Award No. 5127
Docket No. TE-5081

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

A. Langley Coffey, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS
THE NEW YORK CENTRAL RAILROAD COMPANY
(Buffalo and East)

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the New York Central Railroad, Buffalo and East, that

(a) the Carrier violated the terms of the Telegraphers' Agreement when it unilaterally declared "abolished" the third trick position at Cherry Tree, the one trick position at Dowler Junction, and the third trick position at Mahaffey "WJ", beginning June 13, 1949, except during the period of November 15 to December 7, 1949, inclusive.

(b) In consequence of such violation Telegraphers Bennett, Kennedy and Strunk shall be restored to their respective positions and paid for all time lost, plus the higher rate of pay and travel and waiting time, as well as expenses incurred, and

(c) Telegraphers Beals, Fye, Harper and Pearce and all other employes who were adversely affected by this improper action of the Carrier shall be restored to their former positions and paid in accordance with the provisions of Article 13 of the Telegraphers' Agreement, and

(d) All extra employes assigned by the Carrier to work any of the above named three positions less than a full work week commencing June 13, 1949 shall be paid for a full work week as required under the rules, plus travel and waiting time and necessary expenses incurred, less any amount earned on any other position.

EMPLOYES' STATEMENT OF FACTS: An agreement by and between the parties bearing effective date of July 1, 1948 is in evidence, hereinafter referred to as the Telegraphers' Agreement; copies thereof are on file with the National Railroad Adjustment Board.

Prior to June 13, 1949 full eight hour a day positions were scheduled under the Telegraphers' Agreement on the Beech Creek District of the Pennsylvania Division of the Carrier at the following locations: (1) Cherry Tree "WS" third trick 10:30 P.M. to 6:30 A.M. daily except Sunday, assigned to Telegrapher E. I. Bennett; (2) Dowler Junction, one trick office 5:00 P.M. to 2:00 A.M. daily except Sunday, assigned to Telegrapher T. C. Kennedy; (3)

(Exhibits not reproduced.)

OPINION OF BOARD: Prior to June 13, 1949 full eight-hour a day positions were scheduled under the Telegraphers' Agreement on the Beech Creek District of the Pennsylvania Division of the Carrier at the following locations: (1) Cherry Tree "WS" third trick 10:30 P.M. to 6:30 A.M. daily except Sunday, assigned to Telegrapher E. I. Bennett; (2) Dowler Junction, one trick office 5:00 P.M. to 2:00 A.M. daily except Sunday, assigned to Telegrapher T. C. Kennedy; (3) Mahaffey "WJ" third trick 11:55 P.M. to 7:55 A.M. daily except Sunday, assigned to Telegrapher P. J. Strunk.

The Beech Creek District of the Pennsylvania Division runs through the bituminous coal region of Pennsylvania and much of the local business is derived from the coal mines. The offices in question are operated primarily for coal traffic.

For the period September 15 to November 9, 1949, strike conditions existed at the mines due to an unsettled labor dispute between the miners and mine operators.

As of the date when the Carrier undertook to abolish their positions, Bennett, Kennedy and Strunk were guaranteed six days' work per week on the positions to which assigned, as provided in Article 12 of the July 1, 1948 Agreement. Under Article 12, as amended effective September 1, 1949, the weekly guarantee was reduced to five days' work per week.

Effective June 13, 1949, the three positions at the above named locations were closed. Advance notice was given the employes affected in accord with Article 28 (h) and displacement was permitted in accord with Article 28 (a) 1. As of November 15, 1949, the positions were reestablished and bid in by employes according to seniority. As of December 8, 1949 the positions were again closed and again the Carrier complied with the procedural requirements of the Agreement for abolishing positions and reducing forces.

The record shows that during the period the positions were purportedly abolished, extra employes were used on the positions for less than a full week, but that for all weeks except one, June 26 to July 2, 1949, there was some work performed on each position to September 15, 1949, the date on which the coal mines first closed. The work schedule was more regular than irregular, except the position at Mahaffey appears to have been worked on irregular days during the week. Only during four weeks out of the fourteen week period was the position filled more than two days a week. On the other hand, the positions at Dowler Junction and Cherry Tree followed a pattern generally of Monday, Tuesday and Wednesday service. During the strike period, September 15 to November 9, only two days were worked by extra employes on the position at Mahaffey; two days at Dowler Junction; and none at Cherry Tree.

No claim is made for the period November 15 to December 7, and for this, and other reasons which will hereinafter become apparent, we do not comment on the schedule of work after November 9th.

The Carrier urges as a general proposition that so long as it follows the procedural requirements of the Agreement for abolishing positions, there is nothing in the Agreement to preclude it from using extra employes on the abolished positions for casual and intermittent service, when there is no longer need for full time positions due to a decline in business. The Organization holds that the positions were not abolished in fact, but that the Carrier established a short work week in an endeavor to "sidestep" the guarantee of a full work week for each position.

As an abstract principle, the decisions of this Board uniformly hold that where the work of a position remains, it may not be abolished, but if the work has disappeared in whole or to such extent as to leave nothing for the employe to do for a substantial part of his time and for a reasonably sus-

tained period, the position may be abolished. However, the Carrier may not, under the pretense of abolishing positions, evade the application of an established rule, nor take an undue advantage of the employes by discontinuing positions when there is a real necessity for their continuation.

The divergency of opinion in Board decisions is not attributable to disagreement on principle, but comes about from application of principle. Each case stands more or less on its own facts and the rules of agreement. The particular facts of each controversy must be weighed and tested in the light of the rules of agreement and on that basis a decision is reached as to whether or not the agreement has been breached.

