

Award No. 11294
Docket No. TE-10247

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Preston J. Moore, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

GULF, COLORADO AND SANTA FE RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Gulf, Colorado and Santa Fe Railway that:

1. The Carrier violated the Agreement between the parties when, beginning June 17, 1957, it discontinued the full time agencies at Alvarado and Joshua, Texas and thereafter required the agent at Joshua to perform work at both stations; and

2. The Carrier shall now pay the incumbent of the agent's position at Joshua, Texas, the equivalent of eight hours pay at the rate applicable to the position of agent at Joshua, beginning June 17, 1957 and continuing until the violation of the Agreement is discontinued, for each day he performs work at Joshua and in addition thereto the equivalent of three hours pay at the rate applicable to the agent's position at Alvarado plus expenses incurred; and

3. The Carrier shall pay Mrs. M. H. Stewart the equivalent of eight hours' pay at the rate applicable to the position of agent at Alvarado, beginning June 17, 1957 and continuing each day she is held off the position at Alvarado and in addition thereto, pay her at the time and one-half rate for work performed outside the assigned hours of the position at Alvarado plus expenses incurred as a result of improper displacement.

EMPLOYEES' STATEMENT OF FACTS: An Agreement between the parties bearing effective date of June 1, 1951, is in existence.

At page 85 of said Agreement the following positions are listed:

"Joshua	Agent-Telegrapher	1.625
* * * *		
Alvarado	Agent-SNT	1.505"

assign the remaining work thereof to others of the same craft or to employees of another craft who are entitled to perform it. The Carrier is, of course, limited by any agreement it has made in conflict with the method employed. We have found no rules which have been violated by the Carrier in closing these one-man stations and assigning the remaining work of the agent-telegraphers to those entitled to perform it. Awards 4939, 4992, 5283, 5318, 5719.' (Also Award 6854.)"

The Carrier explained on page 6 hereof that the then Local Chairman and General Secretary-Treasurer for the Order of Railroad Telegraphers, Mr. M. L. Penney, attended the public hearing held in the County Courthouse at Cleburne, Texas, on February 6, 1957, at which time he attempted to introduce the Telegraphers' Agreement into the evidence taken at the hearing as support for his allegation that the proposed arrangement would violate the terms of that agreement and further contended that the Railroad Commission, in granting the applications of the Carrier, would be aiding the Carrier in violating its contract with the Telegraphers' Organization. The Railroad Commission of Texas, however, overruled the objections and contentions advanced by Mr. Penney at the hearing and, acting under the powers invested in it by the State of Texas, authorized limited agency service at both Alvarado and Joshua for the express purpose of preventing an excessive and unwarranted burden on interstate commerce. Wages paid to the agent comprise the principal expense of operating a small station and a sustaining award in the instant dispute would have the effect of directly overruling and setting aside the Orders of the Railroad Commission of Texas (see Carrier's Exhibits "C" and "D"). The Carrier is convinced that, after a careful analysis of all of the circumstances involved, your Honorable Board will have no difficulty in reaching the conclusion that the Carrier acted correctly in complying with the Orders of the Railroad Commission of Texas and, in so doing, did not in any manner violate the Collective Bargaining Agreement.

In conclusion, the Carrier respectfully reasserts that the Employees' claim in the instant dispute is entirely without merit or support under any rule in the current Telegraphers' Agreement and should be denied in its entirety.

The Carrier is uninformed as to the arguments the Employees will advance in their ex parte submission and accordingly reserves the right to submit such additional facts, evidence and arguments as it may conclude are necessary in reply to the Organization's ex parte submission in this dispute.

All that is contained herein is either known or available to the Employees and their representatives.

(Exhibits not reproduced.)

OPINION OF BOARD: This is a dispute between The Order of Railroad Telegraphers and The Gulf, Colorado and Santa Fe Railway Company.

On June 17, 1957, the positions of agent at Joshua and Alvarado were abolished. In effect, on that date the Carrier established the position which required the agent at Joshua to work 5:20 A. M. to 7:30 A. M. at Joshua, drive eighteen miles to Alvarado and work from 8:00 A. M. to 11:00 A. M. then to return to Joshua to complete his eight hour assignment. His tour of duty ended at 2:20 P. M.

The first issue to determine is if the Carrier is prohibited by the Agree-

ment from (1) abolishing the position at Alvarado, and (2) requiring the agent at Joshua to perform the service at Joshua and Alvarado.

This dispute has required considerable study and meticulous examination of all awards cited by the parties. Very able and impressive presentations have been made by both parties. The Petitioner urges that Awards 556 and 1302 of this Division between the same parties are controlling in the instant case.

