NATIONAL RAILROAD ADJUSTMENT BOARD
Third Division

Willard E. Hotchkiss, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

SOUTHERN PACIFIC LINES IN TEXAS AND LOUISIANA

DISPUTE.—(Docket TE-244.)

"Claim of the General Committee of System Division No. 72, The Order of Railroad Telegraphers, that the position of agent at each of the stations listed below, be restored to the current schedule agreements at the basic rate established in those agreements, subject to hours of service, overtime, call, meal hour, and Sunday and holiday rules, retroactive to the date the position was arbitrarily removed from the provisions of the agreements by the management and basic rates reduced to monthly basis shown:

Station	Position	Basic Hourly Rate	Present Monthly Rate
New Caney	Agent-Telegrapher	$0.61	$75.00
Lavernia	"	.61	60.00
Burlington	"	.53	65.00
Blessing	"	.65	80.00
Zavalla	"	.65	80.00
Sweet Home	"	.55	75.00
Quinlan	"	.60	75.00
Enloe	"	.60	75.00
Westhoff	"	.61	80.00
Kingsland	"	.56	75.00
Edgerly	"	.63	70.00
Rosser	"	.60	75.00
Colmesneil	"	.68	75.00
Lexington	"	.61	75.00
Smiley	"	.61	80.00
Nordheim	"	.61	80.00
Mamou [1]	"	.63	75.00
Riesel	"	.61	75.00
Dime Box	"	.61	70.00
Milton	"	.60	70.00
McNary	"	.71	80.00
Chilton	"	.65	75.00
Wallis	"	.69	80.00
Cline	Agent-Pumper	.63	90.00
Iowa	Agent-Telegrapher	.64	75.00

[1] Station now closed."

(Docket TE-245.)

"Claim of the General Committee of System Division No. 72, The Order of Railroad Telegraphers, that the position of agent-telegrapher at each of the stations listed below, be restored to the current schedule agreements at the basic rate established in those agreements, subject to the hours of service, overtime, call, meal hour and Sunday and holiday rules, retroactive to the date the position was arbitrarily removed from the provisions of the agreements by the management and basic rate reduced to monthly basis shown:

Station	Position	Basic Hourly Rate	Present Monthly Rate
Saspamco	Agent-Telegrapher	$0.62	$80.00
Goodrich	"	.61	75.00
Roanoke	"	.63	75.00
Lafourche	"	.63	100.00
Estherwood	"	.60	70.00
Wellborn	"	.60	75.00
Richland	"	.68	75.00
Center Point	"	.55	60.00
Louise	"	.60	80.00
Damon	"	.65	80.00
LaPorte	"	.66	75.00
Hillister	"	.61	75.00
Youngsville	"	.60	70.00
Iota	"	.65	70.00
Gibson	"	.62	70.00
Waller	"	.62	75.00
Muldoon	"	.57	75.00
McDade	"	.63	75.00
Minerva	"	.59	75.00
Howe	"	.66	90.00
Hockley	"	.60	75.00
Deanville	"	.60	75.00
Missouri City	"	.64	85.00
Knippa	"	.71	80.00
Fulshear	"	.58	80.00
Fredericksburg Junction	"	.67	65.00
East Bernard	"	.69	80.00
D'Hanis	"	.69	80.00
Premont	"	.60	80.00
Needville	"	.62	80.00
Moscow	"	.64	75.00
Nome	"	.67	100.00
Winchester	"	.59	70.00
Paige	"	.62	45.00
Manor	"	.66	75.00
Midlothian	"	.70	80.00
Melissa	"	.60	75.00
Carmine	"	.66	75.00
Bertram	"	.70	80.00
Simonton	"	.55	80.00
Marion	"	.66	80.00
Harwood	"	.73	80.00
Fort Hancock	"	.72	80.00
Boerne	"	.65	80.00
Shepherd	"	.61	75.00
Seagoville[1]	"	.61	75.00
Kemp	"	.68	75.00
Pledger	"	.59	80.00
Mathis	"	.65	80.00
Lantana	"	.62	80.00
Aransas Pass	"	.74	80.00
Longstreet	"	.64	75.00
Leggett	"	.61	75.00
Appleby	"	.61	75.00
Crosby	"	.66	75.00
Washington	"	.67	70.00
Scott	"	.69	70.00
Eola	"	.64	60.00
Broussard	"	.66	70.00
Los Fresnos	"	.62	80.00
Boling	"	.65	80.00

[1] Station now closed."

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

The carrier and employees involved in these disputes are respectively carrier and employees within the meaning of the Railway Labor Act, as approved June 21, 1934.

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

As a result of a deadlock, Willard E. Hotchkiss was appointed as Referee, and upon request, a second hearing was held beginning September 14, 1936, at which the cases were argued before the Division with the Referee sitting as a member thereof.

There are in evidence agreements covering the relationships between the parties on the several properties involved, all bearing effective date April 16, 1930. Article 27 of the Sunset agreement and corresponding articles of the other agreements involed, in referring to the rates specified for the various positions listed, use this language:

> "Guaranteed minimum rate per hour, exclusive of ticket, express, or other commissions or deductions of any character other than hospital dues and bond premiums."

Article 29 of the Sunset Agreement and corresponding articles of the other agreements are as follows:

> "It is understood and agreed by and between the management of the Companies named above and the General Committee of the Order of Railroad Telegraphers on said lines, that the rates and schedule of pay, conditions, and terms of employment, service and promotion herein specified for the employees on said lines, will be in effect from and after April 16, 1930, and shall continue in effect for a period of one year and thereafter until thirty (30) days' notice in writing stating the change or changes desired shall have been given by either party to the other; provided, that if commercial or other conditions change materially, the Companies reserve the right to abolish an office, or reduce the force without notice, to conform to such modified conditions, and the Management of said Companies on its part and the employees aforesaid on their part, do hereby agree that they will perform their several duties and stipulations provided for in this agreement.
>
> "This supersedes previous agreements and rulings thereon and is made subject to any subsequent municipal, state, or federal legislation."

The carrier particularly cites a supplementary agreement, to-wit:

> "It is hereby mutually agreed that when an agency position (telegraph or non-telegraph) covered by the schedule with the Order of Railroad Telegraphers is changed to a small non-telegraph agency, removing it from the provisions of the telegraphers' schedule, that the agent on the position at the time of the change will be permitted to remain on the re-classified position if he desires to do so, but will take the rate and conditions established by the company for the re-classified position and in the event that the agent does not desire to remain on the non-telegraph agency, the company will have thirty (30) days in which to relieve him and during this period the rate and conditions established by the company for the position will apply and there will be no claims made for loss in compensation.
>
> "An Agent, who elects under the terms of this agreement to remain on the re-classified position, will continue to be carried on the telegraphers' seniority list and will accumulate seniority thereon which he may exercise in applying for a station under bulletin that is covered by the telegraphers' schedule.
>
> "In the event that the re-classified agency is discontinued at any time, the agent holding seniority on the telegraphers' seniority list who elected to remain on the position, after it had been re-classified will return to the telegraphers' extra list.
>
> "It is further agreed that the company may use, if it so desires, employes carried on the telegraphers' extra list for filling small non-telegraph agencies, and that such employes, during the time they are filling such agency position, will not lose their seniority on the telegraphers' seniority list and will be permitted to exercise their seniority to positions under bulletin that are covered by the telegraphers' seniority list and if this is done the company will have thirty (30) days in which to relieve such employes from the small non-telegraph agency and there will be no claims made for loss in compensation, it being undersood that during the time such employes are assigned to non-telegraph agencies that they will take the rate and conditions established by the company for the position they occupy.
>
> "It is also understood and agreed that employes carried on the telegraphers' official seniority list will not have seniority rights to fill small non-telegraph agencies.

"It is further understood and agreed that small non-telegraph agencies on these lines do not come within the jurisdiction of the telegraphers' organization and are not subject to the provisions of the telegraphers' schedule, as this matter was definitely settled by the committee and the company when the present schedule of April 16, 1930, was negotiated and placed in effect.

"This agreement is effective October 19, 1931, except that it will apply to employes who have given up their seniority standing on the telegraphers' seniority list since April 16, 1930, to take position as agent at a small non-telegraph agency. The seniority standing of such employes on the telegraphers' seniority list will be restored in accordance with the provisions of this agreement.

