Award No. 3659
Docket No. TE-3623

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Joseph L. Miller, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE COLORADO & SOUTHERN RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on Colorado & Southern Railway,

1. That the act of the Carrier was improper and in violation of the terms of the telegraphers' agreement when, effective on or about March 10, 1933, it proceeded to consolidate, but did not abolish in fact, the agent-telegrapher position at Lynn, Colorado, a position covered by the telegraphers' agreement, and transferred the duties and responsibilities of the position to the agent-telegrapher at Aguilar, Colorado, for actual performance of same by him at Lynn on each day, except on Sundays, in addition to the performance of his work of agent-telegrapher at Aguilar, which improper practice has been continuously indulged in by the Carrier since that date;
2. That when the General Committee served formal protest in writing on the Carrier on May 7, 1946, against the continuance of this improper practice the Carrier should have ceased to longer indulge in this improper practice; and
3. That as the Carrier declined to comply with the formal protest of May 7, 1946, against the continuance of this improper practice, the Carrier shall now be required to discontinue the said improper practice and restore the agent-telegrapher position at Lyn, Colorado, to the telegraphers' agreement as a separate position and bulletin and fill the position in accordance with the governing rules of the telegraphers' agreement; and shall be further required to compensate the agent-telegrapher at Aguilar an additional day's pay of eight hours at his pro rata rate for each day he has been required by the Carrier to also perform the work of the agent-telegrapher position at Lynn since June 6, 1946, as claimed.

EMPLOYES' STATEMENT OF FACTS: There is in effect and in evidence an agreement bearing effective date of June 16, 1924, between The Order of Railroad Telegraphers and the Colorado and Southern Railway Company, copies of which are on file with the National Railroad Adjustment Board. At page 18 of the agreement there is listed the Lynn agent-telegrapher position, rate 56c an hour, the present rate being $1.00½ an hour.

Lynn station is located on the main line of the Colorado & Southern Railway Company approximately 2.3 miles from Aguilar which is located on the branch line. The agent at Aguilar, Mr. H. M. Trickey, is required to drive from Aguilar to Lynn each day except Sunday to perform the agent-telegrapher work at Lynn for which he is allowed 3c per mile for the use of his private automobile.

When the Lynn station was closed and the position of agent was discontinued, the telegrapher holding that position was required to exercise his seniority under the rules of the agreement.

Conferences were held in connection with the complaints filed by the General Chairman, and, as the General Chairman felt they were not satisfactorily adjusted, he filed the following claim on September 21, 1934:

> "Claim of J. S. Sammons: First, that he be reinstated as agent-telegrapher at Lynn, Colorado. Second, that the consolidation of Lynn and Aguilar agency positions under one agent are in violation of schedule agreement."

We declined the claim. No further action was taken in connection with this matter until a new General Chairman inquired under date of January 25, 1936, with respect to the matter. The matter was discussed with him on February 3, 1936, and in that conference, he requested that the case be held in abeyance until he could look into the matter and decide what action he desired to take. In February, 1938, the then General Chairman requested another conference in connection with a complaint he had received in regard to this matter. In conference held on March 11, 1938, it developed that his complaint involved reducing the hours of assignment of the Agent at Aguilar from nine hours to eight hours and the allowance he was paid per mile for the use of his automobile in lieu of using track motor car which had been furnished by the Carrier. It was explained to him that the assigned hours of the Agent at Aguilar had been changed account change in passenger train schedules, and we agreed to increase the allowance per mile paid the Agent for the use of his automobile.

The General Chairman was still holding in abeyance the claim which was filed on September 21, 1934. Not having heard further from the General Chairman in regard to the complaint made in 1933 and the claim filed on September 21, 1934, which had been discussed in conferences in February, 1936, we asked the General Chairman in the early part of June, 1939, what he was going to do with the claim, as he had been holding the matter in abeyance for over three years, and we were verbally advised that so far as the Organization was concerned the matter was closed and that we could consider the complaint and claim that had been filed as withdrawn. The Carrier wrote the General Chairman on June 16, 1939, referring to that conversation and requested the General Chairman to confirm the statement he had made so that the file could be closed. He was traced several times for a reply and on October 16, 1939, he advised as follows:

> "This is to advise you that the arrangement now in effect is satisfactory, and I am therefore closing my file."

