

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Dozier A. DeVane, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE MIDLAND VALLEY RAILROAD COMPANY

STATEMENT OF CLAIM: "Claim of the General Committee of The Order of Railroad Telegraphers on Midland Valley Railroad that,

"(1) The position of agent-telegrapher at Arkansas City, Kansas, was brought within the scope of telegraphers' agreement between the parties upon telegraph duties being added to the position on or about November 1, 1937, and thereafter subject to the terms thereof; and

"(2) That employes covered by said agreement entitled to compensation by failure of the carrier to carry out the terms of telegraphers' agreement, shall be compensated accordingly."

EMPLOYES' STATEMENT OF FACTS: "An agreement bearing date March 16, 1922, amended November 16, 1923, by Decision No. 2025 of the United States Railroad Labor Board, as to rules and rates of pay, is in effect between the parties to this dispute.

"The scope rule of said agreement provides:

"This schedule will govern the employment and compensation of telegraphers, telephone operators (except switchboard operators), agent-telegraphers, agent-telephoners, towermen, levermen, tower and train directors, block operators, staffmen and such agents as may be included by the operation of the second paragraph of this Rule, and will supersede all previous schedules, agreements and rulings thereon.

"The dispute as to what exclusive agents shall be covered by the rules are remanded to the representatives of the parties on the individual carriers for further negotiations."

"Article XXIV of the agreement, as amended February 1, 1935, by Supplement No. 3, provides:

"The following agencies do not come within the provisions of this agreement; Wichita, Pawhuska, Tulsa, Muskogee, Excelsior, Ft. Smith and Arkansas City."

"On or about November 1, 1937, the incumbent agent of the Arkansas City non-telegraph agency died, whereupon telegraph duties were added to the position. The vacancy was filled by the appointment of a person not under Telegraphers' Agreement, without bulletin and appointment as provided in Article VII of said agreement."

CARRIER'S STATEMENT OF FACTS: "The notice of intention to file claim states the claim as consisting of two parts, numbered (1) and (2).

telegraph duties being added, the position on which a vacancy then existed should have been bulletined and filled under the governing rules of said agreement; that as the position was not bulletined and filled in this manner the agreement was violated; and that the position shall now be bulletined and filled as provided in the rules of telegraphers' agreement and at the present rate of pay."

POSITION OF CARRIER: "1. As to that part of the claim numbered (1), it is the carrier's position that since the question presented by this claim and the dispute with reference thereto was disposed of by the arbitration award of March 2, 1933, as shown by the Carrier's 'Statement of Facts,' it cannot now be resubmitted to the National Railroad Adjustment Board.

"2. Even if the question had not been disposed of by the arbitration award mentioned, there could be no merit in the contention that the restoration of the telegraphing to the agent's position brought that position within the provisions of the telegraphers' agreement, in view of the fact that by Article XXIV, it was agreed at the time the agent was doing the telegraph work as agent-operator, that the agency at Arkansas City was not to come within those provisions, and the re-assignment of telegraphing to the agent merely restored the conditions which existed at the time the agreement was made.

"3. It will be noted that the Board of Arbitration, which was duly constituted under the Railway Labor Act to take evidence and to determine the questions submitted, stated in the award that it appeared in the record that at the time the agreement was executed the agent at Arkansas City was performing telegraph work. It further stated that the evidence showed that in the negotiations which resulted in the exclusion of another agent's position (Stigler), it was understood by the employes that the agent was to perform the telegraph work. The Board of Arbitration said that the employes by their acts had placed an interpretation upon the agreement which may not be avoided.

"4. As to that part of the claim numbered (2), it is the Carrier's position that in view of the record as stated in Fact 12, that part of the claim is not referable to the Third Division until the claims, whatever they are, have been filed and progressed in the usual and customary manner.

"Since this is an ex parte case, this submission has been prepared without seeing the employes' statement of facts or their contention as filed with the Board, and the carrier reserves the right to make a further statement when it is informed of the claims and the contention of the petitioner, and requests an opportunity to answer in writing any allegation not answered by this submission.

"Carrier's exhibits submitted herewith are:

"**Exhibit A**—Arbitration award of March 2, 1933, U. S. Board of Mediation Files C-755 and GC-1068 Arb.

"**Exhibit B**—Copies of letters exchanged between the General Chairman, Order of Railroad Telegraphers, and the management."

OPINION OF BOARD: The schedule agreement between the parties to this dispute, effective August 15, 1919, covered position of agent-telegrapher at Arkansas City, Kan. The revised agreement of Mar. 16, 1922, which is now in effect, excluded the agency from the agreement.

Article 24 excluding said agency reads as follows:

"The following agencies do not come within the provisions of this agreement: Wichita, Pawhuska, Tulsa, Muskogee, Excelsior, Ft. Smith and Arkansas City."

On Feb. 12, 1931, Article 24 was amended by adding Stigler, Okla. to the agency stations excluded from the agreement.

