

Award No. 5039

Docket No. TE-4865

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Edward F. Carter, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

**THE DELAWARE, LACKAWANNA & WESTERN
RAILROAD COMPANY**

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Delaware, Lackawanna & Western Railroad Company that:

1. The Agent-operator position at Poolville, New York, has not been abolished in fact; in consequence thereof the Carrier shall now bulletin said agency position to employes covered by the Telegraphers' Agreement at the rate of pay in effect prior to December 1, 1932, plus subsequent wage increases; and

2. For each working day, beginning with October 27, 1947, and forward until the position is bulletined to and filled by an employe under the Telegraphers' Agreement, the senior extra employe not working on a day-to-day basis shall be paid a day's pay at the rate applicable to the position.

EMPLOYES' STATEMENT OF FACTS: Agreements by and between the parties bearing effective dates of May 1, 1940 and November 1, 1947, are in evidence; copies are on file with the National Railroad Adjustment Board.

Beginning with the Telegraphers' Agreement of May 1, 1919 and continuing in the revised Agreements of January 1, 1923, February 15, 1924, March 1, 1926, January 1, 1927 and January 1, 1929, there was listed in the wage scales an agent-operator position at Poolville.

On or about December 1, 1932, the Carrier allegedly discontinued the agency at Poolville and placed a custodian in charge of the premises, presumably to tend fires and clean the station buildings. This action without authority of the Public Service Commission of New York.

The Carrier applied to the Public Service Commission of New York on August 14, 1941 for authority to discontinue all services at Poolville except the handling of prepaid incoming freight and out-going freight in carload lots. (The Organization does not know the reason for this belated application, but it is presumed it was to comply with the Commission's Rules and Regulations, since the alleged discontinuance of December 1, 1932, was without the Commission's approval.)

The Commission's Order of November 17, 1941 (attached hereto as Employes' Exhibit No. 1 and made a part hereof) approved the application, but stipulated certain requirements.

With regard to handling U.S. Mail at Poolville, or any other point where an Agent is not on duty, the Government provides messenger service at points to handle U.S. Mail to and from trains. The handling of U.S. Mail at Poolville is not required of the Caretaker. If the Caretaker handles U.S. Mail at that point he may do so as a helpful gesture to the Government messenger. It is not a requirement of the Carrier.

The fact that the Employees would accept an allowance to an extra available employee not then employed for the period October 27, 1947 to June 15, 1948 clearly indicates that the Employees know that there is not enough work at Poolville to require the opening of that Agency.

The Carrier is not agreeable to going beyond payments to extra employees covered by the Telegraphers' Agreement other than for such days as the Employees definitely show that work was performed at Poolville by instructions other than from the Agent at Earlville.

The Employees have failed to present any facts to support their position in this case. It is the obligation of the Employees to show that the Caretaker at Poolville was performing Agency duties on each working day between October 27, 1947 and June 1948 as claimed.

Attached are copies of the following letters exchanged in connection with this claim:

- (1) November 10, 1949—A. M. Bimson to M. Slocum.
- (2) November 30, 1949—M. Slocum to A. M. Bimson.
- (3) December 6, 1949—A. M. Bimson to M. Slocum.
- (4) December 12, 1949—M. Slocum to A. M. Bimson.

On all the facts of record, the claim is without merit and should be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: Prior to 1932, an Agent-Operator position was in existence at Poolville, New York. On December 1, 1932, Carrier abolished the position and designated a custodian to care for its interests. On November 17, 1941, the Public Service Commission of New York authorized the discontinuance of service at Poolville "except the handling of prepaid incoming and out-going freight in carload lots."

The record shows that during the period of the claim, on some days thereof, the custodian collected freight charges and C.O.D. charges on inbound freight, and handled express both inbound and outbound including the collection of charges thereon. This is agency work under the awards of this Board. The Carrier could properly abolish the Agent-Operator position at Poolville and assign the agency work to the Agent at Earlville as it did. It cannot, however, abolish the Agent-Operator position at Poolville and direct or permit a custodian not within the Telegraphers' Agreement to perform the work of an agent. The record is clear that violations occurred at various times during the period of the claim.

It is asserted that the remaining work performed by the custodian belonged to clerks after the Agent-Operator's position was abolished and that the telegraphers were in no position to make a claim. We think it was telegraphers' work for the simple reason that the Carrier assigned it to the Agent at Earlville, an employee within the Telegraphers' Agreement.

The real question here involved is the number of violations which occurred, including the question when the violations were corrected. The Carrier asserts that it terminated the violations by order on January 14, 1948. The Organization contends that the violations were finally corrected on June 15, 1948. When violations occurred, and consequently when they ended,

is purely a question of fact. A joint check of Carrier's records will disclose the dates on which violations occurred and the senior extra employes not working on such dates. The parties are obligated to produce all available evidence and where this is not done, a joint check to determine the facts is usually in order. Award 4460. A remand of the claim is required under the facts shown.

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 claim is remanded for a joint check of Carrier's records to determine the dates that violations occurred, if any, and the senior extra employe not working on the dates any such violations occurred will be paid a day's pay for each violation at the rate applicable to the position.

AWARD

Claim remanded in accordance with Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 22nd day of September, 1950.