The claim before your Board, as submitted by the O.R.T. under date of December 18, 1946, is the same claim that was pending and closed out in October, 1939. In view of the fact that this claim was handled and settled satisfactorily by the Organization, your Board should decline to handle same and dismiss the claim account of having been previously settled.

(Exhibits not reproduced.)

OPINION OF BOARD: The basis of these claims is of such ancient vintage that the Referee is impelled to criticize the Organization for not having prosecuted the matter to a conclusion long years ago. The basic claim concerns a violation alleged to have occurred nearly 17 years before it reached this Board. Three different claims for relief have at various times been superimposed upon this basic claim. It is the third of these that is now before us, one of the others apparently having died of old age and the other having been settled amicably.

Good relations between men and management depend in large part on the prompt and equitable settlement of grievances. We have here for final disposition one which, if not the oldest, certainly is one of the longest-lived in the history of modern labor relations.

The basis for the dispute was the Carrier's order of March 10, 1933, canceling the assignment of the agent-telegrapher at Lynn, Colo., and assigning his work to the agent-telegrapher at Aguilar. The Aguilar agent was subsequently instructed regularly to make two trips a day to Lynn, to handle business here, and to go to Lynn at any other time the dispatcher instructed him to do so. Lynn, on the main line, is 2.3 miles from Aguilar, on a branch. Aguilar is a town; Lynn is just a station. The Carrier furnished a track car for the agent's use in going between the two points. The Aguilar agents, however, have preferred to use their automobiles, for which the Carrier has made an allowance.

Soon after the Carrier issued the consolidation order, the Organization protested, claiming that the consolidation was "improper" and that the seniority rights of the Lynn agent were disregarded in giving the consolidated position to the Aguilar agent. These claims, or amended ones to the same effect, were discussed several times during the next few years without settlement. The seniority issue apparently vanished sometime prior to the spring of 1936, for on March 11 of that year the Organization made a complaint to the Carrier that the Aguilar agent should have his hours changed and the allowance for use of his car increased. This complaint was settled amicably between the parties. The Carrier apparently was in some doubt, with this adjustment, as to whether the basic claim and the seniority claim for the displaced Lynn agent had been disposed of. Twice the Carrier wrote to the General Chairman, asking about this. Three months after the first letter went out, on October 16, the Organization, through the General Chairman, replied:

> "Referring to your letter September 26, 1939, especially your letter of June 21, 1939, in regard to mileage arrangement at the Aguilar-Lynn agency as compensation because of the agent making trips to Lynn for the purpose of meeting passenger trains and checking yard at Lynn.
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> This is to advise you that the arrangement now in effect is satisfactory, and I am therefore closing my file."

The Carrier contends that this letter constituted acquiescence on the Organization's part to the consolidation of the agencies. We believe the purport of the letter was to confirm a settlement of the Aguilar agent's complaint about his automobile allowance. Perhaps it also indicated that the Organization intended to set aside the basic issue for the time being. But it did not foreclose reopening. Less than a month after the General Chairman had written the above-quoted letter to the Carrier, he told the President of the Organization, in a letter:

> "There is no agreement with the management that this cannot be abolished at any time I desire to do so, that is, the present arrangement."

The issue was not reopened, however, until May 7, 1946, when the current claims were filed.

We believe it unnecessary to recite in this opinion all the facts in the case as regards the duties of the Aguilar agent at Lynn. It suffices to reject the Carrier's conclusion that "the agency at Lynn was discontinued" and "all of the work was moved to Aguilar and is now being performed at Aguilar by the Agent at that point." This is patently out of line with the facts; the Aguilar agent performs at Lynn many of the duties once performed there by the Lynn agent.

What exists, in fact, is a joint agency, substituted ex parte by the Carrier for the two agencies called for in the agreement. Many times we have held that ex parte action in such cases constituted violation. Awards 388, 434, 496, 556, 1302, 3364. We so hold in the matter before us.

We are unable to agree, however, that the claim in behalf of the Aguilar agent is a proper one. It appears to us to call for the levy of a penalty, i.e.,

a fine on the Carrier, rather than for making whole an individual or group for losses suffered because of a violation. Award 3651. The Aguilar agent has suffered no money loss by the Carrier's violation. He may have had to work harder than he would have, had there been a separate agency at Lynn. But we have no measure for compensating him for harder work.

