Award No. 564
Docket No. TE-532

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Frank M. Swacker, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS
KANSAS, OKLAHOMA AND GULF RAILWAY COMPANY

STATEMENT OF CLAIM: "Claim of the General Committee of The Order of Railroad Telegraphers on Kansas, Oklahoma & Gulf Railroad that, the following named positions of Agent, shown in the wage scale of telegraphers' agreement:

Clarita	Agent-telegrapher	54¢ per hour
Atwood	Agent-telegrapher	53¢ per hour
Achille	Agent	$70.00 per month

which have been improperly declared abolished by the carrier, classified as caretaker and assigned to persons not under telegraphers' agreement, shall be restored to said agreement as agent, or agent-telegrapher if required to perform telegraph communications service, a just and reasonable rate of pay negotiated for each position in conference between the committee and carrier and the positions filled in accordance with the governing rules of the schedule agreement."

EMPLOYES' STATEMENT OF FACTS: "A contract of agreement bearing date May 1, 1929, as to rules and rates of pay is in effect between the parties to this dispute.

"The agency positions enumerated in this dispute are covered by the agreement and at the rates stated in the claim.

"Since the effective date of the agreement, the carrier has, on various dates, improperly declared these positions abolished and placed employes not under telegraphers' agreement in charge of the stations on irregular tours of duty and on a reduced monthly basis of compensation.

"These agencies are not in fact abolished. The employes placed in charge of these stations are, by unilateral action of the carrier, classified as caretakers."

POSITION OF COMMITTEE: "The prevailing contract of agreement bearing date May 1, 1929, contains the following rules:

'Article 1.

Scope.

'This schedule will govern the employment and compensation of telegraphers, telephone operators, (except switch-board operators), agent-telegraphers, agent-telephoners, towermen and levermen, tower and train directors, block operators, staffmen and such agents as may be listed herein, and will supersede all previous schedules, agreements and rulings thereon.

'The word "Employe" as used in these rules, will apply to all the foregoing classes.'

OPINION OF BOARD: The case has been presented most comprehensively and has taken an extremely wide range, but it is controlled by two definite questions, one of fact and the other of interpretation of the agreement. The question of fact is as to what services are being performed by the so-called "caretakers." There is really not a great deal of difference between the parties as to the detailed facts of what these employes do, but rather the classification that should obtain as to such services and the implication to be drawn from the facts. That the stations in question were closed on the date indicated, in the technical sense that by tariff publication they were made prepay instead of open stations, is not open to dispute. This, however, progresses the question but little. The organization claims that notwithstanding such technical closing that they are still maintained in fact as what might be called limited agencies. The so-called "caretakers" represent the Company in contacting with adjacent stations for the placement of cars for outbound traffic. They obtain telephone authority from such agents to sign bills of lading covering such outbound shipments; inbound less than carload shipments are placed in the warehouses by the train crews and delivery thereof to the consignees is effected by these so-called "caretakers." Where cotton is received they make out so-called cotton reports, one copy to the adjacent agent, a copy for station record file, and a copy for the General Manager's office. They occasionally attend to the collection of charges on a collect or insufficiently prepaid shipment, doing so for acount of the adjacent agent. They do not sell tickets, handle station accounting, or cash, except as above indicated. They handle the mail and express, these of course under arrangements with the postal authorities and the Express Agency and not for the account of the carrier. The circumstance is mentioned because of the fact that these are functions ordinarily performed by the agent at one-man agency stations.

The evidence discloses nothing that they might be said to do in a capacity of caretakers; that is they are not watchmen or janitors or anything of that sort; all of the service performed by them is a portion of the service commonly performed by the agent at one-man stations and formerly performed by the agent at these stations. It is earnestly urged for the carrier that these services may be and often are performed at other stations by employes other than the agent and that consequently it cannot be asserted that this is purely agency work. It is quite true that such may be the case at other places, but the fact is that at these stations—one-man stations—it was a part of the agent's work.

The situation is not as though these caretakers were merely performing the service of a watchman or custodian of the company's property; on the contrary, the essential characteristics of their work is as a representative of the company to deal with the shipping public. It is true that they are far from being full-fledged agents, probably not qualified legally to contract on the company's behalf as such with respect to transportation; nonetheless the conviction is inescapable that they are doing agency work, and only that, and that is the sole reason for their employment. It must therefore be held that this service is agency service of the type which the contract between the carrier and the organization covers.

