Award No. 8036
Docket No. TE-7405

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Frank Elkouri, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

ATLANTIC COAST LINE RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Atlantic Coast Line Railroad that:

(1) Carrier violated Agreement between the parties hereto when, on the 1st day of October 1951, acting unilaterally, arbitrarily and capriciously, it reduced the hourly rate of pay for the position of Agent-telegrapher (or Agent) at Winterville, North Carolina, and thereby established a less favorable rate of pay for such position than that provided in the Agreement.

(2) Carrier shall be required to restore rate of pay for position of Agent-telegrapher (or Agent) at Winterville, North Carolina to the rate prevailing prior to October 1, 1951, together with any increase in rate of pay applicable thereto.

(3) Carrier shall be required to compensate each occupant of position of Agent-telegrapher (Agent), Winterville, North Carolina, the difference, between the amount paid and the amount agreed to be paid for such position, from October 1, 1951, until such violative practice is discontinued.

EMPLOYES' STATEMENT OF FACTS: On the 24th day of May, 1937, in Case No. R-331, the National Mediation Board, issued its certification of representation as follows:

"On the basis of the investigation and report of election the National Mediation Board hereby certifies that The Order of Railroad Telegraphers has been duly designated and authorized to represent telegraphers, telephone operators (except switchboard operators), agent-telegraphers, agent-telephoners, towermen levermen, tower and train directors, block operators, staffmen and such agents as are shown in the existing wage scale of the Atlantic Coast Line Railroad Company, for the purpose of the Railway Labor Act."

Thereupon, The Order of Railroad Telegraphers, hereinafter referred to as Employes or Telegraphers, and Atlantic Coast Line Railroad Company, hereinafter referred to as Carrier or Company, entered into a collective bargaining agreement concerning wages, hours of service and other conditions of employment for all employes of Carrier within the bargaining unit.

bid for and had been assigned to the newly-created position, General Chairman Keller requested, in accordance with the agreement of long standing, that Mr. Winstead be permitted to return to Elm City and occupy the newly-created position of agent-telegrapher. When inquiry was made as to whether claims would arise out of this change, General Chairman Keller assured carrier's representatives that inasmuch as the procedure was strictly in accordance with the understanding existing for many years, the organization would not progress claim in connection with this assignment. Up to the present time, no such claim has been presented.

Effective January 15, 1953, the position of agent-telegrapher occupied by Mrs. S. S. Carroll at Cope, S. C., was abolished. The following day, new position of agent (non-telegraph) was established and it not being known that Mrs. Carroll desired to remain at Cope after the new position of agent (non-telegraph) had been established, bulletin advertising this vacancy was issued in the usual manner. Learning of the proposed change, General Chairman Keller, in his letter of January 6, 1953, addressed to Carrier's Assistant Vice-President, Mr. Baker, called attention to the fact that the parties had reached an understanding that the only time a bulletin would be issued when positions were reclassified would be in those cases where the incumbent of the position being abolished desired to exercise seniority. Mrs. Carroll, occupant of the former position of agent-telegrapher at Cope, was, therefore, permitted to remain at that station after January 15, 1953, on the newly created position of agent (non-telegraph), in accordance with the understanding reached with representative of the employes which had been in effect for many years.

There are numerous other instances on record where the present General Chairman has handled such matters along the lines mentioned, but the instances shown are representative and clearly demonstrate the fact that the employe representatives know full well the meaning of the agreement and are in full accord with the understanding reached in 1931 with representative of the employes.

Inasmuch as the creation of the position at Winterville, North Carolina, is fully supported by Article 7 of the current agreement and by custom, practice and understanding with representatives of the Employes, the Board is respectfully asked to deny the claim in its entirety.

The respondent carrier reserves the right, if and when it is furnished with ex parte petition filed by the petitioner in this case, which it has not seen, to make such further answer and defense as it may deem necessary and proper in relation to all allegations and claims as may have been advanced by the petitioner in such petition and which have not been answered in this, its initial anwswer.

Data in support of the Carrier's position have been presented to the Employes' representative.

(Exhibits not reproduced).

OPINION OF BOARD: By letter of September 27, 1951, the Carrier informed the Organization as follows:

> "As information, we are preparing to **reclassify** agencies at the following points, changing from the present rate to rate of $1.565 per hour, effective with close of business Friday, September 28, 1951: * * * Winterville, N. C. * * *" (Emphasis added).

By letter of October 4, 1951, the Organization filed a Claim protesting the reduction in rate. By letter of February 28, 1952, the Carrier denied the Claim and in doing so identified it as one "account of positions **reclassified.**" (Emphasis added) The Claim was appealed higher, and was again denied by letter of February 25, 1953, which letter also used the term "reclassified".

