Award No. 6869
Docket No. TE-6900

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Jay S. Parker, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the New York, New Haven and Hartford Railroad that:

(1) The terms of the agreement between the parties have been and are being violated by the Carrier when it declared abolished the first shift signal operator positions at Westerly and Kingston, Rhode Island, Signal Stations and consolidated said positions with the position of agent at the same locations requiring the incumbents of the passenger-freight station positions to divide their time between the signal station and the agency station during their tour of duty, resulting in the suspension of work during regular hours on each position.

(2) The signal station operator positions at Westerly and Kingston shall be restored, and the employes assigned thereto at the time of the declared abolishment shall be returned thereto and paid the difference between what they would have earned thereat and what they have earned on other positions, together with payments due under the provisions of Article 29 (Relief Service by Regular Employes) commencing December 3, 1951, until restoration and returns are effected.

(3) All other employes who were resultantly displaced in the exercise of seniority shall be returned to their former positions and paid the difference between what they would have earned on their former positions and what they would have earned on other positions, together with payments due in accordance with Article 29 from December 3, 1951, until returns are effected.

(4) For each working day, and for work denied at Westerly and Kingston from December 3, 1951, until the position is restored, the senior extra or unassigned employe shall be paid the equivalent of one day's pay.

(5) For each day the agents and/or other telegraph service employes at Westerly and Kingston have been or may be required to act as signal station operators they shall be, in addition to their regular compensation as agent or telegrapher, paid the equivalent of one day's pay at the signal station operator rate of pay.

EMPLOYES' STATEMENT OF FACTS: An agreement as to rates of pay and working conditions, effective June 15, 1947, revised September 1,

In that case there was such a schedule limitation and the claim was sustained. In the present dispute there is no such limitation in the agreement and the claim should be denied. See also Award 5380.

Award 5318, a dispute between Carrier and Employes under the same Agreement, denied a similar contention in part on the following finding:

> "Assuming but not deciding that all of the duties of the position in question belonged to the Telegraphers' craft, it is well settled Respondent could have abolished the job and apportioned its duties among the remaining members of the craft without doing violence to the Schedule. Nor do we think the Schedule prohibits Carrier from abolishing a job when in fact it also discontinues the duties of said job."

There is in the proceeding no ground for claim that any work has been transferred from the scope of the agreement. The employes here involved are all employed under the telegraphers' contract. Nor has there been any violation of the rules relating to seniority districts. Both the operators and agents at Kingston and Westerly have always been carried on the same roster. And the rates of pay prescribed by the agreement have been fully preserved. The agents' positions carry the higher salary. In reducing forces Carrier has simply assigned the remaining duties of two positions at a simple location, both within the scope of the same agreement and filled by employes with identical qualifications and on the same roster, to the position carrying the highest rate of pay. That such action is proper is manifest from numerous decisions of this Division.

The claim should be denied.

All of the facts and arguments used in this case have been affirmatively presented to Employes' representatives.

(Exhibits not reproduced.)

OPINION OF BOARD: So far as here pertinent the wage scale of the Agreement between the parties, effective September 1, 1949, reads as follows:

Location	Occupation	No. of Positions	Rates Hourly or Monthly With *
Kingston	Agent	1	$ 1.711
Kingston	S.S. Operators	3	1.57
Westerly	Agent	1	373.24*
Westerly	S.S. Operators	3	1.654

Westerly and Kingston, Rhode Island are located approximately seventeen miles apart on the Providence Division of the Carrier's main line which extends between New Haven and Providence. There are three separate buildings maintained at each location by the Carrier, namely, a passenger station, a freight station and an interlocking signal station. For many years, at each point, the passenger station and the freight station were in charge of an Agent, while the interlocking signal station was maintained with around the clock daily service by employment of signal station operators. We are told, and it is not denied, this has been the situation since the Organization existed on the property and that during all that time the positions above indicated have been incorporated in every Agreement.

