

NATIONAL RAILROAD ADJUSTMENT BOARD

Third Division

Lloyd K. Garrison, Referee

PARTIES TO DISPUTE:

**THE ORDER OF RAILROAD TELEGRAPHERS
THE BALTIMORE AND OHIO RAILROAD COMPANY**

DISPUTE.—

"Claim of General Committee of the Order of Railroad Telegraphers on B. & O. R. R. that the position of agent at East Butler, Pa., declared abolished by the carrier, be restored to Telegraphers' Agreement at the scheduled rate of 79½¢ per hour, and the position bulletined and filled in accordance with the governing rules of the agreement."

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

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

The parties to said dispute were given due notice of hearing thereon.

As a result of a deadlock, Lloyd K. Garrison was called in as Referee to sit with the Division as a member thereof.

An agreement bearing effective date of July 1, 1928, as to rules, and May 16, 1928, as to wage rates, are shown to exist between the parties.

On January 1st, 1932, the Baltimore and Ohio Railroad Company acquired the Buffalo, Rochester & Pittsburgh Railroad and started operating it as a part of the Baltimore and Ohio Railroad. Prior to May 17th, 1932, the force at East Butler, Pa. (Noeline located on former BR&P) consisted of an agent, rate of pay 79½¢ per hour (covered by former BR&P Telegraphers' Wage Agreement), and one clerk.

On May 17th, 1932, due to consolidation, Mr. R. E. Fry, who held the position of agent at East Butler, Pa., was transferred to Butler, Pa., (a supervisory agency located on the Baltimore and Ohio proper, but not covered by the wage agreement) and classified as Assistant Agent at the same rate of pay. The clerk has been allowed to remain at East Butler, Pa., in charge of the station, reporting to the agent at Butler, Pa.

The employees claim that the position of agent at East Butler had not been abolished in fact and that it should be restored, contending that the clerk who remains there performs work formerly done by the agent.

The record shows that prior to the date of change, May 17, 1932, the station at East Butler was a freight and ticket office handling express and Western Union business and was also a train order block office. After May 17, the accounts were transferred to the agency at Butler and the telegraph instruments, train dispatchers' telephones, ticket sales and express and Western Union business were all discontinued. The clerk who remained performed substantially the same kind of work as before—checking and handling freight, checking cars on industrial and other tracks and doing some billing under the direction of the agent at Butler.

A substantially identical case was presented by the parties hereto to the Telegraphers' Adjustment Board created by an agreement between the parties dated June 10, 1929, and consisting of two representatives of the carrier and two representatives of the employees. The case arose at Girard, Ohio, and the facts were as follows: The position of agent at Girard was abolished and the agency placed under the supervision of the agent at Youngstown. The

clerk at Girard was retained. The carrier described his activities in terms similar to those here: He checked the yards, received and billed out freight, and delivered freight, the expense bills for which were prepared at Youngstown. He handled no accounting, the accounts having been transferred to Youngstown as in this case they were transferred to Butler. The employees requested that the station at Girard be handled by an assistant agent at the rate of pay (sixty-nine cents) of the assistant agent at Akron whose duties were alleged to be the same as those remaining to be performed at Girard. In Case No. 2, Session of March 29, 1932, the board made the following decision:

"The board sustains the position of the committee in so far as the designation should be that of assistant agent and so advertised under the terms of the telegraphers' agreement, but sees no reason for changing the present rate of pay and feels that the basic rate of sixty-five cents per hour should be continued."

This decision can only rest upon the ground that agency work remained to be done at Girard despite the transfer of accounts to Youngstown, and that therefore since the agency had been placed under the Telegraphers' Agreement the work should be done under the Telegraphers' Agreement. In holding that the rate of pay should remain at that of the clerk, the board seems to have been assuming the role of a mediator rather than that of a quasi-judicial body engaged simply in interpreting and applying an agreement. However that may be and whatever importance may be attached to the fact that the employees asked only for the position of assistant agent, the fact remains that in granting this request the board must have concluded that the agency work had not been abolished.

In another case before the same board involving substantially the same factors, in connection with the abolition of the agency at West Salisbury and the transfer of the accounts to Meyersdale, the board again sustained the position of the employees that the work handled by the remaining clerk should be placed under a properly qualified employee covered by the Telegraphers' Agreement. This case has been fully described in Award No. 233, Docket TE-235, rendered by this Division.