The trouble with this and like cases is that the agreements almost uniformly contain "guarantee" rules as opposed to rules for abolishing positions and reducing forces, thereby creating a situation where action taken under one rule may interfere with or abrogate rights and benefits for which provision is made by another rule of the same agreement. Thus the Board is in the unhappy position of having to strike down the rights of one of two parties to the agreement, if the conflicting rules cannot be harmonized, in order to effect the true purpose and intent of the agreement in all its parts. In weighing the conflicting interests of the parties in controversies of this kind, the Board is charged on the one hand with the protection or promotion of the economic operation and interests of the Carrier and its right to manage. On the other hand, there is involved the protection and promotion of the interests and employment of the employes.

When confronted with guarantee rules, which incidentally are designed to protect employes from indiscriminate irregularity of employment, the Board must determine from the language of the agreement the extent, if any, that a mere lack of business may offset the purpose of the guarantee rule which is to provide pay when work is not available.

In the confronting Agreement the parties have dealt with that subject. The last paragraph of Article 12, entitled "Guarantee" provides:

> "This Rule shall not apply in cases of reduction of force nor where traffic is interrupted by conditions beyond the control of the Company."

In three earlier cases the Board has had occasion to construe a very similar rule. See Awards 4117, 4455, 4389.

In the first cited Award, the Board, without the assistance of a referee, did not enter a finding as to whether the agreement had been violated, but contended itself by upholding the Carrier's offer to pay incumbents of 21 positions who had been taken out of service under strike conditions, after finding the claim too broad and "not susceptible of ascertainment."

In Award 4455 the Board upheld the Carrier's right to abolish positions where the facts bring the case within that part of Article 12 above, citing with approval Award 4389 involving a similar rule. These cases are authority for holding that where traffic is interrupted or suspended by a strike, such is a condition not within the control of the Carrier within the meaning of the rule.

Accordingly, we see no merit in the claim that the Agreement was violated during periods when traffic was interrupted or suspended due to the coal mine strike. On the other hand, there appears nothing of record which can be said to constitute an interruption or suspension of traffic beyond the control of the Carrier, to support the Carrier's action in replacing regularly assigned employes with extra employes prior to September 15th, at Dowler Junction and Cherry Tree.

There is grave doubt, however, that there existed the need for a regularly assigned position at Mahaffey for the period in question, unless it can be

said that a position once established can never be abolished as long as any work, no matter how inconsequential, remains. At the time the position was abolished, the service required had been reduced an appreciable extent and there appears no reason for saying with reasonable certainty that there was promise of increased service within more or less a reasonable period. There being some evidence of a sustained reduction in the work, and a need for only intermittent service at irregular days during the week, it would seem that the continuance of the operation depended upon abolishment of the regular position and substitution of extra assignments for intermittent work seldom requiring more than two days a week.

Therefore, we hold there was no violation of the Agreement by abolishment of the position at Mahaffey covering the period from June 12 to November 9, 1949, but that for the period June 12 to September 15, 1949 the Carrier deviated from the Agreement when it assigned extra employes to positions at Dowler Junction and Cherry Tree. To the extent indicated, claim (a) should be sustained.

That part of the claim (b) and (c) should be remanded. Subdivision (d) thereof should be denied on the grounds and for the reasons that the record discloses extra employes were not assigned to the positions within the meaning of the Agreement but were called in accordance with the provisions of Article 21 (a).

The Board declines to rule further on the claim since it is not satisfied the parties have fulfilled their obligations under the Railway Labor Act. The law requires they exert every reasonable effort to make and maintain agreements and to settle all disputes arising out of such agreements.

The record discloses little more than an exchange of correspondence between the parties. This is not enough to comply with the true spirit and intent of the Act which expressly provides for conferences between representatives designated and authorized to confer on the subject of grievances. As said by this Division of the Board in its early Award 137:

> "The term 'conference' implies something more than mere letter writing; it implies personal, and perhaps more or less formal, discussions by participants. * * * * it was undoubtedly the thought of the framers of this legislation that the parties to a dispute should be compelled to discuss it face to face before appealing to the Adjustment Board for assistance."

In the instant case each party would shift to the other the blame for failure to confer. The Board is only concerned that there was no real effort to settle the dispute in conference, and must now call upon the parties to deal more fully with the controversy, due to the Board's inability to proceed further on the record before it.

The Carrier and Organization must be, and in fact are mindful of changes that have come about on the property after the last handling of the claim by the parties. On October 18, 1949, the claim was finally denied. Since that time positions were reestablished and again abolished. There seems to have been a break in the coal strike after October 18, followed by another interruption of mining operations in February and March 1950, the dates being indefinite. We do not know from the record what has happened on the positions since February 28, 1950.

The foregoing recitation should be sufficient to show how impossible it is for the Board to handle claims which request, among other things, that employes be restored to their former positions, when the record is based upon changing conditions which have not been discussed between the parties, and the Board being wholly uninformed of current conditions on the property. We think it all points up very well a need for the Carrier and the Organization to meet and discuss, as contemplated by the Railway Labor Act, the

proper disposition of the claim. It appears to the Board that the parties now should be able to settle claims for compensation and reestablishment of positions with the limited assistance which the Board has been able to give.

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 to the extent shown in the Opinion.

AWARD

Claim (a) allowed to extent indicated in Opinion; (b and c) remanded; (d) denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 30th day of November, 1950.