"This agreement is subject to cancellation by the company or the organization on thirty (30) days' written notice.

"Signed at Houston, Tex., October 19, 1931.

"For employes:

"A. E. LAISURE, *General Chairman.*

"For the Company:

"J. G. TORIAN, *Assistant Gen. Manager.*"

The above agreement was later put in the form of "An Agreed-to Interpretation" with the understanding that it should have the same force and effect as the agreement of October 19, 1931, to-wit:

"It is hereby mutually agreed that when an agency position covered by the schedule with the Order of Railroad Telegraphers is changed to a small non-telegraph agency, removing it from the provisions of the Telegraphers' schedule, that the agent on the position at the time of the change will be permitted to remain on the re-classified position if he desires to do so, but will take the rate and conditions established by the Company for the re-classified position and in the event that the agent does not desire to remain on the non-telegraph agency, the Company will have five (5) days in which to relieve him and during this period the rate and conditions established by the Company for the position will apply and there will be no claims made for loss in compensation. If the employe desires to remain at the re-classified station, he will make known his desires immediately.

"An Agent, who elects under the terms of this interpretation to remain on the re-classified position, will continue to be carried on the Telegraphers' seniority list and will accumulate seniority thereon which he may exercise in applying for a position under bulletin that is covered by the Telegraphers' schedule.

"In the event that the re-classified agency is discontinued at any time, the agent holding seniority on the telegraphers' seniority list who elected to remain on the position after it had been re-classified will return to the Telegraphers' extra list.

"It is further agreed that the Company may use, if it so desires, employes carried on the Telegraphers' extra list, if said employes so desire, for filing small non-telegraph agencies, and that such employes, during the time they are filling such agency position, will not lose their seniority on the Telegraphers' seniority list and will be permitted to exercise their seniority to positions under bulletin that are covered by the Telegraphers' seniority list and if this is done the Company will have twenty (20) days in which to relieve such employe from the small non-telegraph agency and there will be no claims made for loss in compensation, it being understood that during the time such employes are assigned to non-telegraph agencies that they will take the rate and conditions established by the Company for the position they occupy.

"It is also understood and agreed that employes carried on the Telegraphers' official seniority list will not have seniority rights to fill small non-telegraph agencies.

"This interpretation is effective February 16, 1932, except that it will apply to employes who have given up their seniority standing on the Telegraphers' seniority list since April 16, 1930, to take position as agent at a small non-telegraph agency. The seniority standing of such employes

on the Telegraphers' seniority list will be restored in accordance with the provisions of this interpretation.

"Signed at Houston, Texas, February 16, 1932.

"For Employes:

"A. E. LAISURE, *General Chairman.*

"For the Company:

"J. G. TORIAN, *Asst. General Manager.*
"T. C. MONTGOMERY, *Supervisor Wages.*"

The claims in the two dockets were submitted separately to the Board, but handled together at the hearing, in rebuttal, surrebuttal, and at the rehearing before the Referee. Docket TE–244 covers twenty-five positions and Docket TE–245 covers sixty-one positions. In Docket 244 the Telegraphers' Committee request that twenty-five positions of Agent be restored to the current schedule agreement, while in Docket 245 they request that sixty-one positions of agent-telegrapher be restored to current schedule agreement. In TE-245 petitioners say that the positions were not abolished because the occupants are still performing telephone service. The subject matter of the two cases is so nearly identical that decision upon them will be covered in a single award.

POSITION OF PETITIONERS.—Petitioners contend that the arbitrary action of the management in changing the basic rates of pay and working conditions of these positions and removing them from the provisions of the agreement without notice to, conference, and agreement with the Committee, or as provided in the Railway Labor Act, constitutes a violation of the provisions of the agreement and the Act; also a violation of the Chicago Agreement and its extensions where changes were made subsequent to February 1, 1932. They ask that the positions be restored to the agreement at the basic rates listed therein, retroactive to the dates such rates were arbitrarily changed, and that any and all employes affected be fully compensated for wage losses suffered.

In essence it is the contention of petitioners that the right of the carrier in respect to abolishing positions and creating other positions in their place, to do the same or similar work, is no greater in respect to small non-telegraph agencies than in respect to other positions, and that it is unthinkable to permit the exercise of any such alleged right to abolish positions for which guaranteed minimum rates of pay are specified in the agreement. Petitioners submit that basic hourly rates for the positions listed in the agreement were made a part of the agreement subject to change only in pursuance of the same legally prescribed procedure that applies to any other item in the agreement. They say it is not competent to invoke past practice in support of the carrier's action since the current agreement specifically stipulates that it supersedes previous agreements and rulings thereon and it is made subject to subsequent municipal, state, or federal legislation which includes the Amended Railway Labor Act under which these cases are brought.

Inasmuch as the agreement between the parties provided guaranteed rates of pay and working conditions, petitioners contend that it was a violation of Section 6 of the Railway Labor Act to change such rates of pay and working conditions pending notice of conference and agreement on new rates as provided in the act.

Petitioners' position was further developed in response to some of the carrier's arguments. To the contention that signing a new agreement with the same wording as previous agreements was tantamount to confirming previous constructions of the rules, petitioners point out that while they have objected to these constructions in the past, they have lacked an effective tribunal before which to make their objection felt and that the passage of the Amended Railway Labor Act supplied this need. Past interpretations, petitioners point out, were made by the carrier and not by agreement or by a disinterested impartial agency and the organization has merely acquiesced in these interpretations pending availability of peaceful legal means of changing them. In this connection, petitioners stress past rulings of this Board to the effect that repeated violations of an agreement do not have the effect of amending it.

Concerning the arguments which the carrier has based upon actions of petitioners which carrier contends were tantamount to confirming the carrier in the right to do the things of which complaint is now made, petitioners make substantially this response: The situation created by the carrier's action in con-

tinuing to abolish agencies and agent-telegrapher positions and to substitute small non-telegraph agencies in their place made it incumbent on petitioners to protect the interests of their members as far as possible under a de facto situation which they were trying unsuccessfully to change. This attitude, they say, applied equally to their dealing with conditions under the de facto status and with their efforts to change the status. Among specific acts which they explain in this way are these: (1) Negotiating the instruments of October 1931 and February 1932; (2) Handling cases before Telegrapher's Adjustment Board; (3) Corresponding with small non-telegraph agents seeking their aid in getting their positions back into the agreement; (4) Seeking to get these positions back into the agreement by negotiation; (5) Resorting to the U. S. Board of Mediation.

Finally petitioners cite decisions of this Board and earlier boards to the effect that unilateral action of a carrier in abolishing positions must be abolitions in fact, and that the power to abolish positions does not mean that a carrier may abolish a position or positions covered by agreement and thereupon create in their place positions involving the same or similar duties, not covered by agreement, and carrying less favorable rates of pay and working conditions.

POSITION OF THE CARRIER.—Insofar as the carrier's position has been revealed in stating the position of petitioners, some repetition will be involved in developing the carrier's arguments. In the first place, the carrier objects to the Board taking jurisdiction of the cases for reasons among which the following may be noted:

1. The cases do not involve an interpretation or application of an agreement but are requests for changes in rates of pay, rules, and working conditions.

2. The cases have not been handled in the usual manner up to and including the chief operating officer of the carrier. They were not originated by the individual employees affected nor within the specified time limit, but on the contrary the employes have, by binding contracts in their behalf, accepted the positions and rates and working conditions attached thereto.

As to the merits of the cases the carrier says that since January 1, 1914, and even prior thereto, the management has had and exercised the right of abolishing telegraph agencies listed as such in the telegraphers' schedules and establishing in lieu thereof small non-telegraph agencies at a reduced rate of pay whenever the management, in the exercise of its discretion, has deemed such a change necessary or desirable because of changed conditions or for the welfare of the service. Abolition of telegraph service at a station has always been treated as a sufficient change in conditions to warrant the establishment of that station as a small non-telegraph agency. The aforesaid practices, carrier contends, have continued without interruption up to the present time and they have been repeatedly recognized by the O. R. T.