The question then is whether the work is in fact actually covered by the agreement. For a better understanding of the contentions here involved it is necessary to quote additionally from the rules of the agreement. In the quotation in the Committee's statement of fact the text part of Article XXXII, "Duration of the Agreement," is given. In the agreement this is followed by a list of stations, the position, either telegrapher, agent-telegrapher, or agent, and the rates of pay. There is also quoted from Article XXXI, paragraph (a) thereof, but this is followed by paragraph (b), reading as follows:

> "Following positions of exclusive agent, do not come within the provisions of this agreement — Baxter Springs, Henryetta, Allen, Durant and Denison."

Among the stations named in Article XXXII are the three in question, each thereof classified under the heading of position as agent-telegrapher. That agreement became effective May 1st, 1929. On March 1st, 1933, the parties entered into Supplemental Agreement No. 1, which is here quoted in full:

"SUPPLEMENTAL AGREEMENT NO. 1

Effective March 1, 1933

to

Agreement of May 1, 1929

Between

KANSAS, OKLAHOMA & GULF RAILWAY COMPANY

and

EMPLOYES REPRESENTED BY ORDER OF RAILROAD TELEGRAPHERS

"Substitute the following for the positions and rates of pay shown in Article XXXII.

Station	Position	Rate Per Hour	Rate Per Month
Baxter Springs	Telegrapher	59 cents	
Miami	Agent-Telegrapher		$165.00
Strang	do	57	
Locust Grove	do	57	
Wagoner	do	62	
Henryetta	Telegrapher	60	
Dustin	Agent-Telegrapher	55	
Calvin	do	57	
Allen	Cashier-Telegrapher	61	
Allen	Telegrapher	60	
Wapanucka	Agent-Telegrapher	57	
Durant	Towerman-Telegrapher	53	
Durant	do	53	
Denison	Telegrapher	64	

NON-TELEGRAPH AGENCIES

Station	Monthly Rate
Fairland	$70.00
Ketchum	70.00
Salina	70.00
Council Hill	70.00
Achille	70.00

"Non-telegraph agencies listed above will not be subject to Article III.

"Sunday and holiday service performed by non-telegraph agents will be paid for in addition to the monthly rate shown herein in accordance with Article VIII.

"The rates shown herein for non-telegraph stations are basic rates and are subject to the agreement signed at Chicago January 31, 1932, providing for a deduction of 10%, and the extension thereof signed December 21, 1932, by the representatives of the carriers and the representatives of the various organizations of employes.

"Each employe filling a position reclassified to that of non-telegraph agency under this supplemental agreement, will have the right to retain same or exercise rights under Article XXII (a) provided such election is made within seven days from date of this supplemental agreement. Non-telegraph agencies vacated under the provisions of this paragraph will be filled under the provisions of Article XIV (c).

"Station employes at closed stations or non-telegraph stations shall not be required to handle train orders, block or report trains, receive or forward messages by telegraph or telephone, but if they are used to perform any of the above service, the pay for the agent or telegrapher at that station for the day on which such service is rendered shall be the minimum rate per day for agent-telegraphers, as set forth in this agreement. Nothing herein contained shall limit the right of the carrier to use the telephone for such conversation or verbal instructions as it may deem necessary or desirable to handle the company's business.

"The carrier agrees that prior to October 31, 1933, it will not convert any additional telegraph agencies into non-telegraph agencies, or make effective any further consolidations of stations (by consolidation is meant the placing of two or more open stations, i.e., stations which are not prepay stations, under the jurisdiction of one agent); nor prior to the date named herein will it make effective a reduction in the basic rate of pay for employes who are within the scope of the agreement. This paragraph, however, shall not be construed to limit in any way the carrier's right to abolish any position no longer needed, or to at any time it may deem it necessary or desirable close any station by abolishing the position of agent and making such station a prepay station.

KANSAS, OKLAHOMA & GULF RAILWAY COMPANY

(Signed) J. W. Womble,
General Manager.

ORDER OF RAILROAD TELEGRAPHERS

(Signed) W. C. Thompson,
General Chairman.

WITNESS:

(Signed) Julian H. Moore
(Signed) S. E. Bryant."