In November 1949 the Carrier unilaterally discontinued the position of S. S. Operator on the first trick and assigned the duties of such position to the Agent at both Kingston and Westerly. Thereafter the Agent performed the work previously assigned to the occupant of the S. S. Operator positions. This action was protested by the Organization, as to both Kingston and Westerly, by the filing of separate claims on the property. It may be said these claims were based on the same general premise as paragraph I of the claim now before the Board.

The Kingston claim reached this Board in November 1950 and was ultimately disposed of by Award No. 5507, dated October 3, 1951, wherein it was held the Carrier's action at that location constituted a violation of the Agreement. Following the rendition of such Award the Carrier satisfied its monetary requirements by paying the senior idle employe. Subsequently the Westerly claim, which had been denied but had not as yet been progressed to this Board, was reconsidered and like payment made.

Following the action just indicated the Carrier did not restore the first trick S. S. positions at either Kingston or Westerly. Nor did it make any effort to negotiate with the Organization respecting them. Instead, effective December 3, 1951, it unilaterally reclassified the position of Agent at each location to that of Agent-Operator and continued to perform the work at the discontinued first trick positions just as it has been doing before, the only difference being that the work of each position was performed by an employe classified as Agent-Operator whereas formerly the same employe had performed the work under the classification of Agent. Thereupon the Organization protested this action by the filing of a claim which, when finally denied, was brought to this Board in form as heretofore set forth in the record.

What has been heretofore stated makes it apparent that Award 5507, although its opinion deals with the discontinuance of the S. S. Operator position at Kingston in 1949, becomes highly important in deciding the present claim. On that account and, because contentions advanced by the parties are based on portions thereof, it is deemed necessary, even at the expense of time and space to quote from each Award at length. With paragraph numbers supplied by the Board, solely for purposes of future reference, it reads:

(1) "On November 3, 1949, effective November 7, 1949, the Carrier unilaterally discontinued the position of S. S. Operator on the first trick and assigned the duties of such Operator to the Agent, whose hours of work were changed to cover the hours of the former first trick S. S. Operator.

(2) "In our Award No. 434, between the same parties, we held that to eliminate or combine positions, which have been negotiated into the agreement, the Carrier is obligated to follow the procedures established by the rules for the modification of the agreement except when such action is due to the elimination of the work and duties for which the position was created or to a change in the service required since the position was negotiated into the agreement.

(3) "In this case the work and duties of the first trick S. S. Operator were not eliminated but were admittedly assigned to the Agent, and there is no evidence of any change in the services required from September 1, 1949, to November 3, 1949. The Carrier exhibited and relied upon evidence of a decline in business which however indicates that such state existed and was known prior to September 1, 1949 as well as between then and November 1949. It also exhibited and relied upon evidence of the seasonal character of the work requirements at Kingston but such fact was equally evident in prior years.

(4) "The Carrier contends that our Award No. 911 is controlling of decision here but in that case there were very substantial changes in the services required between the negotiations of the position of Towerman into the Agreement and the abolition thereof.

(5) "However Article 29 of the Agreement between the parties provides in part as follows:

'Regularly assigned employes will not be required to work at other than their regular positions, except in cases of emergency.'

Here the position of Agent was not changed to Agent-Operator so the Agent was obviously required to work at other than his regular position commencing November 7, 1949.

(6) "As we held in Award No. 5375, among many others, we should not direct the reestablishment of the position involved so that Carrier may have the opportunity to reassign the work in conformity with the agreement, negotiate thereon with the Organization or act in accordance with subsequent changes."

Obviously sensing the foregoing Award is one of the decisive factors here involved most of the contentions advanced by the parties hinge around the construction to be placed upon what is there said and held. On this particular point the Carrier contends its action at both Kingston and Westerly has been in compliance with the requirements of such Award while the Organization denies that is so and holds that instead of correcting the violation in the manner required by its terms Carrier has merely continued it.