Both the Girard and the West Salisbury cases were decided by the Telegraphers' Adjustment Board in 1932. A year previously the board had decided a somewhat similar case in a different manner. (Case No. 3, Session July 28, 29, 30, 1931). In that case the regular agent at Hillsdale left the service and the vacancy was advertised on September 5, 1929, "with the understanding that the station may be closed in the near future and accounts placed under the direction of the agent at Montezuma." On October 1, 1929, Singleton, the successful bidder for the agency, reported, and for the next month, at the end of which period he was transferred back to Montezuma, he did the same identical work as had been done by the former agent except that he signed the Montezuma agent's name, the accounts apparently having been transferred before he reported for service. Although he was doing the same work as had been done before, he was, during the month of his incumbency, paid at the rate of a clerk. On November 1, when he was transferred back to Montezuma as a clerk, the vacancy was bulletined as that of a clerk's position and it was bid in by another clerk. Shortly prior thereto on October 19, before Singleton had left to go back to Montezuma, The Public Utilities Commission of Indiana authorized the closing of the agency. The employees asked that the position of exclusive agent at Hillsdale be restored and pointed out that the existing incumbent, the clerk who had taken Singleton's place, was in substance acting as an agent; that he was bonded and acting as agent for the express company; and that the station had never been closed but was open for passengers, freight, express, and United States mail. Nevertheless the board decided merely that Singleton should be paid the difference between the rate of an agent and the rate of a clerk "until the accounts at Hillsdale were consolidated or absorbed with the Montezuma accounts or after the Public Utilities Commission of Indiana had officially authorized the closing of Hillsdale station." Since the case seems to have indicated that the accounts were consolidated on or before the date that Singleton reported for work, it would appear that he got nothing from the decision because the reference to the action by the Public Utilities Commission, which took place a few weeks later, was put in the alternative instead of the conjunctive. It is hard to understand the theory of the decision unless the board was influenced by the fact that in the advertising of the vacant agency position, bidders were warned that the station might be closed

in the near future and the accounts transferred to Montezuma and that having accepted the position in the face of this warning, the successful bidder could not complain if the accounts were transferred. The fact remains, however, that the request by the employees for the restoration of the agency was denied and that Hillsdale was allowed to remain in the hands of a clerk.

The two subsequent decisions in the Girard and West Salisbury cases are squarely to the contrary although made by identically the same board composed of identically the same members. Moreover, the board seems to have thought its decisions to be consistent for in the West Salisbury case, the latest of the three, the board said in substance that the same question had been passed upon in two prior decisions and that the board ought not to be asked repeatedly to pass upon the same issue. Perhaps the discrepancy between the Hillsdale case and the other two can be explained and can only be explained on the ground that in the former the Public Utilities Commission had officially authorized the closing of the agency, whereas there was no such official action in the other two cases. But it is hard to see just why this should make much difference since the station at Hillsdale remained open for passengers, freight, express, and United States mail. In the present case at East Butler no official action of any sort has been taken. The Pennsylvania law apparently requires the posting of a notice when an agency is to be closed in order to give patrons an opportunity to protest to the Public Utilities Commission if they wish to protest. But it appears from the record that no such notice has ever been posted.

Whatever view is taken of the Hillsdale case it seems to us that the two subsequent cases decided by the same board in one of which the facts were indistinguishable from those in the East Butler case, represent the controlling view of the Telegraphers' Adjustment Board. Since the carrier had equal representation on that board and joined in these decisions we think the decisions must be given weight as indicating the common understanding of the parties in situations such as that now before our board. Since our function is to apply the agreement between the parties the interpretation which they themselves, through their own board, have placed upon it should not lightly be disregarded by our board.

If we are to follow that interpretation we will have to say that the work now performed by the clerk at East Butler is really agency work. To this the carrier replies that the clerk is in fact performing no duties that he had not previously performed when there was an agent at East Butler, and that once a clerk always a clerk unless his duties are enlarged. The same argument was made by the carrier in its submission to the Telegraphers' Adjustment Board in the West Salisbury case, and no doubt the theory of the board in ruling against the carrier was that when an agent is taken from a station and the clerk is put in sole charge, his responsibilities, while not in theory enlarged (since he must still report to an agent at another station) are in fact enlarged, and take on the character of those of an agent. But if we accept the carrier's contention, which seems to have been rejected by its own representatives on the Adjustment Board, and say that the clerk's responsibilities have not been enlarged in fact by being left in sole charge of the station, another difficulty presents itself, for it then follows that the responsibilities and duties of the agent have been assigned to the supervisory agent at Butler, who is an employee not covered by the Telegraphers' Agreement.