The attorney for the carrier at the oral hearing laid emphasis upon the contention that these cases pertain exclusively to agreements in force and interpretations of them that have been given the sanction of established practice on these properties. Conditions on other properties and under other agreements, he argued, have nothing to do with these cases. The carrier contends that established practice under the current and earlier agreements together with the agreement of October 19, 1931, and the Understanding of February 16, 1932, give it an unquestioned right to do the things of which petitioners complain.

Considering the question of past practice, the carrier calls attention to the fact that prior to the period of Federal Control non-telegraph agents as a class were not covered by the agreement with telegraphers and were first incorporated into telegraphers' agreement on this property on July 1, 1921, at a minimum rate of 48 cents per hour, which was considerably less than the rate paid to Agent-telegraphers.

The carrier says that automobiles, buses, and trucks cut into the business of small stations to such an extent that a rate of 48 cents an hour could not be justified, and that the management sought and obtained an agreement to eliminate "small-non-telegraph-agency" positions from the telegraphers' agreement and that those positions are not mentioned or covered by the current telegraphers' schedules which became effective on April 16, 1930.

Further, the carrier maintains that not only were small-non-telegraph agency positions then in existence not covered by the agreement of April 16, 1930, but that by long practice which had received the stamp of approval of the parties, management had the right to abolish existing agency positions and create in their place small-non-telegraph-agency positions without conference or agree-

ment with the O. R. T. This, the carrier contends, had the effect of carrying the established practice of abolishing agencies and creating small-non-telegraph-agencies in their place into the new agreement of April 16, 1930, since the rules were not changed in any way to affect this practice. In support of this contention numerous judicial decisions were cited to show that when a statute has been given a certain construction by the courts and thereafter re-enacted, the legislature is presumed to have intended that the new statute will be given the same construction as the old. By analogy the carrier applies the same principles to the telegraphers' agreement as regards small non-telegraph agencies.

The carrier also contends that the provisions of the agreement of April 16, 1930, "that if commercial or other conditions change materially the companies reserve the right to abolish an office or reduce force without notice, to conform to such modified conditions * * *" gives it the right to change 'agency' and 'agent-telegrapher' positions into 'small non-telegraph agency' positions.

In challenging the positions taken by the petitioners, the carrier points to the agreement of petitioners in 1930 to take small non-telegraph stations covered by prior schedules, and those that might be established in the future, out of the agreement and to handle them on the monthly rate basis to compensate for all services performed. Major emphasis, however, is placed on the agreement of October 19, 1931, and the agreed to interpretations of February 16, 1932, both of which have been quoted in full. As noted, carrier stresses the point that these two instruments have the same force and effect.

The carrier's position in respect to the agreement to take small non-telegraph agency positions out of the telegraphers' schedules in 1930, and the instruments of October 1931 and February 1932 is that they definitely confirmed the right to change agency and agent-telegrapher positions into small non-telegraph agency positions and thus to withdraw them from the agreement. As previously indicated, the carrier maintains that even without these added confirmations the making of a new agreement carried the implication that it would necessarily be construed as prior agreements had been, still, these additional documents, the carrier holds, removed any doubt which might have existed prior to their execution.

Carrier also contends that in support of past practice and of the confirmation given to it by the agreement of 1930 and the instruments of October 1931 and February 1932 the petitioners have admitted that the carrier has the rights which it claims to have by overt acts subsequent to the effective date of the 1930 agreement. Among such acts the carrier points particularly to the following:

1. Letters which the General Chairman wrote to small non-telegraph agents telling them that their positions were going to be put into the agreement, thus admitting that they were not in.

2. Carrier cites the handling of cases before the Telegraphers' Adjustment Board which were predicated upon the right of the carrier to make the changes now complained of.

3. The carrier also stresses the fact that small non-telegraph agencies, in existence when the agreement of October 19, 1931, was made, included twenty-five such agencies established subsequent to the effective date of the 1930 agreement, and that those in existence when the February 1932 instrument was made included thirty-two more established between October 19, 1931, and February 16, 1932. It is the position of the carrier that this fact gives particular pertinence to the language of the October 1931 and the February 1932 instruments as confirming the carrier's position.

Among other facts noted by the carrier are that occupants of small non-telegraph agency positions are not carried on the telegrapher seniority roster, that the General Chairman has tried to negotiate an agreement to put small non-telegraph agency positions into the agreement and, failing that, has carried the case to mediation in the hope of changing the agreement to achieve the end, which is now being sought by appeal to this Board.

In the final presentation of the case for the carrier, the argument was advanced that in entering into a labor agreement, management retains all of the inherent prerogative of management except those which it specifically surrenders. Therefore, it is contended, that since management has never given up the right to readjust positions and duties to meet the needs of the service it still has the right to change agency and agent-telegrapher positions into small non-telegraph agency positions as claimed.

OPINION OF THE REFEREE.—The records of these cases are exceptionally voluminous and exhibits run to monumental proportions. The parties have advanced their contentions in such a way that the very emphasis with which claims have been urged at times tended to produce doubt rather than conviction as to the soundness of the line of argument followed. Neither party has strengthened its position by appearing to deny all merit to opposing argument. On some occasions language used has seemed to exceed the limits of suitable expression. Greater moderation, clarity, and conciseness in argument would have greatly aided the Board in approaching a decision.

However, the extraordinary mass of materials—facts, statements, counter-statements, and arguments—can be related to a few significant questions which lend themselves to logical analysis.

FIRST. Consideration must be given to the question whether and to what extent the relations between the parties and the conditions upon these properties differentiate these cases, as they pertain to abolition of positions and transfer of duties to other positions, from previous cases which have had to do with removal of positions from agreements by similar or analogous abolitions and transfers.

In trying to analyze these cases, the fact must not be overlooked that as long as small non-telegraph agency positions were in the agreements, the incumbents were, theoretically at least, under the protection of the organization, even though in practice that protection did not prove very effective. Once such positions were taken out of the agreements, as they were by the actions taken in 1927 and 1930, the incumbents lost whatever recourse coverage by the agreement afforded. For this reason, unilateral power to transform positions under the agreement into small non-telegraph agency positions was a more sweeping power after 1927 and 1930 than it had been before. If the carrier were able first to take all small non-telegraph agencies out of the agreements through negotiation and then secure confirmation of its power to change agency and agent-telegrapher positions into small non-telegraph agency positions, it would obviously be in a position to exercise quite exceptional powers in progressively restricting the scope of the agreements.

By removing small non-telegraph agency positions from the agreements by negotiation in 1927 and 1930 the parties strengthened the natural presumption that the carrier was not empowered to take positions within the agreements out of the agreements except through negotiation and joint action. It scarcely follows that by having taken positions bearing a certain label out of the agreement by joint action a power was conferred to take other positions out of the agreement unilaterally by merely attaching the same label to them.

Whatever the force of past practice, it was not strong enough to accomplish what the Carrier desired to accomplish. The Carrier seems to have had a de facto power in past years to change agency and agent-telegrapher positions but this power appears not to have been supported by strong de jure foundations. Negotiations of 1930, 1931, and 1932 as their results are interpreted by the carrier, gave new support to its alleged right to transform these positions and take them out of the agreement.

The referee is of the opinion that the past actions of the carrier, when considered in connection with the basic safeguards which must be presumed to inhere in labor agreements of the type in force on these properties in order to give them substance, materially weakens the position the carrier is now taking and specifically, the interpretations placed on the chain of events extending over the period during which the parties have maintained contractual relations. Petitioners likewise do not appear to have performed in recent years in a way to build up and strengthen the cases they are now arguing.

As noted above, the carrier lays particular emphasis on the instruments of October 19, 1931, and February 16, 1932. The language of the October agreement upon which, apparently, the carrier especially relies is as follows:

> "It is further understood and agreed that small non-telegraph agencies on these lines do not come within the jurisdiction of the Telegraphers' organization and are not subject to the provisions of Telegraphers' schedule, as this matter was definitely settled between the Committee and the Company when the present schedule of April 16, 1930, was negotiated and placed in effect."

It is significant that this language is not found in the agreed-to interpretations of February 16, 1932. However, the carrier maintains that since it was agreed that the instrument of February 1932 was to have the same force and

effect as the agreement of October 19, 1931, the omission is not material. Moreover, Carrier contends that the first paragraph of the instrument of February 1932 says substantially the same thing by implication.

