Award No. 767
Docket No. TE-723

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Frank M. Swacker, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE CHICAGO, ROCK ISLAND AND PACIFIC

THE CHICAGO, ROCK ISLAND AND GULF RAILWAYS

(Frank O. Lowden, James E. Gorman, Joseph B. Fleming, Trustees)

STATEMENT OF CLAIM: "Claim of the General Committee of the Order of Railroad Telegrephers on the Chicago, Rock Island and Pacific Railway, that the two positions of telegrapher in the Topeka, Kansas passenger station which were temporarily discontinued March 1, 1935, by the Carrier pursuant to an order by the Federal Co-ordinator of Transportation under the provisions of the Emergency Railroad Transportation Act, 1933, the duties of which were transferred to employes of another carrier, shall be restored and the employes who were regularly assigned to the positions shall be reinstated to them and paid the difference in earnings retroactively to June 16th, 1936, or in the event any of the two employes do not desire to return to their former positions, the vacancy thereby created shall be filled in accordance with the governing rules of the telegraphers' agreement; and the further claim that available extra employes shall be paid for the time lost to them by reason of these two positions not being restored on June 16, 1936."

EMPLOYES' STATEMENT OF FACTS: "It is claimed by the General Committee of the Order of Railroad Telegraphers that: The Order of Railroad Telegraphers has a working agreement with the Chicago, Rock Island and Pacific—Chicago, Rock Island and Gulf Railway Companies covering wages and conditions of employment, the required number of copies of which have formerly been furnished to this Board, bearing date of January 1, 1928, on page 23 of which will be found four jobs under the caption 'offices under jurisdiction of Superintendent of Telegraph,' the titles of which are indicated as Manager, wire chief, night chief, late night chief and telegrapher. However, several years ago this office was abolished and a new office opened at Herington, Kansas which was assigned to the jurisdiction of the Superintendent of Telegraph, and three telegraph positions created in the Topeka Passenger station under the jurisdiction of the Kansas-St. Louis Division Superintendent, second and third shifts being combination ticket jobs. These three telegraph jobs are not listed in the Telegraphers' Agreement although the jurisdiction over them is automatically provided for by Article 2-(a) of the Telegraphers' Agreement, which reads:

> 'When new positions are created, compensation will be fixed in conformity with that of existing positions of similar work and responsibility in the same seniority district.'

Effective March 1, 1935 the carrier effected arrangements with the Union Pacific Railroad at Topeka for the handling of all Rock Island passenger

"Whatever claim the employes may have had (and we maintain they had none) was disposed of and settled by the agreement evidenced by the letter of July 23, 1935, and payments made thereunder.

"Therefore, there being no basis for the claim, it should be denied."

OPINION OF BOARD: Undoubtedly the special agreement of July 23, 1935, quoted in the Carrier's Position had the effect of superseding the rights under the schedule agreement now sought to be asserted.

Whether or not the coordination effected was technically one coming under the Emergency Act is beside the point for the surrender of the rights under the general agreement in return for those which were provided by the Emergency Act was unquestionably a valid consideration.

It is believed however that the contention originally made on the property by the Organization rather than that now advanced was correct; namely, that it was the intention of the parties to the Washington Agreement (May 21, 1936) that it in turn should supersede the Emergency Act. Although Section 15 of that Agreement provides in general that it should be effective June 18, 1936, (just following the expiration of the Emergency Act) Section 12 clearly provides for anticipatory coordinations to occur before the general effective date of the agreement and makes them subject thereto.

Considering this circumstance together with the legislative situation regarding the proposed further extension of the Emergency Act and the adoption of this mutual agreement so far as displacements was concerned—which were matters of common knowledge—the conclusion is inescapable that it was the intent of the Washington Agreement to take over subsisting obligations, as modified by it, arising from coordinations previously affected, or in course of effectuation, under the Emergency Act.

As 2 of the 3 immediately affected employes died before June, 1936, and the one remaining employe appears to have placed himself in a no worse position, also before the Washington Agreement became operative, there would appear to be no displacement pay coming to him at present, although it appears he is entitled to the protection of Section 6 of that Agreement. The Agreement of July 23, 1935, appears to have embraced two other employes as well, but the evidence does not show their status subsequent to June 16, 1936. To the extent that it may have been worse than in May, 1933, they are entitled to the protection of the Washington Agreement and the decision herein is without prejudice to their rights.

For the foregoing reasons the claim as made should be denied.

