Award No. 10950
Docket No. TE-9588

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Roy R. Ray, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

GEORGIA RAILROAD

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Georgia Railroad:

1. That the Georgia Railroad, hereinafter known as Carrier, violated its Agreement with its Telegraphers, hereinafter known as Employes, when beginning September 6, 1956, it instructed its Agent-Telegrapher at Crawford, Georgia, to close the Crawford agency at 12 noon on Thursdays and Fridays, go to Stephens, reopen that agency and work thereat from 1:00 P. M. to 4:00 P. M., Thursdays, Fridays and Saturdays and on any other days that agent, Crawford, is notified the cotton gin at Stephens is running, come back to Crawford after closing Stephens, and work at Crawford until work for the day is finished, with overtime that is necessary to complete the day's work. On September 18, 1956, these instructions were amended to read:

> "Beginning Wednesday, September 19th, please arrange to go to Stephens on Wednesdays, Thursdays, Saturdays and Mondays of each week between the hours of one and four P. M. for the purpose of handling cotton until further advised. Also, please arrange to order a box car to be left at Stephens each day of the week except Sundays and Tuesdays to load this cotton."

2. That the Carrier further violated the Agreement when after re-establishing the open agency at Stephens it failed to assign an extra employe thereto in accordance with Section (e), Article 8, of the Agreement, pending advertisement and filling of the position in accordance with Section (f) of the same Article.

3. That Carrier shall, as result of such violation (1) above, now compensate P. M. Marchman, Agent-Telegrapher, Crawford, for an additional 8 hours per day at the Stephens' rate for each day required to close the Crawford agency for three hours and work as agent at Stephens during those hours, as per Guarantee Rule, Section (e), Article 3.

4. Additionally, Carrier shall, as result of violation (2), now compensate Mrs. Edith S. Bell, Maxeys, Georgia, extra operator, first out on extra board and readily available, for eight hours per day for five days per week at the Stephens' rate, account not being called for that work during the time the agency operated as an open agency, and until such time as the position of agent, Stephens, is advertised and filled in accordance with Article 8, Sections (d), (e) and (f) of the Agreement.

EMPLOYES' STATEMENT OF FACTS: There are, in full force and effect, collective bargaining agreements entered into by and between Georgia Railroad, hereinafter referred to as Carrier or Management and The Order of Railroad Telegraphers, hereinafter referred to as Employes or Telegraphers. The current rules agreement was effective September 1, 1949. The agreements are on file with this Division and are, by reference, made a part of this submission as though set out herein word for word.

The dispute submitted herein was handled on the property in the usual manner, through the highest officer designated by carrier to handle such claims and failed of adjustment. This Division, under the provisions of the Railway Labor Act, as amended, has jurisdiction of the parties and subject matter.

The dispute concerns the positions of Agent, at Stephens, Georgia, and Agent-Telegrapher at Crawford, Georgia. Agency service, at both points, was regularly maintained for many years. In the Agreement, the parties negotiated for and reached agreement on the two positions as follows: (Article 19)

				Overtime rate
Stephens	One Position	Agent pro rata rate	$1.294	$1.941
	(When required to telegraph (telephone))		1.462	2.193
Crawford	One Position	Agent-telegrapher	1.546	2.319

The reason for the differential rates at Stephens was because normally it was to be considered as a non-telegraph (telephone) position and by special agreement carried the lower rate. The special agreement provided as follows:

"SETTLEMENT NO. 1

to

Agreement of September 1, 1949

between

Georgia Railroad and Monroe Railroad and its Telegraphers

It is agreed that as a temporary measure and to afford further opportunity to develop the traffic possibilities thereat sufficiently

Awards dealing with Carrier actions in discontinuing such positions as the one at Alda. Those Awards have generally recognized the right of the Carrier to discontinue a position where the work of that position declines to the point where a substantial part of the employe's time is not occupied with the duties of the position. Awards 439, 4759, 4385, 5127, 5283, 5318.' In the instant case there was such decline of duties at Hassell. (See also Award 5999.)

"As stated in Award 6022, there are two principles so well established there is no occasion for citing awards supporting them that must be given consideration in determining the rights of the parties under the confronting facts as we have construed them. The first is that except in so far as it has restricted itself by the agreement the assignment of work necessary for its operation lies within the carrier's discretion. The second is that in the absence of any rules of the agreement precluding it from doing so it is the prerogative of management, so long as it actually intends to accomplish such a result, to abolish a position if a substantial part of the work thereof has disappeared. (See also Award 6839 and awards cited therein.)

"The carrier may in the interests of efficieny and economy of its operations abolish positions and rearrange the work thereof unless it has limited its right to do so by the provisions of the collective agreement. However, when doing so the work of the positions abolished must be assigned to and performed by the class of employes entitled thereto under the agreement.

"From an analysis of the record, the authorities herein cited and the reasons stated herein, we conclude the claim should be denied."

Carrier respectfully asserts that the employe's claim is without merit and should be denied.

The data contained herein has been made available or is known to Petitioner.

OPINION OF BOARD: Due to declining business and revenue, the Carrier was authorized by the Georgia Public Service Commission to discontinue Agency service at Stephens, Georgia, on February 1, 1956. The order of the Commission, however, required Carrier to work out with the shipper at Stephens specific arrangements for handling cotton traffic during the cotton shipping season in September, October, and November of each year. Carrier closed the agency at Stephens on February 1, 1956, and abolished the Agent position there. Prior to the beginning of the shipping season in September 1956, the operator of the cotton gin at Stephens advised Carrier that he would run the gin two or three days a week and would need service for about three hours on those days. After an unsuccessful attempt to work out an arrangement with the General Chairman to provide service on a limited basis, the Carrier assigned the work at Stephens to its Agent at Crawford, Georgia, to be handled as a part of the Crawford Agency work. The Georgia Public Service Commission approved this arrangement on September 5, 1956, and it continued through October 1956. On October 5, 1956, Employes filed the present claim alleging that Carrier's action was a violation of the Agreement. The Claim was declined, thereafter appealed and denied by the

highest officer of the Carrier, designated to handle such matters, on November 28, 1956. No conference between the parties was held on the claim and on March 4, 1957, Employes served notice of intent to file an ex parte submission to this Board.