To a person inexperienced in situations out of which labor agreements emerge it might well appear inconceivable that official representatives of employes would use the language found in the instruments of October 1931 and February 1932 if they did not intend those instruments to confirm management in its alleged right to take unilateral action in changing agency positions into small non-telegraph agency positions and thus to take the positions in question out of the agreement.

On the other hand, it can just as plausibly be argued that gifted and experienced principles and attorneys, versed in all the techniques of labor agreements, would never have failed to express an agreement, the intent of which was to confirm management in a right which representatives of labor would naturally be reluctant to concede, in language which would explicitly accomplish that purpose. The fair inference from the language and all the attending circumstances, including the history of the issues involved, is that both parties were sparring in order to get as much and to give as little as possible.

The only safe conclusion to reach in reference to these documents is that they accomplished the purpose which they were intended to accomplish in reference to seniority rights and that beyond that their significance is a matter of conjecture. One must look in vain in the agreement effective April 16, 1930, and in the Agreed-to Interpretation of February 16, 1932, for any statement concerning the authority by which agency or agent-telegrapher positions could be changed subsequent to April 16, 1930, into small non-telegraph agency positions.

Literally the same is true of the Agreements of October 19, 1931, and while the language of that Agreement, especially the part of it which was eliminated from the Agreed-to Interpretation of February 16, 1932, puts the negotiators of that Agreement in a somewhat vulnerable position, the fact that the Grand Officers of the Organization caused the language to be changed, taken together with all the history and circumstances of the cases, makes it incumbent on this Board not to read into either of these Agreements by implication any meaning which they do not carry on their face.

Viewing the cases from the background of prevailing conditions leads to similar conclusions. Business was on the decline in 1930, it was worse in 1931, and still worse in 1932. Whatever motives dominated the organization, there can be no possible warrant for interpreting agreements, which labor representatives found it expedient to make on the above dates, as making greater concessions than are carried by the language of the instruments which they joined the carrier in making.

Rules, legal requirements, precedents, decisions, and governing principles which apply to the facts of these cases are not new. The basic issues have been before this Board frequently, and before earlier agencies of adjustment.

In particular, the jurisdictional issues raised by the carrier have been passed upon by this Board since these cases were originated and the circumstances of the cases to which these decisions pertained were sufficiently similar to those of the instant cases to be held as governing and they serve to overrule objections to the Board taking jurisdiction.

Approaching the instant cases in the light of past decisions assumes a relationship between these cases and other cases in which similar or analogous circumstances have been present, even though the cases arose under agreements on other properties than the one involved in the instant disputes.

The position taken at the hearing before the Referee by the attorney for the carrier, that conditions on other properties and under other agreements have nothing to do with these cases, is untenable due to several obvious facts among which the following are worthy of note:

1. Cases which have been before this Board have had to do, in numerous instances, with subject matter which linked a particular agreement to other agreements and to decisions applicable to the railways of the country generally, and which revealed a common origin for many items in individual agreements as well as common language in many of the rules, and in other rules, language which had essentially the same meaning as between agreements in force on different railroad properties.

2. Numerous awards of this Board have been accepted and put in force by parties to disputes, which awards were based, in part, upon precedents drawn from agreement other than the one to which the dispute in question pertained

3. Agreements in force on the railways of the country, in addition to being closely similar in much of their language and origins, were entered into with organizations of employees which are common to American Railways and the representative status of these organizations has been established by law and is enforced by the highest judicial authority of the land.

4. Relationships between carriers and organizations of employees are carried on under Federal legislation. This legislation gives force to agreements on individual properties and thus avoids a uniform set of rules. At the same time it has the purpose and effect of setting certain general standards to which it is legal and proper to relate issues which arise on the property of any carrier. Such issues frequently can be settled by an interpretation and application of the agreement in question in the light of previous interpretations of other agreements to which said standards have been applied. Precedents drawn from other agreements come into play when issues which arise under a particular agreement are similar or analogous to issues which have arisen under like or similar agreements and when such precedents will aid in resolving doubts concerning the interpretation and application of the agreement before the Board. Obviously it is not permissible, in applying precedents based on other agreements, to transgress the rules of the agreement which is being interpreted and applied.

5. Agreements and relationships carried on under them come within the purview of the Amended Railway Labor Act and interpretations and applications of agreements are, by that Act, made subject to appeal to this Board.

6. It has become standard practice of this Board to consider precedents drawn from other agreements than the one under which a particular dispute arises insofar as such precedents are deemed applicable to the issues in dispute and provided that they are not in conflict with the agreement under which the dispute arose.

In view of these circumstances and of the powers vested in the National Railroad Adjustment Board, the Third Division finds that, without transgressing the agreements under which these disputes arose, it is empowered to give such consideration as it deems proper in arriving at a decision concerning the issues before it, to precedents which it considers pertinent to the issues which it has to decide. The Division finds further that the current agreements and the special agreements cited and the acts and omissions of the parties as developed in the record, do not reveal any special circumstances surrounding these cases of such a nature as to differentiate them basically from other cases involving similar or analogous facts and circumstances so as to preclude application of appropriate general principles and standards previously upheld by the Board.

SECOND. Having held that this dispute, as it pertains to the alleged right of the carrier to act unilaterally to transform agency and agent-telegrapher positions into small non-telegraph agency positions not covered by the agreement, is subject to similar principles and standards to those previously enforced by this Board under similar agreements, the question now becomes what those principles and standards are and how they apply.

Argument based on the general nature of labor agreements is advanced to support the contention that since management has not specifically contracted not to abolish agency and agent-telegrapher positions and create in their place small non-telegraph agency positions, therefore it is absurd to maintain that management does not have that power. In the same connection it was pointed out that management in 1930 granted an increase in pay of two and one-half cents per hour in return for which the committee agreed to take the then remaining small non-telegraph agencies out of the agreement.

Irrespective of any special agreements, the right of the carrier to abolish positions that are not needed is conceded. The right of the carrier to create new positions when they are needed is likewise conceded and the question whether the new positions are under or not under the agreement depends upon the terms and interpretation of the agreement in question. But the sum of the right to abolish plus the right to create positions obviously does not equal an unrestricted right to transform positions in such a way as to modify materially the whole purpose and effect of an agreement.

Notwithstanding the fact that petitioners have acquiesced in past interpretations of the agreement by the carrier, they are on solid ground when they say that the situation is quite different from the case of legislation which has been construed by legally established courts of law whose decisions all parties are legally bound to observe.

The record indicates clearly that the O. R. T. has not been content with the small non-telegraph agency situation on this property in recent years, and it is not surprising that with the beginnings of recovery in 1933 the organization served notice on the carrier of its desire to have all small non-telegraph agencies again placed in the telegraphers' schedule. After this request was declined the organization invoked the services of the United States Board of Mediation. The question submitted to the Board was "Revision of Rules and Working Conditions—Incorporation into agreement of 128 small non-telegraph agency positions."

The carrier maintains that submission of the above case to the Board of Mediation showed that the O. R. T. regarded the question as involving a change in the agreement, and that in bringing the cases before this Board as a grievance it is seeking to repudiate an obligation. If applied solely to positions which have been withdrawn from coverage by the agreement through joint action, this argument would have merit, but the main issue to be decided is whether the carrier now has a right to change agency and agent-telegrapher positions in the agreement into small non-telegraph agency positions outside the agreement by unilateral action.

Numerous cases were in mediation when the Amended Railway Labor Act of 1934 became operative. Circumstances under which cases previously submitted for mediation may be passed upon by this Board have been considered on several occasions. Since decisions are not identical, the question, to some extent, is still in process of clarification. Concerning those positions which have been withdrawn from the agreement by unilateral action since April 16, 1930, which constitute the crucial issue of the instant cases, the language used in an earlier decision may be quoted. In Award 290, MW–160, referring to a previous effort of petitioners in that case to submit the case to mediation, the Referee used this language:

> "taken together with all the factors in the case, this action merely reflected a belief that petitioners had a grievance and indicated that they were making an effort to find the proper channel through which the grievance might be redressed. The action does, to be sure, reveal considerable doubt as to whether the grievance is covered by the agreement."