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

No violation of the schedule agreement has been shown.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 1st day of December, 1938.

SPECIAL CONCURRENCE IN AWARD 767, DOCKET TE-723

I concur in the denial of the claim in this case, but the "Opinion of Board," containing definite expressions on the merits of a claim once presented to the carrier by petitioner and prosecuted through the processes prescribed by the Railway Labor Act and the existing agreement between the parties to the threshold of this Board, there to be abandoned by substitution of the claim before us, which was not properly progressed on the property, demands comment, drawing attention to the expedient by which the employes are propitiated when the claim before this Board is absolutely wanting in merit. It may reasonably be assumed that it was the opinion contained in this award which induced those who advocated the cause of the petitioner to welcome and embrace the award in toto.

Briefly, the circumstances presented are these:

In November, 1934, the respondent, Rock Island Railroad, entered into negotiations with the Union Pacific Railroad looking to a consolidation of passenger facilities at Topeka, Kansas. The former proposed to abandon its facilities and use those of the latter. The arrangement was consummated to be effective March 1, 1935. On February 20, 1935, the General Manager of the Rock Island addressed a letter to the General Chairman of the Telegraphers' Organization, informing him of the proposed consolidation and that it would result in the abolition of two telegrapher positions. The General Chairman promptly responded, invoking the application of Section 7 (b) of the Emergency Transportation Act. Carrier took the position that this provision of the Emergency Transportation Act was not applicable, as the consolidation was not being effectuated under the terms of the Act. Conferences and correspondence ensued with the result that agreement was reached to apply Section 7 (b) of the Emergency Transportation Act to certain employes directly and indirectly affected. There was not agreement at the same time, however, as to the period during which the benefits should apply. The carrier held that benefits should continue only during the life of the Emergency Transportation Act, then due to expire by its own limitations on June 16, 1935. During the course of negotiations, the Emergency Transportation Act was extended by resolution of Congress until June 17, 1936.

On July 11, General Chairman, replying to Chief Operating Officer's letter of June 21, took exception to some of the details of the Operating Officer's proposal, among others to the termination of benefit payments as of June 16, 1935, for which the Operating Officer was then still contending. In his reply, General Chairman stated it to be his contention that since the Emergency Transportation Act had been "perpetuated" by Congress, benefits bestowed upon employes by its provisions were automatically continued. He invited a settlement of the dispute on the basis of an agreement reached by certain eastern lines with their employes, which he quoted as follows:

> "In the disposition of any and all questions involved in this consolidation it is the intention to preserve to any and all employes involved all of the advantages of the Emergency Transportation Act of 1933, during its continuance, particularly Section 7 (a) and (b) thereof, or any similar regulations which may be adopted by Congress amending or superseding this Act."

The reply of the Operating Officer to that letter, indicating the extent to which he accepted the General Chairman's proposal, was dated July 23, 1935, and is quoted in full in the award under the caption "Position of Carrier." It is to be noted that in the third paragraph thereof he used the exact language set out and quoted by the General Chairman in his letter of July 11, except that he did not subscribe to the last clause of the General Chairman's quotation, reading:

"or any similar regulations which may be adopted by Congress amending or superseding this Act."

It is apparent from the Operating Officer's letter that there had been a conference on that date, July 23, 1935, at which agreement had been reached in all essential particulars. His letter was an acceptance of the General Chairman's proposal of July 11, so far as he was willing to go with it, and it is to be noted that it was **in the disposition of any and all questions involved in this consolidation.**

The next day following the date of this letter, the General Chairman, as suggested, did confer with the Assistant Operating Officer and did work out in detail month by month payments to be made to each of the five employes who were to receive benefits under the agreement. The carrier asserts that he signed and approved a separate statement of such payments for each employe for each month and that the same process was followed during each succeeding month the payments continued.

Payments ceased under the agreement on June 16, 1936, the expiration date of the Emergency Transportation Act as extended. On June 25, 1936, the General Chairman wrote the Chief Operating Officer, contending that the benefit payments should be continued under the terms of the so-called Washington Agreement, referred to in the Opinion of Board, and stating that he was instructing the employes to file claims for the difference in their present pay and that of the position they occupied at the time of the coordination.

The carrier declined to continue the payments, drawing attention to the definite language of the understanding entered into at the time the payments were initiated.