The Employes contend that the Agreement does not permit the Carrier to take the measures it did to furnish the service at Stephens, and they refer to certain rules of the Agreement which they claim support their position.

The Carrier challenges the jurisdiction of this Board to consider the dispute because no conference was held on the property as required by the Railway Labor Act and the Rules of Procedure of this Board. It will be necessary to determine this issue before we reach the merits of the dispute.

There is no doubt that the Congress intended for the parties to meet face to face in conference before progressing a dispute to this Board; as to this the language of Section 2, Second of the Railway Labor Act is clear ("All disputes . . . shall be considered . . . in conference . . ."). It is also clear from the record that the entire dispute here was handled by correspondence between the parties and that no conference was held. The question presented here, however, is whether the parties must confer in order for this Board to have jurisdiction. It has been before this Board many times and the awards are in conflict. While a majority of awards on the point have held that a conference is not a prerequisite to jurisdiction, most of these have been decided on equitable grounds rather than on an interpretation of the Act. There are a number of well reasoned awards holding the lack of a conference fatal to jurisdiction. See especially Award 10852 (Third Supplemental). The basis of these is that Section 2, Second requires the conference and that Circular No. 1 of the Railroad Adjustment Board's Rules of Procedure states:

> "No petition shall be considered by any division of the Board unless the subject matter has been handled in accordance with the provisions of the Railway Labor Act."

The better grounds for the view favoring jurisdiction have been spelled out in Award 10675 of this Board. The reasoning of that award is that Section 2, Sixth, modifies Section 2, Second and implies that a party must **want** a conference and **request** it before he will be permitted to assert lack of jurisdiction for failure to hold a conference.

A thorough study of awards on this point shows that good arguments can and have been advanced by Carrier and Employes in many cases in favor of each view. However, in view of Awards 10567 and 10675 recently rendered by this Board on the identical point between these same parties we do not regard the question as an open one. Those Awards hold that where Carrier has not requested a conference and has not been denied an opportunity for a conference, it cannot defeat jurisdiction on this ground. In the interest of putting the matter to rest we feel that those awards require a similar decision here and, therefore, that the Board has jurisdiction to consider the dispute.

We thus proceed to a consideration of the claim on its merits. At the outset the Employes advance the novel argument that Carrier has not pointed to any rule or group of rules which permit the action taken

by the Carrier in this case. It is sufficient answer to say that the burden is not on the Carrier to show that its action is authorized by some provision of the Agreement. Rather the burden is upon the complaining Employes to show that the action taken violates some part of the Agreement. The Employes also argue that the action of the Georgia Public Service Commission permitting the Carrier to provide agency service on a part-time temporary basis at Stephens does not relieve the Carrier of any of its obligations under the Agreement. We accept this proposition as well established by the Awards. But the question here is whether the Carrier's action is contrary to the Agreement.

We turn now to the specific rules relied upon by the Employes. They contend that Carrier re-established the Agency at Stephens on a temporary part-time basis without observing the bulletining provisions of the Agreement in violation of Article 8(d) or 8(f), and that the establishment of hours less than 8 hours per day five days a week for the new position violated Article 3 (a) and (j) and 4(a). We cannot agree with this contention. In our view the Agency was not re-established; what really happened was that with the abolition of the Agency the Carrier, in accordance with the requirement of the Public Service Comission's order, assigned the few hours of work per week to its employe of the same class at another station. We do not agree that the employe was performing work on two positions, since the position at Stephens no longer existed. We find nothing in the Agreement prohibiting an employe from performing work at two places. In the absence of a prohibition, numerous Awards uphold the right of the Carrier to have an employe perform work at two separate locations as long as he goes on and off duty at the same location which the Agent did in this case. See especially Awards 8428, 6944, 6945, and 1670. We think the language of Award 39 of Special Board of Adjustment No. 259 — Telegraphers v. New York Central, is especially applicable here.

Employes contend that Carrier violated Article 3(e) and 3(i) when it required the Agent at Crawford to suspend his work at Crawford and go to Stephens to perform the assignment there. This contention is without merit. Article 3(e) provides for a guarantee of a day's pay for an employe. Here the Agent at Crawford was paid all that he was guaranteed by the rule. As to 3(i) (which says "Employes will not be required to suspend work during the regular hours . . .") the Agent at Crawford did not suspend work on his assignment, which included the few hours per week at Stephens. Except insofar as it has restricted itself by the Agreement the assignment of work necessary to its operations is the prerogative of the Carrier. Awards 6944, 6945. There is no evidence that the Claimant here suspended work "during the regular hours." In fact, the evidence is that he worked his "regular hours". It follows that there was no violation of 3(i).

In connection with the claim that the position at Stephens was re-established, Employes argue that a temporary vacancy resulted which another employes seniority entitled her to fill, and that Carrier's action violated her rights under Article 8. This contention is disposed of by our holding that no position was re-established at Stephens and therefore, no vacancy was created.

For the reasons which have been set forth above, we hold that Carrier's action did not violate the Agreement and that the claim must be denied.

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 not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST. S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 7th day of December 1962.