The Act of 1934 created two distinct jurisdictions where only one had existed before. As frequently set forth in argument before this Board and in decisions, the act undertook to draw a line of demarcation between the two jurisdictions by limiting the jurisdiction of the Mediation Board to cases involving changes in agreements, and the jurisdiction of this Board to cases involving interpretations and applications of agreements. While obviously this is a logical and sensible way to classify issues, the classification does not automatically answer the question whether a given case is of one kind or the other. And so in previous cases this Board has sometimes taken jurisdiction when its jurisdiction was challenged in order to determine whether a particular case involved a change in agreement, which this Board is without power to make, or an interpretation or application of an agreement, which it is empowered to make.

Concerning positions withdrawn from the agreement by the sole action of the carrier, it appears that the instant cases call, in the first instance, for decision as to whether the claim involves a request for a change in the agreement or a dispute over interpretation and application of the agreement. The fact that the claim has been before the Board of Mediation does not change its basic quality in this regard. The Division holds that the cases are properly before it on the issue of the carrier's right to change agency and agent-telegrapher positions into small non-telegraph agencies by unilateral action.

Decision upon this issue, which is the crucial issue of the cases, does not necessitate passing judgment upon the form in which the claim is advanced nor is it necessary to pass judgment on all of the events that may have transpired in the relations between the parties. The principles and standards pertinent to the main issue rest to a large extent upon precedents which this Board and earlier boards have established.

THIRD. This brings us to consideration of any previous decisions which may appear pertinent to the issues in the instant cases.

The carrier has referred to Decision 4101 of the U. S. Railroad Labor Board. In argument for petitioners, appears the following quotation from this same decision:

"The board is of the opinion that a rate below the minimum for small non-telegraph agencies, 48 cents an hour, shall not be established without agreement with the representatives of the employees, and that the question of the proper rate of the positions is one which is dependent upon the extent of the decrease in the duties and responsibilities of the positions. The evidence submitted on this point is conflicting and should be the subject of a joint investigation by the representatives of the parties for a sufficient length of time to develop the actual conditions.

"*Decision.*—A rate of 48 cents an hour shall be established for these positions with retroactive adjustment in the compensation of the employees affected to the date the positions were reclassified. Parties shall confer and endeavor to agree on the proper rate which should have been established for these positions. In the event an agreement cannot be reached and it is necessary to re-submit the dispute to the Railroad Labor Board, a joint check shall be made at each of the stations involved and a detailed report of the duties and responsibilities of each position with full information as to the extent such duties and responsibilities have been changed, shall be submitted."

This decision is especially valuable as indicating a sane approach to the type of problem which is before the Board in the instant cases, irrespective of differences in jurisdiction under present and earlier legislation.

Several decisions by this Board have been cited and a number of others might have been cited as bearing on the basic question of the circumstances under which the carrier may or may not abolish a position and thereupon create a new position with the same or similar duties. Considerable attention has been given to Award 255 (TE–150) and conflicting conclusions drawn from it.

While the specific claims in the instant cases and the case upon which Award 255 was based are different as are some of the circumstances including some of the terms of the agreements under which the cases arose, Award 255 appears to be more closely related to the issues of the instant cases than any of the other cases which have come before the Board and some of the principles laid down in Award 255 are applicable here.

The jurisdictional issues in Award 255 to which attention has been called have been sufficiently covered in recent decisions so that they require no extended restatement. To the extent necessary they are covered elsewhere in this opinion.

Award 255 contains, in reference to the merits of the case, a review of principles applicable to the abolition of positions and the assignment of their duties to new positions but they are all summed up in the statement that the carrier has an unquestioned right to abolish positions but that the abolition must be an abolition in fact and not merely in name. Award 255 is also helpful in confirming, with approval of petitioners, an approach to the problem of reclassifying agencies to meet changed conditions similar to the approach indicated in U. S. Labor Board Decision 4101, above quoted.

Representatives of the carrier point to the fact as above noted, that there are many points at which the case upon which Award 255 was based is unlike the instant cases. They emphasize especially that in the Santa Fe case in respect to which Award 255 was made the organization was asking merely to negotiate concerning the proper classification and rating of positions in which the duties had changed whereas in the instant cases, they say, the organization is demanding that rates provided in the schedules be maintained regardless of changed duties. Several other points were stressed by the carrier in opposition to using the Santa Fe case as a precedent, but as the Referee is cognizant of the points at which the cases differ it is not necessary to discuss these points.

The Referee finds that the problem in the Santa Fe case was similar but not identical to the problem presented by the instant cases. As in certain other cases which have been before the Board the form in which the instant claim is made is not necessarily controlling and it is not necessary to pass judgment upon this form in order either to make comparison with similar cases or to decide the basic issues before the Board.

FOURTH. The Railway Labor Act effective May 20, 1926, is cited by petitioners as forbidding the kind of changes which the carrier in the instant cases has made. The point is made that the agreements upon these properties contain guaranteed rates of pay and that Section 6 of the Railway Labor Act specifies the only way in which those rates can be changed. In the same connection it is

urged that since the agreement of April 16, 1930, ran for one year and thereafter until changed after notice and under the procedures prescribed by law, no changes whatever could be made in the agreements prior to April 16, 1931, and no changes after that date except in the method established by the Act.

On the theory that all small non-telegraph agencies are outside the scope of the agreement, carrier advances practically the same argument from Section 6 of the Amended Railway Labor Act as petitioners made from the same section of the Act of 1926 which brings the whole issue back to the question whether the agency and agent-telegrapher position removed from the agreement and transformed into small non-telegraph agencies outside the agreement were rightfully so transformed. If they are rightfully out the procedures prescribed by law must be followed to put them in; if they are rightfully in, the same procedures must be followed to take them out.

FIFTH. Much discussion has taken place in reference to the duties of the positions around which the issues of the instant cases revolve. The carrier naturally has emphasized the small amount of business transacted at the stations in question, especially under conditions of depression.

Petitioners do not deny a decline in business during the depression but they deny the necessity for such an extensive and drastic reclassification as the carrier has carried out. Petitioners have undertaken to differentiate cases #244 and 245 on the ground that in positions covered in the latter case telephone service is maintained with the effect of placing the agents and agent-telephoners on a par with agent-telegraphers.

The facts upon the telephone issue as upon other aspects of the operating problem by which the carrier was confronted are sharply controverted and the record does not contain accepted facts of a nature and extent which would be required to resolve either the telephone issue or other controverted factual issues by an outside agency such as this Board.

Assuming, as we must assume, that the parties can arrive jointly at a substantially correct appraisal of the facts, there are three possible approaches to the practical operating problem.

1. The method of taking unilateral action by the carrier to achieve the end sought and defending the right to take such action.

2. Denial of the right, assertion of a counter right and an effort to reverse the action taken or contemplated by the carrier.

3. Joint appraisal of the problem and an effort to find a fair solution within the scope of the agreements.

As a practical matter of operation this Board by interpreting and applying the agreements can: (1) set down the limits of right and obligation within which the parties must proceed, (2) correct, as far as possible, any wrongs committed, and (3) hand the practical problem back to the parties for solution under the third of the approaches above indicated.

SIXTH. *Conclusion.*—Both parties to this dispute are in a vulnerable position from the standpoint of the contentions they have respectively advanced before the board.

Although the instruments of October 1931 and February 1932 were sequels to earlier efforts to safeguard seniority rights and must be limited in their effect to the purposes set forth in them, nevertheless, as indicated by documents in the record, they gave considerable color to the arguments which the carrier drew from them. The carrier, on the other hand, having negotiated to take certain positions out of the agreement by process of agreement, was scarcely in a position to proceed to take other positions out of the agreement indiscriminately without conference or negotiation. Moreover, to uphold such a right would so seriously undermine the agreement and run so counter to principles and standards which are enforced under similar agreements that in the absence of such an extraordinary grant of power in the agreement itself it cannot be held to have been within the intent of the parties.

AWARD

1. Small non-telegraph agencies which have been taken out of the agreement through the process of negotiation and mutual consent can only be restored to the agreement in the same manner under procedures prescribed in section 6 of the Amended Railway Labor Act.

2. Small non-telegraph agency positions which have been created outside of the agreement as result of the unilateral action of the carrier in abolishing

agency and agent-telegrapher positions within the agreement and assigning substantially the same duties to a small non-telegraph agent shall be restored to the agreement as of the date abolished and the agents concerned shall be compensated for their loss.

