Award No. 11120
Docket No. TE-9456

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

David Dolnick, 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 23rd day of February, 1954, it abolished position of clerk-telegrapher at Hartsville, S. C.

2. Carrier violated the agreement between the parties hereto when on February 23, 1954, it abolished position of clerk-telegrapher at Bennettsville, S. C.

3. That Carrier will be required to restore positions of clerk-telegrapher at Hartsville and Bennettsville, S. C., and employes covered by telegraphers' agreement, deprived of work by reason of the wrongful abolishment of the positions as set forth in paragraphs 1 and 2, will be compensated for all wage losses incurred as a result of such violations.

EMPLOYES' STATEMENT OF FACTS: There is in full force and effect a collective bargaining agreement entered into by and between Atlantic Coast Line Railroad Company, hereinafter referred to as Carrier or Management and The Order of Railroad Telegraphers, hereinafter referred to as Employes or Telegraphers. The agreement was effective November 1, 1939 and has been amended. The agreement, as amended, is on file with this Division and is, by reference, made a part of this submission as though set out herein word for word.

The disputes involved herein were handled in the usual manner through the highest officer designated by carrier to handle such disputes and failed of adjustment. The disputes involve interpretation of the collective bargaining agreement and under provisions of Railway Labor Act, as amended, this Division has jurisdiction of the subject matter and parties.

Two separate disputes are involved but due to similarity of facts, rules, and interpretations of this Board, are submitted in this one submission. We shall, in the statement of facts, set forth the facts separately as Claim No. 1 (Hartville, S. C.) and Claim No. 2 (Bennettsville, S. C.).

Board, demonstrate conclusively that the claim is wholly without merit and should be denied.

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 answer.

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

(Exhibits not reproduced).

OPINION OF BOARD: There are two disputes before the Board, each processed separately on the property, but both involving essentially the same issues.

In Hartsville, South Carolina, a Supervisory Agent and a Clerk-Telegrapher were covered by the Telegraphers' Agreement. There were also five clerical positions covered by the Clerks' Agreement. One clerical position was abolished on January 15, 1954. On February 22, 1954, Carrier abolished the Clerk-Telegrapher position and the clerical position abolished on January 15, 1954 was restored. The clerical work formerly done by Clerk-Telegrapher was assigned to the restored clerk.

In Bennettsville, South Carolina, a Supervisory Agent and a Clerk-Telegrapher were covered by the Telegraphers' Agreement. In addition, there were clerical positions covered by the Clerks' Agreement. On February 22, 1954 Carrier abolished the Clerk-Telegrapher position. A clerical position was created and the existing clerical work formerly performed by the Clerk-Telegrapher was transferred to the clerk. The telegrapher's work was transferred to the Supervisory Agent.

It is the Employes' position that the Carrier arbitrarily abolished the Clerk-Telegrapher positions in Hartsville and in Bennettsville, and that since the Carrier did not reduce the total work force, and since the same work was being performed by the employes at both stations, the Carrier violated the Agreement. This is particularly true, the Employes argue, because the Clerk-Telegrapher positions, which have existed in the Agreement for many years, includes work of a clerical nature. They request that the Carrier be required to restore the positions of Clerk-Telegrapher at the two stations and that employes deprived of such work since February 23, 1954, be rightfully compensated.

The Carrier raises a procedural question which should receive first consideration. They contend that the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes have an interest in this proceeding and that any Award rendered by this Board will be binding on said Clerks Organization.

Pursuant to the requirements of Section 3, First (j) of the Railway Labor Act, this Board on July 6, 1962 notified the Clerks of the pendency of this dispute and advised that Organization that they had the right to file any documents pertinent thereto, and to appear before this Board to present any arguments in their behalf. On July 11, 1962, the Clerks Organization wrote to this Board disclaiming any interest in these proceedings.

We have examined the Awards of this Board. There is no unanimity of opinion. Unfortunately, this subject has not been finally determined by the Courts.

The provisions of Section 3, First (j) are procedural. There is no provision in the Railway Labor Act of substantive nature which compels a third party in interest to become a party to a dispute before this Board. The procedural requirements of the Act were complied with. The third party in interest declined to become a party to this dispute. We fail to see how any Award of this Board is, therefore, binding on the Clerks Organization. True, some Awards cited by the Carrier have held that under similar circumstances the "matter is now properly at issue and our determination will be binding on the parties." Awards 8330 (Wolff), 9777 (LaDriere) and 10303 (Mitchell). If by "parties" they include those who have refused to be so involved, we believe their conclusion to be contrary to the purposes of the Act and to the weight of authority distinguishing between procedural and substantive requirements of statutory enactments. The issue before the Board is between the Carrier and the Claimants.

The basic issue is whether under the Scope Rule of the Agreement or because of custom, practice and tradition, these positions belong exclusively to the Telegraphers.

The Scope Rule merely lists the positions covered by the Agreement. It does not describe the work of these positions. Whether the work of a Supervisory Agent is traditionally clerical, as argued by the Employes, is not found in the Scope Rule, but may be determined only from evidence in the record which reflects the custom, practice and tradition of the work of such an employe. It is true that the Agreement does not classify a Supervisory Agent. That classification, with the others is found in the Wage section of the Agreement. That, too, merely lists the job classifications and the hourly or monthly rates. There are no job descriptions for any of the positions. Nowhere in the Agreement is there any provisions that clerical work for any of the covered positions belongs exclusively to the Telegraphers.