Decision of the issue thus raised will be simplified by stating at the outset that after careful examination of the record in Award 5507, as well as the record in the instant case, the Board has generally concluded (a) that under the confronting facts and circumstances the decision in Award 5507 is to be regarded as a controlling precedent which should be adhered to; (b) that adherence thereto compels the conclusion the discontinuance of the S. S. Operator positions at Westerly, as well as Kingston, was in violation of the Agreement; and (c) that the situation and applicable course of action at both Kingston and Westerly as herein related, prior to and after the rendition of Award 5507, are so closely related that for all purposes here involved such Award must be regarded as having application to the existing situation at each location.

Turning to Award 5507, particularly paragraphs 2, 3 and 6 as heretofore quoted, the Board has little difficulty in concluding that such Award must be construed as holding, that under the facts and circumstances there involved, the Carrier was required to either reassign the work of the first trick S. S. Operator positions to such positions, or negotiate thereon with the Organization, or act in accordance with subsequent changes. The record makes it clear there have been no material subsequent changes at either Kingston or Westerly since the date of the Award. Based on this construction, and applying it to both locations, the inescapable result is that the Carrier's action in failing to either restore the work or to negotiate thereon with the Organization did not comply with the requirements of such Award. Otherwise stated, so far as such Award is concerned, its action resulted in a continuance of the violations. This, it may be added, is true notwithstanding paragraph 5 of such Award, as heretofore quoted, on which Carrier relies. In our opinion paragraph 2, **supra**, supplemented by paragraphs 3 and 6, **supra**, set forth the fundamental premise on which such Award is based while paragraph 5, **supra**, is to be regarded as merely stating an additional reason in support of the decision therein announced.

There remains the question whether, as the Carrier contends, the Agreement, specifically Article 2(b) and (c) and 15(h), authorizes its action in reclassifying the positions of Agent to Agent-Operator at Kingston and Westerly and thereafter unilaterally assigning the work of the first trick S. S. Operator positions at those points to the newly classified positions of Agent-Operator at such points under the existing facts, notwithstanding the requirements of Award 5507. In giving consideration to this question it may be said the Referee, and author of this opinion, has read and reread the entire record; has carefully considered the extensive briefs of the representatives of the parties; and has analyzed more than eight Awards cited by such representatives in support of their respective positions. These Awards,

it may be added, are of little, if any, value as controlling precedents because they do not deal with factual situations similar to the one here involved. It may be further stated, that as a result of such action the Referee has concluded this is a case which must be decided on the basis of its own factual merits and that hence it is neither necessary nor required that the Board deal with general questions raised and discussed pertaining to when the Carrier may abolish or reclassify positions without negotiation, pursuant to Articles 2(b) and (c) and 15(h) above mentioned, under other and wholly different conditions and circumstances.

Looking through form to substance, and limited strictly to the facts of this case, the record discloses that the Carrier undertook to unilaterally abolish the involved first trick S. S. Operator positions in 1949, which had long been incorporated in the Current Agreement, at a time when there had been no material change in the work of such positions; that when its action in that regard was challenged Award 5507 of this Division of the Board was handed down, holding that such action was in violation of the Agreement and requiring that Carrier either reassign the work of such positions to such positions or negotiate them out of the Agreement or take action in accord with subsequent changes; that thereafter whether intentionally or through misunderstanding we do not attempt to say, Carrier failed to comply with the requirements of such Award and instead caused the work of the first trick S. S. Operator positions to be performed, just as it had been performed in the interim between their discontinuance and the date of the rendition of such Award, by the simple process of unilaterally reclassifying the positions of Agent to Agent-Operator at the involved locations. In the fact of the foregoing conditions and circumstances, and others set forth at length in the opinion, we do not believe that it can be said or held that Articles 2(b) and (c) and 15(h) of the Agreement can be construed as permitting the reclassification of the involved positions of Agent to Agent-Operator for the purpose of accomplishing the result here intended and actually achieved without negotiation or other compliance with the procedure established by rules providing for the modification of the Agreement. Actually, so far as this case is concerned, any other conclusion would result in permitting the Carrier to accomplish by indirection what this Board has previously said it could not do directly.