3. As applied to those agencies or agent-telegrapher positions listed in the agreements of April 16, 1930, in which there has been such a change of duties as to justify reclassification, the case is remanded to the parties with instructions to reach an agreement in accordance with the above finding if possible, and, failing that, to submit a concise joint statement or ex parte statements of the essential facts pertinent to the individual cases upon which agreement is not reached for decision by this Board.

4. Any action taken by the carrier to restore positions which have been eliminated by its unilateral action shall not prejudice proper consideration of the positions in question, upon resubmission.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: H. A. JOHNSON
Secretary

Dated at Chicago, Illinois, this 17th day of November, 1936.

DISSENT ON DOCKETS TE–244 AND 245

Prior to the period of Federal control, non-telegraph agents as a class were not covered by the agreements with telegraphers. These positions as a class were first incorporated into the telegraphers' agreements on this property July 1, 1921, at a minimum rate of 48¢ per hour which was considerably less than the rate paid agent-telegraphers. Due to the inroads made in the company's business by automobiles, buses and trucks, the work at these small stations diminished to the point where a rate of 48¢ per hour could not be justified, and the management sought a complete elimination of all such positions from the telegraphers' agreements so that thereafter it could fix compensation for the positions commensurate with the work performed. The record shows that a complete agreement was reached with the O. R. T. under which all small non-telegraph agency positions were eliminated from the telegraphers' agreements and the jurisdiction of the telegraphers' committee, and at the present time those positions are not mentioned in or covered by the current telegraphers' agreements which became effective April 16, 1930.

When these agreements were negotiated it was agreed that the small non-telegraph stations covered by the prior agreements would be eliminated therefrom, thus permitting the company to handle all small non-telegraph stations then in existence and those that might be established in the future on a monthly rate basis to compensate for all services performed. An examination of the current agreements will show that they neither cover nor purport to cover small non-telegraph agencies. Since the effective date of the current agreements the O. R. T. has repeatedly recognized the right of the management to abolish telegraph agencies listed in the agreements and to thereafter create without prior conference or agreement with the committee, small non-telegraph agencies at a monthly rate to compensate for all services performed. In 1931 and again in February 1932 General Chairman representing the O. R. T. entered into written agreements with the management which specifically provided that when an agency position covered by the schedule with the O. R. T. is changed to a small non-telegraph agency removing it from the provisions of the telegraphers' schedule that the agent on the position at the time of the change will be permitted to remain on the re-classified position if he desires to do so, but will take the rate and conditions established by the company for the re-classified position.

The record shows specific cases where a telegraph agency was changed to a small non-telegraph agency since the effective date of the current agreements, and these cases were reviewed by the Telegraphers' Adjustment Board which was created by agreement between the Company and the O. R. T., and in those cases no contention was made that the change from telegraph to small non-telegraph agency was contrary to the agreements in effect. To the contrary, the records in those cases show that the O. R. T. recognized that the management was acting within its rights in making the change from telegraph to

small non-telegraph agencies and that the positions were thereby removed from the provisions of the telegraphers' agreements.

In 1933 the organization served notice upon the management of its desire to have all small non-telegraph agencies again placed in the telegraphers' agreements. This request was declined and subsequently the organization invoked the services of the United States Board of Mediation. The question submitted by the O. R. T. to the Board of Mediation was:

> "Revision of Rules and Working Conditions—Incorporation into agreement of 128 small non-telegraph agency positions."

Positive proof, in our opinion, that the organization recognized that small non-telegraph agents were not covered by telegraphers' agreements and they were seeking a change in the agreements. Mediation proceedings were conducted by the Board, and when the organization discovered that it would be unsuccessful in securing the rule changes desired by it in mediation it withdrew its request from the Board of Mediation and submitted the alleged claims to this Board. The changing or making of agreements or rates of pay is not a function of this Board.

The claims in these dockets are not "Grievances" coming within the provisions of Section 3–(i). The statement of facts of the employees shows clearly that the claims do not involve the interpretation of existing agreements, but involve changes in rates of pay and working conditions, all of which are subject to enacting clause of agreement, Houston & Texas Central Railroad, Article 28; Texas and New Orleans Railroad, Article 25; Sunset Lines, Article 29; and Section 6 of the amended Railway Labor Act.

The whole purpose and intent of the Railway Labor Act, as amended, is to provide a tribunal to adjudicate disputes growing out of the interpretation or the application of agreements, and no such dispute is here presented. As to the purpose of the Act to create this Board to handle only the disputes growing out of interpretation or application of agreements, there was cited the testimony of its sponsors before the Committee on Interstate and Foreign Commerce, U. S. Senate and House of Representatives.

The record shows that even if these claims were considered grievances, the employees have not complied with the provisions of Section 3–(i) of amended Railway Labor Act and the agreements in that they failed to handle these claims in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes—therefore, the Board had no right to assume jurisdiction.

Rates of pay are negotiated with Committees representing employees—positions are established by the Management without negotiation,—this is confirmed by Employes' Statement of Facts, 1st paragraph, reading "The basic hourly *rates* for the positions listed above were negotiated by and between the management and committee, and were by mutual consent incorporated into and made a part of the current agreements which became effective as of April 16, 1930." [Italic type mine.] Positions being established by management without agreement, they also have the right to abolish them without agreement.

The Telegraphers' Committee admits that effective April 16, 1930, the management granted an increase of 2½¢ per hour for scheduled positions in consideration of which the Committee agreed to remove from the agreements the remaining small non-telegraph agencies, and that this definitely settled all controversies between the Management and Committee with regard to small non-telegraph agencies. The Committee then took the position, "There being no rule in the current schedule agreement which in any way relates to small non-telegraph agencies, no such positions could be created except through conference and agreement between the parties." This position is untenable—Management does not contract against doing certain things, when it contracts with Labor Organizations to do certain things: the specific undertaking is all that it is bound by. In the beginning the carrier was not bound by any agreement, but through the processes of collective bargaining the management from time to time agreed with representatives of the employees to certain rules and rates of pay which were written into agreements and certainly such agreements are the extent of the carrier's obligation. The situation is just the reverse to that stated by the telegraphers, in that the telegraphers' agreements admittedly do not cover small non-telegraph agents, therefore, the telegraphers' committee have nothing to say about them, and certainly there is no obligation on the carrier's part to serve thirty days' notice

under articles 25, 28, and 29, of the respective agreements, as the committee argues, to establish small non-telegraph agencies that the telegraphers' committee admits are not covered by the agreements.

Articles 25, 28, 29 of the respective agreements say nothing about establishing positions—they refer to rates of pay, conditions and terms of employment, service and promotion—it is also agreed in the same articles that the carrier may abolish positions or reduce force without notice. When the carrier abolished the positions listed in agreements they did not change any rules or rates of pay for such positions.

As to the carrier's right to abolish positions in the telegraphers' agreements and create small non-telegraph agencies, what could be clearer and more convincing than the agreement dated October 19, 1931, and the agreed-to-interpretation dated February 16, 1932 signed by both parties? The carrier stated at the hearing and it was not denied by the employees that this interpretation is still in effect—I quote the first paragraph of the interpretation:

> "It is hereby mutually agreed that when an agency position covered by the schedule with the Order of Railroad Telegraphers is changed to a small non-telegraph agency, *removing it from the provisions of the Telegraphers' Schedule*, that the agent on the position at the time of the change will be permitted to remain on the re-classified position if he desires to do so, but *will take rate and conditions established by the Company for the re-classified position* and in the event that the agent does not desire to remain on the non-telegraph agency, the Company will have five (5) days in which to relieve him and during this period the rate and conditions established by the Company for the position will apply and *there will be no claims made for loss in compensation.* If the employe desires to remain at the re-classified station, he will make known his desires immediately." [Italic type mine.]