The General Chairman continued to prosecute the claim on this basis until May 12, 1937, when he addressed a letter to the Assistant to Chief Operating Officer in which he referred to that Officer's letter of May 22, declining to join him in a joint submission to this Board of the then existing dispute, and said that since the management declined to participate in a joint submission:

> "We hereby modify our request for continuance of the payments under the Washington Agreement to employes entitled to such by requesting that the three telegraph jobs at Topeka passenger station, which were abolished when the Rock Island's passenger work and facilities were consolidated with the Union Pacific at Topeka, be restored and telegraphers entitled to such jobs and extra employes who would have benefitted by the restoration of such jobs, be reimbursed for any monetary loss sustained from June 16, 1936."

No conferences were sought on this claim, nor does the record reveal that the General Chairman ever changed the number of employes, for whom he was claiming restoration of positions, from three to two, in his correspondence with the Management. The claim before this Board is for the restoration of two positions, which is the number that were abolished with the consolidation of passenger facilities.

Manifestly, an appropriate action for the Board to have taken would have been dismissal of the claim because the requirements of the Railway Labor Act had not been complied with in its handling on the property. But if it were disposed to overlook that dereliction, it was bound to recognize on the facts that the claim had no standing, for the reasons that the referee recognizes in the first two paragraphs of his Opinion.

It is true that the record reveals the original contention of the employes for a continuation of the benefit payments under the so-called Washington

Agreement which became effective on June 18, 1936, after the expiration, by its own limitations, of the Emergency Transportation Act. The Washington Agreement, however, was no part of the record in the case, nor was reference made by the petitioner to any of its definite provisions. There was no reason for the petitioner to introduce it because it had no relation whatsoever to the claim this Board was called upon to consider. Upon having it drawn to his attention, however, the referee chose to explore its terms, and undertakes to confer an unsought benefit upon the employes by his interpretation of Section 12 thereof.

He says, considering this circumstance (his interpretation of Section 12 of the Washington Agreement) together with the legislative situation, the **conclusion is inescapable** that it was the intent of the Washington Agreement to take over subsisting obligations, etc. I assert on the contrary that an unbiased review of the Agreement as a whole leads to the inescapable conclusion that the Washington Agreement is specific in its terms as to everything the parties intended to include therein; that nowhere in its terms is to be found any provision that it supersedes, modifies, changes, or extends agreements, previously entered into, dealing with displacement allowances and related matters, growing out of co-ordinations or consolidations long since accomplished. Section 12, by its very language, is prospective, not retrospective, and its purpose is clearly stated.

Furthermore, the referee who attempts to find such a broad purpose in Section 12 of the Washington Agreement appears to undertake in other portions of his Opinion to vitiate the very next succeeding Section 13, which provides that any controversy arising under the agreement, not composed by the parties within thirty days after it arises, may be referred by either party for determination to a committee established by the terms of the Act.

The Petitioner had the right to take the position—whatever the merits of it may have been—that the terms of the Washington Agreement should be applied, as he first contended with the carrier when benefit payments ceased on June 16, 1936, but if he seeks benefits under that Agreement he must submit to its terms and invoke the aid of the tribunal thereby established for a determination of his rights.

The last paragraph but one of the Opinion of Board is a prejudicial statement on the merits of a dispute which the committee, established by Section 13 of the Washington Agreement, may be called upon to decide and is subversive of the rights of the party against whose interest it is expressed.

/s/ Geo. H. Dugan

The undersigned concur:

/s/ C. C. COOK
/s/ J. G. TORIAN
/s/ A. H. JONES

Member Allison absent

REFEREE'S RESPONSE TO SPECIAL CONCURRENCE AWARD NO. 767—DOCKET TE-723

Under the schedule the petition, prima facie, shows a valid cause of action; the respondent defends in avoidance claiming the schedule was superseded by the special agreement and performance thereunder by it. It was therefore not only appropriate but necessary to inquire into the scope of the special agreement and also the extent of the performance by the carrier; had the evidence sufficiently disclosed insufficient performance an award could have been made. Technically the burden of proof of showing performance was on the carrier and for such deficiency in proof, petitioners might have asked recision of the special agreement upon tender back of the benefits had thereunder and demanded enforcement of the schedule contract; all of which would have been a complicated procedure not conducive

to settlement of the controversy, whereas the simple path to that end was to point out the proper adjustment to complete performance of the special agreement. There is no attempt involved to settle a controversy between the parties to the Washington agreement such as is reserved by Section 13 thereof to be settled in the manner indicated; all that is done is to determine whether the special agreement between the parties here involved designed to adopt the Washington agreement.

/s/ FRANK M. SWACKER