It is necessary to examine the record to determine the custom and practice. At Hartsville a clerical position was abolished on January 15, 1954, because of a reduction in the work load. For years prior to February 22, 1954, "the volume of telegraphic communications, including train orders was in continuous decline." "In February, 1954, the combined time of the Supervisory Agent and the Clerk-Telegrapher devoted to telegraphy was reduced to a total of one hour daily . . ." When the position of Clerk-Telegrapher was abolished, the remaining telegraph work was assigned to the Supervisory Agent covered by the Telegraphers' Agreement, and the clerical work was assigned to the clerks covered by the Clerks' Agreement.

A similar situation existed in Bennettsville. There, too, telegraphic work was reduced to less than one hour daily in February, 1954. When the Clerk-Telegrapher position was abolished the remaining telegraph work was assigned to the Supervisory Agent covered by the Telegraphers' Agreement. The clerical work was distributed among the clerks covered by the Clerks' Agreement. A new clerical position was established as of February 23, 1954 because of the necessities of the business.

There is no question but that the clerk-telegraphers at both stations performed some clerical work. As telegraph work declined their clerical duties increased. Primarily, they were first employed as telegraphers and not as

clerks. We do not believe that they were first employed to primarily perform clerical work. The mere fact that the percentage of time spent in clerical work had increased over the years as telegraph work decreased does not alter the basic requirement of the Clerk-Telegrapher position. The basic requirement is communication and not clerical. Clerical work was incidental to the basic position.

Had the Clerk-Telegraphers performed only clerical work at Hartsville and Bennettsville we would be inclined to agree with the Employes that by custom, practice and tradition that work belonged to the Telegraphers. But that is not the case here.

In Award 4580 (Carter) the position of Assistant Agent was in the Telegraphers' Agreement. The employe in that position exclusively performed clerical work. We properly held that because of the Agreement and because of the practice and custom which previously existed, the work belonged to the Telegraphers. "When the agent's position was abolished there was no telegrapher's work remaining." That is not the case here. The Clerk-Telegraphers at Hartsville and Bennettsville did perform telegrapher's work. When their positions were abolished telegrapher's work was transferred to the Supervisory Agents who were covered under the Telegraphers' Agreement.

We cannot agree with the conclusions reached in Awards 7409 (McMahon) and 6204 (Shake). We are, rather, inclined to the view that where there are overlapping work rights in several collective bargaining agreements, that the primary work functions of the positions in an Agreement should be the controlling factor unless the parties by design or accident have permitted an employe to exclusively perform work which is not of that primary nature. The primary work function of Clerk-Telegrapher is communication. The clerical work performed is incidental.

The record shows that prior to February 23, 1954 the Clerk-Telegrapher at Hartsville "did copy train orders and clearance cards and on rare occasions did copy or send a telegram . . ." This work was reassigned to the Supervisory Agent. The same is true at Bennettsville. When the Clerk-Telegrapher position was abolished, the telegraphers work was absorbed by the Supervisory Agent. The Supervisory Agent is the only employe at that station "handling telegraphic communications." The clerks in each of the locations were not replacements for the Clerk-Telegraphers.

The record also shows that the Supervisory Agents performed clerical duties incidental to their telegraphic work.

In Award 615 (Swacker) we discussed the principle here involved at considerable length. It serves no useful purpose to quote extensively therefrom. It is sufficient to note that while the principle there enunciated has been modified to some extent, the basic element dealing with practice, custom and tradition remains. We said on that issue that it "might be shown by definite evidence such as clearly provable agreement of the parties or by implication arising from the conditions surrounding the making of the agreement; in the last class of cases, however, the Board should be extremely slow to find exceptions and only upon unmistakable proof."

A comparable dispute existed in Award 9344 (Begley). There the Carrier abolished a position of Operator-Clerk. There, too, as here, the Employes

contended that the work was performed by the incumbent for a half century. Some of the work was assigned to one remaining telegrapher, "a substantial amount of the work, most of it, was assigned to clerks . . ." We said:

> "The second trick operator-clerk did not have the right, under the Telegraphers Agreement, to the exclusive right to perform clerical work even though he had performed clerical work for fifty years."

There is no proof in the record that Claimants exclusively performed the clerical work, or that the clerical work was previously associated exclusively with their positions, or that they are exclusively entitled to such work.

For the reasons herein stated Claimants are not entitled to the relief sought.

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 Carrier did not violate the Agreement.

AWARD

Claim is denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 12th day of February 1963.

CONCURRING OPINION IN AWARD NO. 11120, DOCKET NO. TE-9456

We concur in the Award because it correctly decides that there was no violation of the Telegraphers' Agreement, and properly denies the claim. However, we do not agree with the Referee's Opinion that Awards of the Division are not binding on all parties found to be involved in the dispute.

/s/ P. C. Carter

/s/ R. A. Carroll

/s/ W. H. Castle

/s/ D. S. Dugan

/s/ T. F. Strunck

DISSENT TO AWARD 11120, DOCKET TE-9456

Award 11120 is palpably erroneous for a number of reasons, the chief of which is the majority's disagreement with the only two awards this Board has ever rendered in cases fundamentally indistiguishable from this one, viz., Awards 6204 and 7409, and its reliance upon awards and ideas which have at best only a remote relevancy to the issue here involved, such as Awards 615 and 9344.

The latter award is itself so completely erroneous as to make a mockery of the purpose for which this Board was created. My dissent to that award, q.v., points up its errors. By relying upon such an award the majority has compounded the errors it contains.

For these reasons, I dissent.

J. W. WHITEHOUSE
Labor Member