As to the force and effect of agreement of October 19, 1931, and the agreed-to-interpretation of February 16, 1932, nothing could be clearer than the Carrier's letter of February 24, 1932, to General Chairman, reading:

> "I am in receipt of your letter of February 23rd regarding the agreement of October 19, 1931, dealing with seniority of agents at stations changed from telegraph agencies to non-telegraph agencies, and other features, and in reply thereto wish to advise that at conference held with you beginning at 11 a. m., October 31, 1931, you stated that you were being embarrassed to some extent by reason of certain laws of your organization in this matter and that you desired the agreement of October 19, 1931, to be put in the form of an agreed-to-interpretation of the schedule rules. I stated to you that the Company, of course, was not interested in the laws or inter-workings of your organization, but that if the same results as covered by the agreement of October 19, 1931, could be preserved by an agreed-to-interpretation of the schedule rules, that I was agreeable to an interpretation to take the place of said agreement. The matter was handled to this end, and on February 16th we reached an agreed-to-interpretation of the schedule entitled:
>
> " 'Agreed to interpretation of Article 7, Sections 1, 2, and 3 of the Sunset Telegraphers Schedule of April 16, 1930.'
>
> which has the same effect as the agreement of October 19, 1931, and cancels same."

To this no exceptions were taken by the General Chairman and it gives undeniable proof of the fact that the parties had common understanding as to the continued effect of the terms of both the agreement of October 19, 1931, and the agreed-to-interpretation of February 16, 1932. That understanding made unnecessary the repetition in the latter indenture of the paragraph in the former, but indubitably it continued it as well as all other paragraphs of the October 19, 1931 agreement except as upon the fact of its wording any term of the latter may have modified any term of the former. The paragraph in the agreement of October 19, 1931, omitted from the interpretation of February 16, 1932, reads as follows:

> "It is further understood and agreed that small non-telegraph agencies on these lines do not come within the jurisdiction of the telegraphers' organization and are not subject to the provisions of the telegraphers' schedule, as this matter was definitely settled by the committee and the company when the present schedule of April 16, 1930, was negotiated and placed in effect."

It by understanding between the parties upon entering into the agreed-to interpretation of February 16, 1932, was continued in full force and effect as evidenced by the letter of February 24, 1932.

No further argument should be necessary to convince any one that the telegraphers' committee recognized the carrier's right to reclassify positions covered by the agreements to small non-telegraph agencies removing them from the terms of the agreements and the jurisdiction of the telegraphers' committee, and therefore free to fix rates of pay and conditions applying to such positions.

At the hearing before the Referee the petitioner stated that the language in the agreed-to-interpretation of February 16, 1932, "* * * removing it from the provisions of the Telegraphers' Schedule * * *" was not applicable until after the management had served required 30 days' notice to change the agreements, etc. This position is unsound. Why was this language put into the interpretation if it did not mean anything? If the petitioner's position is sound they could just as well have left this language out of the interpretation. I hold that it means exactly what it says or it would never have been agreed to by the parties.

Further, there is no cancellation clause in this agreed-to interpretation of February 16, 1932. If the language "* * * removing it from the provisions of the Telegraphers' schedule * * *" was not in this interpretation there would still be nothing to negotiate because the interpretation further provides, "Will take the rate and conditions established by the Company for the reclassified position" also, note the interpretation provides "there will be no claims made for loss in compensation."

Further evidence that these small non-telegraph agents were removed from the telegraphers' agreements and outside the jurisdiction of the telegraphers' committee is the fact that none of the occupants of these small non-telegraph agencies were carried on the Telegraphers' Official Seniority Roster. If these small non-telegraph agents were covered by and had any rights under the telegraphers' agreements, they would be carried on the Telegraphers' Seniority Roster so they would be in a position to assert their rights in accordance with their seniority.

Up to as late a date as July 12, 1935, we find General Chairman of the telegraphers' committee addressing a letter to all small non-telegraph agents that "Your position is going to be incorporated into the telegraphers' agreement * * *", a clear admission that at that time such positions were not in the telegraphers' agreement, and there is no evidence that such positions have been included in the agreement subsequent to July 12, 1935, in fact as late as September 1935 the General Chairman was trying to negotiate an agreement with the management to include small non-telegraph agencies in the telegraphers' agreement.

With reference to the decision of the Referee in Award No. 255, Docket TE–150, it is clearly distinguishable from the issues involved in Dockets TE–244 and 245 in many particulars, the more important of which are listed below:

1. The facts in the Santa Fe case were that small non-telegraph agents were included in the schedule with the O. R. T. and a minimum rate fixed for these positions.

That is not true in Dockets TE–244 and 245. Small non-telegraph agencies are not covered by any of the schedules in effect on the Southern Pacific Lines in Texas and Louisiana.

2. In the Santa Fe case the carrier based its entire contention upon an alleged agreement evidenced by an exchange of correspondence. The Referee recognized and held that an understanding or agreement between the parties that positions of resident agents, when created, would not come under any of the rules contained in the schedule would be valid, binding, and effective. He said:

> "On the evidence before us we conclude that the agencies have not been abolished, that agency work is still being carried on, and that the payment on a monthly basis of the employees who are doing the work violates the agreement *unless there is some understanding to the contrary. The carrier in essence rests its case upon the existence of such an understanding.*" [Italic type mine.]

In Dockets TE–244 and 245 there are two separate and distinct understandings and agreements between the parties subsequent to the effective date of the current agreements, and each fully sustains the position of the management. Those are the agreements of October 19, 1931, and the agreed-to interpretation of February 16, 1932, together with the further understanding that the agreed-to interpretation of February 16, 1932 would have the same force and effect as the agreement of October 19, 1931.

Prior to the foregoing agreements, the organization and the management reached an agreement on August 27, 1930, creating the Telegraphers' Adjustment Board and providing that its decisions would be final and binding on the parties.

In October 1932 General Chairman submitted the Seale Case to that Board, involving the reclassification of Los Fresnos from a telegraph station to a small non-telegraph agency. The decision of the Telegraphers' Adjustment Board in that case clearly shows that the management was acting within its right in reclassifying the station and in reducing the rate of pay. Numerous other Board decisions together with admissions made by General Chairman and other members of the organization could be referred to as evidencing the effect of the subsequent agreements described above.

In the Santa Fe case the Referee found that the carrier tried to modify a subsequent agreement by relying upon a prior agreement. In Dockets TE–244 and 245, the carrier relies both upon the agreements of April 16, 1930 and the subsequent agreements to sustain its action. If the agreements do not have that effect, the subsequent agreements clearly do have that effect. The parties who mutually agreed to the agreements have like power to mutually modify, rescind or restrict them, and there is no rule of law or custom which would prevent consideration of a subsequent agreement modifying or restricting a prior agreement. Were it otherwise, an agreement once made could never be changed.

3. In the Santa Fe case the Referee held that there was no evidence that when the agreement was executed both parties thereto understood and intended that when positions included in the agreement "were converted into part-time agencies they would automatically be excluded." In Dockets TE–244 and 245 there is an abundance of evidence that both parties understood when the current agreements were negotiated that the management could in the future create small non-telegraph agencies which would not thereafter come under the agreements. Some of that evidence consists of the following:

(a) The memorandum of conference, April 12, 1930, that all small non-telegraph agencies which were then in existence and those which in like manner might come into existence in the future were eliminated from the agreements and the jurisdiction of the Committee.

(b) The admission contained in the agreement of October 19, 1931, to the effect that all questions pertaining to small non-telegraph agencies had been definitely settled when the current agreements were negotiated. That admission pertained to small non-telegraph agencies which had come into existence subsequent to the effective date of the current schedules.

(c) The agreement of October 19, 1931.

(d) The agreed-to interpretation of February 16, 1932.

(e) The understanding, evidenced by Carrier's letter of February 24, 1932, to General Chairman that the agreed-to interpretation of February 16, 1932, had the same force and effect as the agreement of October 19, 1931.

(f) General Chairman's failure to object to the creation of small non-telegraph agencies and their elimination from the agreements subsequent to April 16, 1930.

(g) The various admissions made by General Chairman in his correspondence and in his submissions to the Telegraphers' Adjustment Board in connection with various stations, particularly Los Fresnos.

(h) The award of the Telegraphers' Adjustment Board in the Los Fresnos case, which award by express written agreement was made final and binding upon the parties.

(i) The O. R. T.'s repeated efforts in 1933 and 1934 to secure an anti-reclassification rule.

(j) The O. R. T.'s repeated efforts in 1933–1935 to secure a revision of the agreements to bring small non-telegraph agencies into the agreement, including those small non-telegraph agencies which had come into existence since April 16, 1930.