While Arkansas City was a telegraph station at the time the agreement of Mar. 16, 1922 was executed, said agreement created no telegrapher position at this station. However, on April 25, 1922, carrier created a position of telegrapher-clerk at this point and awarded the position to an employe covered by the Telegraphers' agreement. On April 1, 1927, the telegrapher-clerk position was abolished and the telegraphing was assigned to the assistant agent, an employe not covered by the Telegraphers' agreement. Sometime during 1936 or 1937 (date not important) the assistant agent position was abolished and the telegraphing was assigned to the agent, who has since performed same.

Petitioner contends that when it agreed to the exception of the agencies named in Article 24 of the Agreement from the provisions thereof, it was upon the definite understanding that none of the agents at these stations would perform any telegraphing and that assigning telegraphing to any of said agents is a violation of the scope rule of the agreement.

The General Chairman of the Brotherhood first raised this question in May, 1932, when he contended that the performance of telegraphing by the agents at Wichita and Stigler and by the assistant agent at Arkansas City brought these positions under the agreement. This dispute was progressed under the procedure prescribed by the Railway Labor Act to the Board of Mediation and on Oct. 7, 1932, an agreement to submit the dispute to arbitration was entered into in conformity with Sec. 8 of said Act. The decision of the Arbitration Board is set out below:

"ORDER OF RAILROAD TELEGRAPHERS)	U. S. BOARD OF MEDIATION
vs.)	Files C 755 and GC 1068 Arb.
MIDLAND VALLEY RAILROAD COMPANY)	Award of Arbitration Board.

"The Board of Arbitration, the members thereof being Julian H. Moore, neutral arbitrator, T. H. Niles, and B. C. Lewis, duly constituted under the provisions of the Railway Labor Act, to take evidence, concerning and to determine the certain questions submitted for its determination under the certain arbitration agreement executed by the parties hereto dated October 7, 1932, and made a part of the record herein, opened its hearing in Muskogee, Oklahoma, February 20, 1933, at 10:00 A. M. Thereafter and on March 1, 1933, the question presented under file No. BM C 755 was withdrawn from arbitration by agreement of the parties and notice to this board. The arbitration hearing was thereafter continued as to the question presented under file No. GC 1068 Arb., namely:

'Where the company abolished positions of telegraphers at Wichita, Kansas, Arkansas City, Kansas, and Stigler, Oklahoma, on the ground that the reduced volume of business had so decreased the duties of such telegraphers that their positions were no longer needed and where the carrier required the agents, in addition to their regular duties, to perform such telegraphing as was necessary for the operation of the station, and at Arkansas City later changed the telegraphing from the Agent to the Assistant Agent, does such action on the part of the carrier cause the Agents at Wichita and Stigler, and Assistant Agent at Arkansas City, to come within the provisions of the agreement with the Order of Railroad Telegraphers, notwithstanding Article 24 as amended by Supplement 1 of February 12, 1931?'

"After a careful consideration of the record and the arguments of the representatives of the parties, a majority of the board finds from the evi-

dence and the interpretation it places thereon that the foregoing question should be and accordingly it is answered 'No.'

"Article 1 of the agreement between the parties executed March 16, 1922, and still in effect, provides:

'Effective Mar. 16, 1922, the following rates of pay, rules for overtime, and working conditions, will govern positions held by telegraphers, telephone operators (except switchboard operators), Agents (except as hereinafter specified), Agent Telegraphers, Agent Telephoners, towermen, levermen, tower and train directors, block operators and staffmen.'

"Article 24 thereof, as amended by Supplement 1 of February 12, 1931, provides:

'The following agencies do not come within the provisions of this agreement: Wichita, Pawhuska, Tulsa, Muskogee, Excelsior, Ft. Smith, Arkansas City and Stigler.'

"By Article 24 the position of agent at the stations named therein were excluded from the provisions of the agreement without reservation or limitation as to the kind of services performed or to be performed by such agents.

"The employes urge that only agents who were not required to perform telegraph or telephone work at the stations mentioned in Article 24 were excluded from the agreement; that when such agents are required to perform telegraph or telephone service, they automatically come within the agreement and are entitled to the protection afforded thereby. This position is untenable because Article 24 placed no limitation upon the kind of work the management may require of agents at stations named in Article 24; further, because it appears in the record that at the time the agreement was executed, the agent at Arkansas City was performing telegraph work. The evidence discloses that in the negotiations which resulted in the exclusion of the position of agent at Stigler, it was understood by the employes that the agent was to perform the telegraphic work. Thus it appears that the employes, by their acts, have placed an interpretation upon the agreement which may not be avoided. In other words, they are in no position to urge that the position of agent, excluded by mutual agreement, is automatically included in said agreement because the agent is required to perform telegraph service.

"The position of agent at stations mentioned in Article 24 being excluded from the agreement, notwithstanding the agents thereat are required to perform telegraph work, the management had the right to establish the position of Assistant Agent at Arkansas City and to authorize him to perform similar work theretofore performed by the agent.