As far as appears from the Record, throughout handling on the property the Carrier treated the case as involving reclassification. The Carrier did not interpose the "new position" contention until the case reached this Board, and even in its arguments to the Board the Carrier has spoken of the case as involving the "matter of reclassification" (see page 1 of Carrier's Oral Argument).

The Organization has remained constant in its contention that the case involves reclassification, and challenges the Carrier's freedom to take unilateral action in setting a new rate for the reclassified position (the Organization emphasized, however, that "We do not discuss whether the agreement was violated in making a reclassification by unilateral action of the Carrier"). The Organization relies upon Articles 2(a) and 21 of the applicable Agreement (November 1, 1939). Said Article 2(a) provides:

"ARTICLE 2.

"Classification.

"(a) The entering of employes in positions occupied in the service or **changing their classification or work shall not operate to establish a less favorable rate of pay** or condition of employment than is herein established." (Emphasis added).

The words "changing their classification or work shall not operate to establish a less favorable rate of pay" are specific and clear (thus they are not to be given a different meaning by any past practice, or acquiescence of the Employes), and the Carrier clearly identified its action when it gave the September 27, 1951, notice that it was preparing to **reclassify** agencies" (Emphasis added) Of course the Carrier, when it reached this Board, urged that the position became a "new" position after the telegraphing requirement was eliminated, and the Carrier urged that the case is controlled by Article 7 of the Agreement. It may be that the change in job requirements gave the position some of the attributes of a "new" position, but it is certain that the position assumes all of the attributes of a "reclassified" position, and, the case accordingly is controlled dominantly by Article 2(a).

The Organization has emphasized that the Carrier did not have the right to take unilateral action in setting a new rate for the Winterville position and in this respect the Organization has pointed to Article 21 of the Agreement, which precludes unilateral action in changing rules or wage scale. In this connection it is also significant that in entering into the November 1, 1939, Agreement the Parties apparently negotiated the wage rate for each position at each station on an individual basis—there is no uniform or standard rate for all Agent positions or for all Agent-Telegrapher positions (though there have been a series of across-the-board increases since 1939). Article 21 appears to be the type of provision referred to in the following quotation from Addendum No. 1. to Supplement No. 13 to General Order No. 27, United States Railroad Administration [The quotation pertains to the application of provisions containing the Article 2(a) language]:

"In the event that there is a substantial increase or decrease in the duties and responsibilities of the position or a change in the character of the service, **unless existing schedule agreement prevents change in compensation** on account of substantially changed conditions, the rate for such substantially changed positions shall be established by * * *." (Emphasis added).

The underscored portion of this quotation obviously prompted the statement in the so-called "Cuyler" letter wherein it was pointed out that the aforementioned Addendum No. 1 "recognized that many schedules contained provisions dealing with the method of procedure applicable to changing rates."

In view of the above considerations it must be concluded that the disposition of this case is controlled by Articles 2(a) and 21, and that the

Claim must be sustained unless Awards 6954, 6955, 6956 and 6957 are governing precedents. Said Awards do not govern here, however, for the Referee there said "The genesis of the dispute is in Petitioner's belief that Carrier has transferred 'telegraph work to train service employes and others' at the points in question"; such issue is not the genesis of the dispute in the present case. Moreover, those Awards denied the Claims therein on the basis of procedural defects which are not present in the case now before us.

Finally, it should be noted that other Awards involving a rule similar to Article 2(a) are also distinguishable. In Award 1470 the basic issue was the Carrier's right to reclassify in the first place (and if that case involved any rule similar to Article 21 herein it was not discussed by the Referee); in any event, there was no dispute as to the rate for the positions involved in Award 1470. Likewise, in Award 7768 the Organization challenged the right of the Carrier to unilaterally change the content of a position; the Carrier asserted such a right but recognized that such a change was to be followed by negotiation as to the proper rate to be established for the changed position. Award 7768 specifically pointed out that the Organization was afforded an opportunity to discuss the proper rate but chose not to do so.

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.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 30th day of July, 1957.

DISSENT TO AWARD NO. 8036, DOCKET NO. TE-7405

This is a case wherein it is evident the Referee completely failed to understand the rule involved and disregarded, with attempted weak distinguishment, prior Awards of this Division interpreting a similar, if not, for all practical purposes, identical, rule. The erroneousness of the conclusion reached in this Award and the gross misinterpretation of the rules cannot be by-passed.

The fundamental facts in this case are simple: Carrier abolished an Agent-Telegrapher position, removed all communication equipment from the station and established, by bulletin, a new position of Agent (non-telegraph), rating same in the manner prescribed in Article 7.