(k) The O. R. T.'s submission of the foregoing matter to the National Mediation Board in November 1934 with the statement that rule changes and incorporation of 128 small non-telegraph agencies into the agreement were involved.

(l) General Chairman's letters of September 13, 1933, April 29, 1935, and July 12, 1935, addressed to all small non-telegraph agencies on the Southern Pacific Lines in Texas and Louisiana, including those which had come into existence since April 16, 1930, telling those small non-telegraph agents that efforts were being made to incorporate their positions into the existing agreement.

4. The Referee's decision in the Santa Fe Case does not set forth all of the evidence before the Board. On the other hand, the evidence in Dockets TE–244 and 245 shows that since the effective date of the current agreement the management has merely done what it has always had the right to do and which right it has repeatedly exercised since as early as 1910, and that the exercise of those rights has been repeatedly recognized and acquiesced in by the organization. Each decision rendered by this Division necessarily is based upon the particular facts of the case involved, and where the facts, the schedule rules and other agreements, the practices, Board awards, etc., are not the same, a decision on the Santa Fe Case could under no stretch of the imagination have any pertinency with reference to questions arising on the Southern Pacific Lines in Texas and Louisiana.

In reality, the Referee's decision in Award 255 supports and is not contrary to the position taken by the carrier in Dockets TE–244 and 245. The Referee found:

> (a) * * * *That the removal of the telegraph and telephone work from the stations may well have justified a reclassification and a lower rate of pay.*
>
> (b) That due to the removal of telegraph and telephone service "*The duties of the positions have been materially changed.*" [Italic type mine.]
>
> (c) That the Board had "no power to fix wages," and thus it was left to the parties to attempt to agree upon proper rates.

In Dockets TE–244 and 245 it was shown that the duties of the positions have been materially changed by the removal of telegraph service, thus justifying a reclassification and a lower rate of pay. The management likewise here asserts that the Board has no power to fix wages and further that the organization has agreed to the wages and working conditions fixed by the company in that in both the agreement of October 19, 1931, and in the agreed-to interpretation of February 16, 1932, the organization specifically agreed that any employee taking the position of small non-telegraph agent would take "*The rate and conditions established by the company for the position.*" [Italics added.]

Finally, these two dockets resolve themselves definitely into a question of representation and rates of pay for small non-telegraph agencies, which is outside the jurisdiction of this Board and the cases should have been dismissed for want of jurisdiction.

(Signed) L. O. MURDOCK.

Concurred in by:
A. H. JONES.
R. H. ALLISON.
GEO. H. DUGAN.
C. C. COOK.

ANSWER TO DISSENT OF L. O. MURDOCK, BOARD MEMBER, ON DOCKETS TE–244 AND 245

The attached Dissenting Opinion of Board Member L. O. Murdock, in a general way, is a rehash of the arguments advanced by the Carrier in this case, which have been definitely disposed of by the award.

However, there is one statement with reference to what was found by the Referee in Award No. 255, which we cannot permit to go unchallenged. It is stated that in Award No. 255, the Referee found:

> "(b) That due to the removal of the telegraph and telephone service '*The duties of the positions have been materially changed.*' [Italic type mine.]"

The italic type language quoted as coming verbatim from Award No. 255 is correctly quoted and can be found in the last paragraph of the findings, but has been lifted bodily out of a sentence which explains its use in an entirely different way. By no stretch of the imagination can a conclusion be reached that the referee in that case intended to say that he had found that the duties of the positions have been materially changed, due to the removal of telephone and telegraph service as this Dissenting Opinion would lead one to believe.

(s) F. F. COWLEY.
(s) W. J. POTTS.
(s) D. W. HELT.
(s) H. HEMENWAY.
(s) J. H. SYLVESTER.

Serial No. 7

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

INTERPRETATION No. 1 TO AWARD No. 348, DOCKET Nos. TE-244 AND TE-245

NAME OF ORGANIZATION: The Order of Railroad Telegraphers

NAME OF CARRIER: Southern Pacific Lines in Texas and Louisiana

Upon application of the representative of the employes involved in the above award, that this Division interpret the same in the light of the dispute between the parties as to its meaning, as provided for in Sec. 3, First (m) of the Railway Labor Act, approved June 21, 1934, the following interpretation is made:

The carrier claimed that the Board must confine its attention specifically to agreements in force on the properties involved and that it was not empowered to consider precedents or decisions drawn from agreements on other properties. For reasons which were stated at length in the opinion of the Referee, this contention was overruled insofar as principles which had guided this Board and earlier boards under similar or analogous conditions were found to be pertinent to the issues of the cases to be decided.

The record left many facts essential to a comprehensive handling of all the practical operating problems involved, sharply controverted. However, application of principles and standards previously upheld by this and earlier Boards to the language of the agreements in force on these properties, indicated the general lines which decision of the cases must follow and the limits beyond which it would be impossible for decision to go.

The problem confronting the Referee, therefore, was to apply the agreements in the light of established principles and standards and to decide such issues as could be decided on the basis of the record and the agreements in such a way as to facilitate if possible the subsequent solution by negotiation of remaining operating problems.

Since agreements may be assumed to be instruments of adjustment and mutual accommodation rather than of stalemate and disagreement, and since matters similar to those which on the basis of the record could not be handled to a conclusion in the decision, had been previously handled by the parties in conference, the award contemplated that neither party would take any obstructive position in applying the award and that both parties would approach, in a cooperative spirit, matters that remained to be handled by negotiation.

In this spirit, Award No. 348, as anticipated at the end of the Fifth section of the opinion which preceded it, undertook in paragraphs 1 and 2 to contrast the situation of small non-telegraph agencies which had been taken out of the agreement by negotiation and agreement with that of agent and agent-telegrapher positions allegedly taken out by the unilateral action of the carrier and to order the restoration as of the date abolished of positions wrongfully taken out of the agreement.

It has been said that the subject matter of paragraph 1 is not at issue and that therefore the paragraph is superfluous. Its purpose is to show, by contrast, the status of positions rightfully taken out of the agreement as against those wrongfully taken out.

Paragraph 2 is the only one which requires positive action as of a specific date and therefore that paragraph is the one to which, particularly, the request for interpretation applies.

There are two means by which positions covered by the agreement can be taken out of the agreement. They can be taken out by abolition of the positions in fact. But as indicated clearly in the opinion, a so-called abolition followed by re-creation under another name is not an abolition in fact. The word "agency" in the phrase "small non-telegraph agency" carries a presumption that agency business is transacted at the station in question, and as long as that is true, the agency has not been abolished in fact and therefore remains in the agreement and subject to the clearly mandatory provision of paragraph 2 of the award.

The phraseology of paragraph 2 was carefully considered. The Board had not undertaken to examine the exact status of each one of the stations covered by the claim. In the absence of knowledge which presumably would have come from such an examination, the sweeping declaration "claim sustained" did not appear to be the best way to phrase the mandatory part of the award.

However, it is clear that had the carrier wished, as was at all times its right, to abolish in fact the positions covered by the claim and to discontinue doing agency business at all the stations involved there would have been no occasion to negotiate for a reclassification. It is also clear that if paragraph 2 had not been mandatory in its effect on the carrier there would have been no occasion to protect the carrier in respect to subsequent negotiations as is done in paragraph 4.

Under paragraph 2 as written the action of the carrier in undertaking to abolish agent and agent-telegrapher positions which were covered by the agreement and continuing agency business at the stations in question under the label "small non-telegraph agency" outside the agreement was null and void. Paragraph 2 makes it mandatory upon the carrier to restore the positions so allegedly abolished, as of the date when the alleged abolition occurred and to compensate each of the agents or agent-telegraphers concerned for all loss sustained.

Paragraph 3, as its position in the award indicates, prescribes the action to be taken by the parties following compliance by the carrier, with the mandatory provisions of paragraph 2.

Paragraph 4 as just noted protects the carrier against having his compliance with paragraph 2 prejudice his case in connection with the proceeding prescribed by paragraph 3.

Referee Willard E. Hotchkiss, who sat with the Division, as a member, when Award No. 348 was adopted, also participated with the Division in making this interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 19th day of April, 1937.