Based on what has been heretofore said and held—and again pointing out that our conclusion is founded strictly upon the conditions existing in this particular case—we are constrained to hold, that under the confronting facts and circumstances, the Carrier's action as herein related not only failed to comply with the requirements of Award 5507 but also resulted in a violation of the Current Agreement, particularly Article 35 thereof, contemplating that under the conditions and circumstances herein set forth that action could be taken only as a result of negotiation and Agreement.

Heretofore we have been solely concerned with whether the facts and circumstances required a sustaining or a denial Award. It should now be stated that our conclusion in that respect as just announced does not mean the claim is to be sustained in its entirely. Without laboring the reasons for our decision it suffices to say that in the light of all the facts and circumstances we are not disposed to allow reparation in the nature of a double penalty and are convinced that under existing conditions to allow Claims 2, 3 and 5 would have that result. Moreover, we are mindful that monetary reparation under Award 5507 was paid and accepted on the basis of Claim 4. Therefore, without further prolonging this opinion we hold that Claim 1 should be sustained and that Claim 4 should be sustained as therein claimed until the violations herein found to exist are remedied, either by negotiation resulting in Agreement or, if the Carrier elects to do so, by restoration of the involved positions.

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 Agreement was violated.

AWARD

Claim 1 sustained; Claim 4 sustained to the extent indicated in the Opinion and Findings; Claims 2, 3 and 5 denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 31st day of January, 1955.

DISSENT TO AWARD NO. 6869, DOCKET NO. TE-6900

The concluding paragraph of the Opinion accompanying Award 5507 refused to sustain the request for restoration of the position at Kingston:

> "* * * so that carrier may have the opportunity to reassign the work in conformity with the agreement * * *." (Underlining supplied.)

This was based upon Award 5375, which, in turn, was on the authority of Awards 3906, 4044, and 4987.

In the preceding paragraph of the Opinion in Award 5507 we said:

> "Here the position of Agent was not changed to Agent-Operator so the Agent was obviously required to work at other than his regular position commencing November 7, 1949."

As its language makes clear, this statement is consistent only with the conclusion that there was open to carrier a reclassification of positions at Westerly under the terms of the agreement which would remove the alleged violation.

The preceding Award, 5507, left the door open, and properly so, to three possible dispositions of the complaint, that is (1) reassign the work in conformity with the agreement, (2) negotiate thereon with the Organization or (3) act in accordance with subsequent changes. While conceding the controlling effect of Award 5507 in the present dispute, the majority herein has arbitrarily removed the first of the foregoing avenues of disposition, not on the basis of an interpretation of the rules, but rather based upon its assumption as to the meaning of the earlier Award, a conclusion which is at variance with the significant portions of the Opinion quoted above.

This is accomplished by stating that the only possible "reassignment" of the work in dispute would be as follows:

> "* * * the carrier was required to either reassign the work of the first trick S. S. Operator positions to such positions * * *."

Obviously, if the only possible reassignment of the work contemplated as permissible by the earlier Award was the reestablishment of the positions in dispute, then it would have been logical to say so and the discussion of

change in classification of the agency position was entirely irrelevant if not positively misleading.

Articles 2(b), 2(c), and 15(h) plainly contemplate the reclassification of positions to conform with changing work requirements. They protect the interests of the employes in the preservation of the rates of pay as well as the seniority of the incumbent of the affected position of qualified. Limited to this particular case, the majority herein has stated these rules do not apply based again upon the presumed intent of Award 5507. For reasons heretofore stated such conclusion is unsound and we dissent.

/s/ W. H. Castle
/s/ R. M. Butler
/s/ E. T. Horsley
/s/ J. E. Kemp
/s/ C. P. Dugan