This case hinged on an interpretation of Article 2(a). Such a provision was interpreted in Addendum No. 1 to Supplement No. 13 to General Order No. 27 and our **Award 1470**, and most recently in our **Award 7768** so as not to preclude what Carrier did here. Nevertheless, the Referee chose to disregard same, setting forth what he believed to be distinguish-

ments which, in reality, are no distinguishments at all, particularly in the matter of interpretation and application of a rule similar to Article 2(a).

As to **Award 1470,** he found:

> "* * * In Award 1470 the basic issue was the Carrier's right to reclassify in the first place (and if that case involved any rule similar to Article 21 herein it was not discussed by the Referee); in any event, there was no dispute as to the rate for the positions involved in Award 1470. * * *."

That there was no dispute between the parties to **Award 1470** only made one less issue for this Division to decide. It afforded nothing by which to make any distinguishment in the interpretation and application of a rule similar to Article 2(a) in the instant case.

As to **Award 7768,** the Referee found:

> "* * * in Award 7768 the Organization challenged the right of the Carrier to unilaterally change the content of a position; the Carrier asserted such a right but recognized that such a change was to be followed by negotiation as to the proper rate to be established for the changed position. Award 7768 specifically pointed out that the Organization was afforded an opportunity to discuss the proper rate but chose not to do so."

Award 7768 specifically adopted **Award 1470** as setting forth the correct interpretation of a rule like Article 2(a), but to say that **Award 7768** is distinguishable for the reason stated completely misses the point made in **Award 7768.** The decision as to rates in **Award 7768** was not based on that Carrier having afforded the Organization an opportunity to discuss the rate beforehand, but, rather, on a rule similar to Article 7 in the instant case. Rules such as Article 7 have been uniformly interpreted by Awards of this Division as placing it to be Carrier's function, in the first instance, to establish a rate in the manner prescribed by the rule, and, should the Organization protest, **then** the process of negotiation must be pursued. **(Award 1074.)** Although Carrier could, before applying Article 7, have afforded the Organization an opportunity to discuss a rate of pay, it was under no contractual obligation to do so. It is only after Carrier establishes a rate in the manner prescribed by Article 7, and after protest by the Organization, that the process of negotiation must be pursued.

In this case Carrier established a rate for the new position in conformity with Article 7, and the Organization has submitted no evidence that the rate thus established was not in conformity with the rule.

Awards 1470 and 7768 correctly interpret a rule such as Article 2(a) and should have been controlling here; however, the Referee underscores language in Article 2(a) which he believes is controlling but then fails to give any consideration to the remainder, viz., "than is herein established." When Carrier established a rate for the new position in conformity with Article 7, the rate thus established was no less favorable than already established by the Agreement for "positions of similar work and resposibility in the same seniority district" or as otherwise provided in Article 7.

Additionally, the Referee seems to see something in Article 21 which precluded Carrier's actions. Article 21 is the termination clause and in no way precluded Carrier from doing as it did. Article 2(a), properly interpreted, as was done in **Awards 1470 and 7768,** did not prescribe Carrier's action. Quite the contrary, Carrier's action was in accord with the interpretation of Article 2(a).

Copies of **Awards 6954, 6955, 6956 and 6957** were handed the Referee in support of Carrier's position in the instant case. Those Awards, all denied

by Referee Coffey, involved the same parties as in the instant dispute; the claims set forth in each case were identical to the claim set forth in the confronting dispute, except as to station and claimant, and the ruels involved were identical to those in the instant case, yet the present Referee in **Award 8036** disregarded those precedent Awards and in his Opinion held:

> "* * * Said Awards do not govern here, however, for the Referee there said 'The genesis of the dispute is in Petitioner's belief that Carrier has transferred "telegraph work to train service employes and others" at the points in question'; such issue is not the genesis of the dispute in the present case. Moreover, those Awards denied the Claims therein on the basis of procedural defects which are not present in the case now before us."

It is quite apparent that the Referee in the present case did not give **to Awards 6954, 6955, 6956 and 6957** the careful consideration due, because the Referee in those Awards upheld the right of the Carrier to do exactly what it did in the confronting dispute. The Referee in those Awards held:

> "As earlier indicated, we do not undertake to say what is at issue or what should be the decision in those claims with which we are not concerned in these dockets, **but we do hold that Carrier had the right to put the reduced rates into effect, subject to Petitioner's right to question that action** by a correct statement of claim and on issue properly joined and argued in accordance with the Board's Rules of Procedure.
>
> **"On basis of claim at issue and Employes statement of position, a denial award is in order."** (Emphasis added).

And in the Special Findings held:

> **"On basis of claim at issue and Employe statement of position, the Agreement was not violated."** (Emphasis added).

And in his Award held:

"Claim denied."

For the reasons set forth above, we dissent.

/s/ C. P. Dugan
/s/ R. M. Butler
/s/ W. H. Castle
/s/ J. E. Kemp
/s/ J. F. Mullen