If we say that, we cannot distinguish the case in principle from Award No. 94, Docket TE-161, rendered by this board on September 24, 1935, without a referee. For in that case it was held improper to remove agents at Peabody and Beverly, Mass., and assign their work to a general agent at Salem who was not covered by the Telegraphers' Agreement. It is true that the general agent at Salem spent some time daily at Peabody and at Beverly taking care of the agency work, whereas the agent at Butler to whom the East Butler agency duties had been assigned does not find it necessary to spend time at East Butler, the work being handled partly at his desk at Butler and partly through the clerk at East Butler. But we do not think this difference is one of substance. Since East Butler is still open for the handling of freight in the normal way, some agent must be responsible for the work, and the mere fact that the agent to whom the responsibility has been assigned does not find it necessary to go physically to the station cannot make any difference or disguise the fact that responsibilities formerly in the hands of an employee under the agreement have been transferred to one outside the agreement. It is true also that no physical changes were made in the stations at Peabody and Beverly,

the passenger business, telegraphy, and no doubt other functions remaining and being carried on as before, whereas at East Butler nothing remains but the freight business. But we think the difference is only one of degree. The freight business is the most important part of the business and so long as it remains unchanged some agent must be assigned to take care of it and be responsible for it, and the discontinuance of other activities is of no significance except that it makes the agency job relatively less important than before. The principle decided in TE-161 is that an agent under the agreement cannot be eliminated by assigning his duties to an agent not under the agreement, and the mere fact that the duties so assigned are less onerous than before because of the discontinuance of certain station activities cannot affect the principle, which is founded upon the scope rule of the agreement and the agency positions scheduled thereunder.

To sum up: If we take the view of the Telegraphers' Adjustment Board that the clerk who was left in sole charge of the station is really doing agency work, then it follows that the assignment under the agreement is an improper one and that the agency duties should be performed by an employee under the agreement. If on the other hand we take the view that the clerk is doing no more than clerk's work and that the agency duties have been assigned to the agent at Butler, who is not under the agreement, the assignment is improper under TE-161, and the duties should be assigned to an employee covered by the agreement. Which of these two views is sound we need not now decide, for each leads to the same result.

The only remaining question concerns the classification and rate of pay of the position which should be bulletined at East Butler under the Telegraphers' Agreement. In the Girard Case the employees asked and were granted the position of assistant agent, though at the rate of pay of the clerk who presumably was to be displaced. In the West Salisbury case no specific classification was asked for, or mentioned in the decision. In the case now before us the employees have asked that the position of agent be restored at the scheduled rate. We think the request must be granted, for though the duties of the agent have very materially lessened as a result of the curtailment of activities at East Butler, we have no authority to change classifications or rates in the agreement, and the only position scheduled for East Butler is that of agent at the rate of 79½¢ per hour. Any adjustment of the classification and rate due to changed conditions must be left to the parties to negotiate.

One final contention of the carrier must be noted. After the decision in the Girard case, the clerks' organization protested the abolishment of the clerk's position which followed that decision, and presented a claim to the carrier which is still pending. The carrier is fearful that if the claim of the employees in the present case is sustained and an agent is substituted for the clerk at East Butler there will be a similar protest and claim by the clerk's organization, but this fear is groundless, for this decision settles the matter so far as this case is concerned.

The carrier has cited as authority U. S. Railroad Labor Board Decision No. 2194, Docket No. 2111, which is similar in some respects to the present case in that two agencies were consolidated, but differs in the important respect that the agent to whom the work was transferred, and the telegrapher-apprentice who was placed at the discontinued agency, were both under the Telegraphers' Agreement. The employees on their part have cited U. S. Railroad Labor Board Decision No. 2555, Dockets 2258 et al., July 10, 1924, in which, after a consolidation of several stations under the supervision of a head agent, it was held improper under the agreement with the telegraphers to establish the position of clerk at each of these stations, the clerk signing the name of the adjacent agent to reports and conducting the work under his name, but the duties otherwise being substantially those of the displaced agents. Whatever weight may be given to these two cases we think the decisions of the Telegraphers' Adjustment Board and of this board, heretofore cited, should be controlling.

AWARD

Claim sustained.
By Order of Third Division:

NATIONAL RAILROAD ADJUSTMENT BOARD.

Attest:

H. A. JOHNSON, *Secretary*.

Dated at Chicago, Illinois, this 9th day of April 1936.