In connection with the claim in the agent's behalf, we point out that in all the cases cited above as precedent to our award on the basic claim, either no compensation was asked, or it was asked for those deprived of work by consolidation of duties. None was asked for those who did the work.

In conclusion, although we appreciate the binding effect of our award, we suggest to the parties that negotiation in good faith is the proper method for arriving at the solution of problems such as that presented by this case. "The plan adopted by the carrier was doubtless induced by proper motives of economy, but since its execution infringed upon the terms of the agreement with its employes, the method of negotiation, rather than of ex parte action, should have been followed." Award 388.

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 Carrier violated the Agreement as indicated in the Opinion.

AWARD

Claim (1) sustained; claim (2) denied; claim (3) sustained (save for the claim in behalf of the Aguilar agent which is denied) with the reservation that the necessity for reopening of the Lynn agency be discussed by the parties before it is effectuated.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 23rd day of September, 1947.

DISSENT TO AWARD 3659, DOCKET TE-3623

The conclusion "That the Carrier violated the Agreement as indicated in the Opinion" is based on a narrow and unwarranted interpretation placed upon the wording of two quoted communications. The first, letter of October 16, 1939, of a former General Chairman, is interpreted as being limited to a settlement of a mileage question, but the Opinion states: "Perhaps it also indicated that the Organization intended to set aside the basic issue for the time being. But it did not foreclose reopening," and attempts to support this by quotation of part of a letter from a former General Chairman to the President of the Organization.

At the time the settlement was made in 1939 the parties were handling the entire basic question and before the final and complete settlement was concluded the former General Chairman requested an established rate for the use of the Agent's automobile, but when this was agreed to he stated "This is to advise you that the arrangement now in effect is satisfactory, and I am

therefore closing my file." He closed his file on the whole transaction and no other construction can properly be placed on the action taken. This is confirmed by factual evidence of record as well as the letter from the former General Chairman to the President of the Organization only a portion of which is quoted in the Opinion. The present General Chairman comments on and quotes the letter as follows:

> "While it is true that the former general chairman did withdraw the complaint he was handling with the management because of the agent at Aguilar being also required to handle the separate station at Lynn, as shown in our former brief, nevertheless that withdrawal was not considered by him as permanently closing the file as indicated in the general chairman's letter to President Gardner reporting the situation to him under date of November 14, 1939, reading in part as follows:
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> > 'There is no agreement with the management that this cannot be abolished at any time I desire to do so, that is, the present arrangement. However, I will ask that you will please give this much consideration before a notice is given to the management that we no longer wish to continue the present setup.' "

which is complete confirmation of the fact the then General Chairman had closed his file on the basic question and while professing he could ask for the abolishment of the present arrangement he was pleading with the President of his Organization to give much consideration "before a notice is given to the management that we no longer wish to continue the present setup." What was the setup? That which had existed for over six years and on which he closed his file on October 16, 1939, and remained closed until the matter was resurrected nearly seven years later, June 6, 1946.

The quoted letter from the General Chairman to the President of his Organization is relied upon for confirmation that the basic question could be reopened. That is a communication within the Organization to which the Carrier was not a party and of itself only expresses an opinion as to the absence of any agreement as to abolishing of the agreement. Likewise, there is complete absence of any agreement and of any reservations in respect to the understandings between the parties in 1939 permitting the reopening of the file on this matter which he had closed. The Opinion of Board, in its declaration that the settlement of 1939 did not foreclose reopening, placed reliance on the quoted inter-organization communication, to which the Carrier was not a party and disregards the Carrier's positive statement reading:

> "The settlement of October 16, 1939, was a full and complete settlement of the claim that had been pending since 1933, and there was no understanding that that final and complete settlement was only tentative and that the case could be reopened. Otherwise there would not have been a settlement. It is true that before the final and complete settlement was made, the General Chairman requested an established rate for the use of the Agent's automobile, but when this was agreed to, he withdrew the entire claim."

Irrespective of what may or may not be done in other situations, the fact remains the particular case here involved was disposed of by agreement between the parties and the award errs in not so finding.

/s/ A. H. Jones
/s/ R. H. Allison
/s/ R. F. Ray
/s/ C. P. Dugan
/s/ C. C. Cook