From the foregoing it will be seen that the stations Atwood and Clarita were omitted entirely and the station Achille was changed from the position of agent-telegrapher at 54 cents per hour to non-telegraph agency $70.00 per month.

It is conceded that the list of stations shown in Article XXXII of the original agreement plus the excepted stations shown in Article XXXI constituted all the open stations on the line. It is claimed by the employes that when the supplemental agreement was entered into it was represented to them by the carrier that the stations Atwood and Clarita had been closed and completely abolished as agency stations and that this accounted for their being dropped out of the revised list adopted, covering Article XXXII. This brings the controversy to its point. The Organization says in substance that they concede the right of the carrier to abolish an agency; or in other words, do not claim that the contract compels the carrier to maintain the agency if and when no longer justified, but they say on the other hand this does not warrant a technical closing of an agency and turning the remaining part of the work over to someone else under a different classification under a much lower rate. The carrier on the other hand says the agreement is absolutely

controlling and specifically designates the points subject to the agreement; that reading the Scope Rule together with Article XXXII as affected by the amendment that Atwood and Clarita were by express agreement of the parties excluded from the scope of the agreement. As to Achille, which was still carried by Supplement No. 1, the carrier says it was thereafter, in 1935, closed under the carrier's conceded right to close the station. The carrier, of course, denies as a fact that the present service is in the nature of agency service, but says that even though it is, it still is not embraced within the scope of the agreement. It therefore becomes necessary to determine the actual scope of the agreement. Article 1 is a standard rule coming from Federal control and U. S. Railroad Labor Board; the exact words in that article which govern the question are:

". . . and such agents as may be listed herein . . ."

Clearly that language does not accurately express what was intended as there are no agents listed but rather stations; what the clause is intended to cover is such agencies, not telegraph, as those which are listed. This however does not solve the question; that is whether the intention of the Scope Rule was to limit it to the particular stations listed in Article XXXII. Light on the matter is shed by a reference to the circumstances prevailing during Federal control and immediately thereafter with respect to the Scope Rule there promulgated.

There are numerous agencies on a big System which are of a supervisory nature, and it was conceded that such positions should be excepted from the agreement. There was considerable confusion however as to just where the line should be drawn as to what was and what was not a supervisory agency until the decision of the Interstate Commerce Commission in Ex parte No. 72, defining what were supervisory agencies. It was therefore the intention of the parties in the adoption of the rule at the time of Federal control and for a brief period thereafter to exclude from the telegraph contracts the supervisory agencies. There was, however, widespread disagreement as to what were and what were not supervisory agencies, and consequently the only way that was found to express the Scope Rule was by the specific listing of the stations which the carrier conceded were not supervisory. In some cases, as for example, in the Pittsburgh and Lake Erie, a special reservation was made concerning disputed points. The history of the dispute in the P. & L. E. case, and of the surrounding circumstances of the time of Federal control and shortly thereafter, is set forth rather fully in Award No. 383 of this Division of the Board.

From this it follows that the intention of the Scope Rule was to embrace all station agencies other than such as should be classified as supervisory. If the present agreement did not include the exclusory provision in Article XXXI, the argument that it was limited to those stations named in Article XXXII would be much stronger. The fact here however is that the agreement covered all the agency stations, either by inclusion or exclusion. Supplement No. 1 indicates no purpose to change this scope, that is of all the existing stations. A reading of Supplement No. 1 shows clearly that its object was to reclassify the five stations so named as non-telegraph-agencies, which had previously been classified as agent-telegrapher. (A later Supplement was entered into in 1937 reclassifying two of these stations back to agent-telegrapher.)

The conclusion therefore is that it is the intent of the agreement of May 1, 1929 to make all agency positions, whether telegraph or non-telegraph, except those excluded by Article XXXI, subject to the agreement; that the only intention of Supplement No. 1 was to reclassify some of the stations and incidentally omit the two here in question which were supposed by the parties to be closed. The carrier argues that even in such case, they have nonetheless been dropped from the agreement and that there is no power or authority in this Board to reinstate them in the agreement; that they must be negotiated back. This, however, does not follow. The evidence is not clear as to whether

the stations were originally completely closed and at some later period the present service established, or whether that was the arrangement from the beginning. To test the carrier's contention, however, it may be assumed that they were originally closed and the present service started up at a later day. Without question, under Article IX (b) of the agreement, these would then constitute new positions, the compensation of which would be fixed comparably with similar positions. Incidentally it may be said that this article clearly indicates a contemplation of the parties that there might be new stations not among those listed in Article XXXII and that the agreement would automatically extend to embrace such new stations and a basis of pay be established therefor. If on the other hand the service presently being furnished has subsisted from the time of the closing of the stations, then these were newly created positions taking place of the former positions from the beginning and thus ones upon which a basis of pay should have been negotiated.