"If the operation of Article 24 as herein interpreted is deemed for any reason to be detrimental to the employes, negotiations contemplating its proper modification or elimination should be had under the provisions of the Railway Labor Act."

"(Signed) **Julian H. Moore**
Neutral Arbitrator.

(Signed) **T. H. Niles**

(Signed) **B. C. Lewis**
Dissents

Muskogee, Okla., Mar. 2, 1933"

Carrier contends that the above award of the Arbitration Board is controlling in this case and binding upon this Board.

This controversy was heard and decided before the amendment to the Railway Labor Act approved June 21, 1934, became effective. However,

said amendment in no way changed or modified the arbitration sections (Secs. 7, 8, and 9) of said Act and these sections continued in full force and effect.

Section 9 Second of the Act makes an award of a board of arbitration "conclusive on the parties as to the merits and facts of the controversy submitted to arbitration."

The Arbitration Board found as a fact that the position of agent at the several stations named in Article 24 "were excluded from the provisions of the agreement without reservation or limitation as to the kind of services performed or to be performed by such agents." The Arbitration Board further found "that at the time the agreement was executed, the agent at Arkansas City was performing telegraph work * * * * " and that petitioner is "in no position to urge that the position of agent, excluded by mutual agreement is automatically included in said agreement because the agent is required to perform telegraph service."

As Section 9 Second of the Act makes these findings of fact conclusive on the parties they are, and, perforce, must be binding and conclusive on this Board. To hold otherwise would have the effect of nullifying the whole intent and purpose of the section.

Section 8 (j) of the Act provides that the agreement to arbitrate "shall provide for the date from which the award shall become effective and shall fix the period during which the award shall continue in force."

The agreement to arbitrate provided:

"Eleventh. The award of the Board shall become effective ten days from the expiration of the date on which such award is filed, and shall continue in force for a period of twelve months from the effective date thereof, and thereafter subject to thirty days' notice by or to the railroad."

On May 31, 1937, the General Chairman of the Brotherhood notified carrier as follows:

"As Chief Executive of The Order of Railroad Telegraphers on this property, I hereby serve notice this date that we withdraw from the said agreement 30 days hence as stipulated in said article section eleven (11) and renew our former request upon the carrier to comply with the Telegraphers' agreement effective Mar. 16, 1922, and supplements thereto, which requires the carrier to comply with the scope rule Article 1 and place all employes who are required to telegraph or telephone messages, or reports of record, report trains, or copy train orders under the jurisdiction of the Telegraphers' agreement."

Petitioner contends that this notice terminated the force and effect of the award of the Arbitration Board and restored the right and power of this Board to hear and determine the dispute. We are unable to agree with this contention. Section 8 of the Act sets out certain provisions which every agreement to arbitrate must contain among which are:

"(b) Shall stipulate that the arbitration is had under the provisions of this Act," and

"(1) Shall provide that the award, when so filed (in court as was done in this case) shall be final and conclusive upon the parties as to the facts determined by said award and as to the merits of the controversy decided."

The agreement to arbitrate the dispute contained these among other provisions. The provision in the agreement to arbitrate as to the duration

of the award merely prescribed the time during which neither party to the agreement could take any steps under the Railway Labor Act to change the provision of the prevailing agreement submitted to arbitration.

Both the agreement to arbitrate and Section 9 Second made the award "final and conclusive upon the parties as to the facts determined by said award and as to the merits of the controversy decided." (underscoring supplied). The notice to "withdraw from said agreement" to arbitrate did not terminate the "final and conclusive" effect of the award upon the parties. It merely restored to the parties the right to set in motion the machinery provided by the Railway Labor Act for the modification of the provision of the agreement affected by the award.

Petitioner further contends that inasmuch as the assistant agent at Arkansas City was involved in the arbitration proceeding and the case before this Board involves the agent that the award of the arbitration board is not applicable to this case. We are unable to agree with this contention. The Arbitration Board held that:

"The position of agent at stations mentioned in Article 24 being excluded from the agreement, notwithstanding the agents thereat are required to perform telegraphy work, the management had the right to establish the position of assistant agent at Arkansas City and to authorize him to perform similar work theretofore performed by the agent."

From this quotation it is clear that the Arbitration Board decided the question—as it was compelled to do—as to the right of the agent at Arkansas City to do telegraphing and the award as to that question is res adjudicata upon this Board. The effect of the award of said Arbitration Board can be changed only by agreement of the parties or as provided by the Railway Labor Act.

In reaching this conclusion we do not pass upon the merits of the controversy but hold merely that the decision of the Arbitration Board is controlling upon us with respect to the claim here presented.

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 parties are bound by the award of the Arbitration Board dated March 2, 1933, file GC 1068, of the U. S. Board of Mediation and the award of said Arbitration Board is controlling upon this Board.

AWARD

Claim remanded for further handling by the parties in accordance with the above Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 13th day of September, 1939.