased, the clerical position was abolished. Whatever additional clerical work remained to be performed was reassigned to the Agent and to the Telegrapher-Clerks. To these undisputed facts Carrier's highest appeal officer replied only as follows:

"Inasmuch as employees subject to the Telegraphers' Agreement do not now and have never enjoyed an exclusive or monopoly right to the performance of clerical work, the assignment of clerical work which may have previously been performed by the occupants of either or both the former Agent position and abolished Telegrapher-Clerk position to the clerical position that had been abolished effective February 20, 1958 and reestablished August 28, 1958 was likewise not violative of the Telegraphers' Agreement."

By this answer Carrier has not met the essence of the issue. The clerical position that had existed prior to the abolishment on February 20, 1958, in no way affected the positions of the Agent or the Telegrapher-Clerk. It did not replace a telegrapher position. All the positions existed concurrently.

Petitioner does not maintain that all clerical work at this station belongs exclusively to employees covered by the Telegraphers' Agreement. It urges only that the occupants of the Agent and Telegrapher-Clerk positions have, by custom, practice and tradition, performed such clerical work, are entitled to continue to perform such work, and that the Carrier may not arbitrarily abolish their positions and transfer such work to employees of another craft not covered by the Telegraphers' Agreement.

The fact is that the Agent and the Telegrapher-Clerk have, by history, practice and tradition, acquired the exclusive right to perform clerical work at this station as long as there is clerical work to be performed. Carrier may not arbitrarily transfer that work to employees covered by the Clerks' Agreement. Carrier may only establish additional clerical positions to exclusively perform clerical work and employees assigned to such additional clerical positions may be covered by the Clerks' Agreement.

5. Awards 13074, 13075, 13760 and 13761 involve the same parties, the same Agreement and are predicated upon substantially the same facts, contentions and issues as we are called upon to consider in this dispute. We have carefully read and studied each of them. They are well considered Awards. They are not palpably erroneous. Had they been so erroneous we would not have hesitated to overrule them. No Award, nor is any court decision, so sacred. But we have previously stated in some detail why Carrier violated the Agreement. And that affirms the soundness of these Awards.

6. There is no showing that any Claimant is entitled to damages in the nature of a penalty. No rule in the Agreement provides for such a penalty. There is also no evidence of any expenses incurred by the Claimants. Claimants are entitled only to be made whole for loss of wages suffered because Carrier violated the Agreement. The amount of such actual loss of wages may be readily determined on the property from Carrier's records. This means that actual earnings from any source must be deducted from the amounts Claimants would have earned had the Agreement not been violated and this shall be calculated from the date of the changed work status to the date when the work is restored to employees covered by the Telegraphers' Agreement.

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 Carrier violated the Agreement.

AWARD

Claim in Item 1 is sustained.

Claim in Item 2 is denied in part and sustained in part as indicated in the Opinion.

Claim in Item 3 is denied in part and sustained in part as indicated in the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 29th day of July 1966.

CARRIER MEMBERS' DISSENT
to
AWARD 14708 — DOCKET TE-12217

(Referee Dolnick)

The Board has consistently held that Telegraphers do not have an exclusive right to performance of work which is clerical in nature. Such work is incidental to the work of telegraphers, and under a general scope provision such as that here involved does not mature into a contractual right regardless of the extent or time of performance. Also see the dissent to Awards 13074 and 13075.

/s/ **T. F. Strunck**
T. F. Strunck

/s/ **R. E. Black**
R. E. Black

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

/s/ **G. C. White**
G. C. White