This case resembles very much the controversies dealt with in Awards of this Division, No. 255 on the Santa Fe, Award 348 on the Southern Pacific and Award 383 on the Pittsburgh and Lake Erie, and the subject was given extended consideration and discussion in those cases. The conclusion is that this work is within the scope of the agreement and following a long line of precedents of this and other Divisions of the Board, such work covered by an agreement cannot be arbitrarily taken away from the parties represented in such agreement and given to other parties not subject to its scope. See Awards 529, 535, 553, and 556.

The carrier makes the further contention that so far as Clarita and Atwood are concerned the controversy was not pending and undetermined at the time of the passage of the Amended Railway Labor Act, and hence is not cognizable by this Board. The grievance here is a continuing violation and consequently is one such as may be raised at any time, hence it is unnecessary to go into the argument concerning "pending and undetermined."

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

That the carrier and the employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Board finds that the service maintained at the stations complained of is a part of the agency work formerly performed by the agents of those stations, that the same is subject to the Telegraphers' Agreement and that rates of pay should be negotiated for the changed positions.

AWARD

That the service now being performed at Clarita, Atwood and Achille is agency service and is subject to the Telegraphers' Agreement; rates of pay should be negotiated between the carrier and the committee and the positions assigned in accordance with the agreement.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson,
Secretary.

Dated at Chicago, Illinois, this 13th day of January, 1938.

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION
INTERPRETATION No. 1 TO AWARD No. 564, DOCKET No. TE-532

NAME OF ORGANIZATION: The Order of Railroad Telegraphers

NAME OF CARRIER: Kansas, Oklahoma and Gulf Railway Company

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:

We think General Chairman Thompson considerably misconceives the scope of the Award. It should be borne in mind that the original claim was that the positions in question had been "improperly declared abolished," classified as caretaker and assigned to persons not under the agreement, and that they should be restored to the agreement as agent or agent-telegrapher and a just and reasonable rate of pay negotiated between the parties.

The Board, of course, has no power to specify what, or that any, service should be maintained at the stations in question. It had power to and did, however, declare that the work being performed by the so-called caretakers was in reality agency work and subject to the agreement, and in conformity with the complaint directed that rates of pay should be negotiated and the positions assigned in accordance with the agreement. This, however, does not mean that the Board attempted to order any change in the character of the service. Admittedly, the service being performed at the time was not the same as that which has been performed previously and as to which a rate of pay had been negotiated and previously scheduled. It was the carrier's prerogative to maintain no service whatever there, or to continue as at the time of hearing, or to go back to a full-fledged agency, but the Board could not and did not dictate which it should do.

Naturally, if the carrier restored full-fledged agencies the scale already specified in the agreement would be operative; if it continued the service as at the time of complaint it was under obligation to negotiate a rate under Article IX (b). We do not understand that the schedule carries any minimum rate. There is, of course, a lowest rate but no provision that some lower rate might not be negotiated in compliance with Article IX (b). If the parties failed to reach an agreement on a comparable rate, we consider the Board would have had cognizance of the matter to determine what rate should apply as an interpretation or application of Article IX (b) of the agreement.

As above stated, however, the Board had no power to order either the original or any other service maintained at the stations and did not undertake to do so, and as it appears from the papers at present the carrier has seen fit to discontinue service altogether, removing the

so-called caretakers. In the circumstances, the whole matter is moot so far as any further steps may be concerned in the existing docket, there being no claim for damages involved.

Should the carrier at any time restore service at these stations which it claims is less than that to which the rates specified in the schedule are applicable and the parties be unable to reach an agreement under Article IX (b), the organization should be permitted to reopen the matter for the Board's determination of the rate properly applicable.

Referee Frank M. Swacker, who sat with the Division, as a member, when Award No. 564 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 4th day of October, 1938.