Carrier contends that Award 6944 and Award 10950 are controlling and have, in effect, overruled Award 556.

Award 1302 is distinguishable from the instant dispute. As we approached the awards cited in this case, it appeared that Award 556 was diametrically opposed to Awards 6944 and 10950. However upon careful study of the dockets and opinions we find a substantial variance. In Award 556 the Board found that the work continued to exist.

"In connection with Article XX, Paragraph (k), the Board cannot agree with the interpretation of this rule as stated and applied by the Carrier. It is true there was a reduction made in the force, and the position of Agent-telegrapher was abolished by action of the Carrier but the Board submits that the agency force was not reduced in the sense that the term is used in the rule, and the position was not abolished in fact, as the work continued to exist." (Emphasis ours.)

In Awards 6944 and 10950 it was found that a substantial portion of the work no longer existed.

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 insofar 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.

We have construed the facts and expressly found that a substantial portion of the work of the involved positions had disappeared. The positions were abolished under circumstances disclosing an intent on the part of Carrier to permanently abolish them. Thus, it follows that the Carrier had the right to abolish the two positions.

Award 388 states:

"Nowhere in the agreement is there provision for the establishment of such position as 'joint agent.'"

The above statement indicates that the Board in the above opinion based their opinion upon a false premise, i.e., that the Agreement must provide for the establishment of a position as joint agent. As set forth above, the Carrier has the right to do so unless prohibited by the Agreement.

Award 4972 can be distinguished, and in effect in an indication that the parties thereto believed that the Carrier could establish a joint agency unless otherwise prohibited. In that case there was a Supplemental Agreement providing that an agent could not divide his time between two stations, if it would result in reduction of forces.

We find no provision of the Agreement which prohibits the Carrier from establishing a joint agency.

Award 6944 and a recent Award, 10950, by this Board are in point with the instant case.

We therefore find ourselves in the position of accepting Awards 6944 and 10950 as controlling. We concur and therefore must follow the opinions expressed therein.

For the foregoing reasons we find no violation of the Agreement.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employees involved in this dispute are respectively Carrier and Employees 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 3rd day of April, 1963.

DISSENT TO AWARD 11294 (DOCKET TE-10247)

FACTS

Alvarado, Texas, according to the Carrier, has a population of 1652. It is further stated that there are "97 small business establishments located at Alvarado."

On April 3, 1956, Carrier filed application with Railroad Commission of Texas to "close the agency at that point, except during the cotton shipping season of four months extending from August through November of each year." The Commission denied the application on May 24, 1956.

On November 16, 1956, the Carrier declared the position of agent at Alvarado to be abolished and on November 19, 1956, "the Agent-Telegrapher at Joshua was required to drive to Alvarado each work day to perform the agency work and keep that station open for three hours following which he returned to Joshua to complete his assignment."

On November 16, 1956, claim was presented to Carrier Superintendent by District Chairman alleging violation of the Telegraphers' Agreement. Among other things it was stated:

"The Third Division has held that an agent cannot perform work at two stations—See Award 556 covering a dispute on this property."

In this regard the Carrier stated: (Pages 3-4 Carrier's Ex Parte Submission—R 43-44)

"This arrangement was continued in effect until November 26, 1956, at which time the small non-telegraphic agency was restored at Alvarado and the agent-telegrapher at Joshua was returned to his former assignment after which it was learned that it was the position of the Railroad Commission that part-time agency service could not be established without Commission's approval."

After the re-establishment of the position, the claim filed on November 16, 1956 was not further progressed.

On December 31, 1956 Carrier's General Manager wrote the Commission reiterating the Carrier's position with regard to Alvarado "there is no longer any justification keeping this station open." The General Manager bargained:

"In order to take care of any traffic that might be offered, it is proposed for our agent at Joshua, located approximately 30 miles from Alvarado, to drive to the latter station and remain thereat for three hours each working day.

It then occurred to Carrier's officers that if the agent-telegrapher at Joshua was taken away from that position for a portion of the day, that that station too would also become part time. On January 10, 1957, Carrier's General Manager again wrote the Commission stating:

"I should have stated in my letter that the plan for a part time agency, with an agent working three hours each working day at Alvarado, is contingent upon a similar arrangement being approved for Joshua station where it is contemplated to maintain an agency each working day from 5:30 A. M. to 7:30 A. M. and 12:30 P. M. to 2:30 P. M., one agent taking care of both stations * * * ."

On January 9, 1957, General Chairman Barraclough wrote General Manager Olson (1) advising that such an arrangement would be in violation of the Telegraphers' Agreement. On the same date District Chairman Penney wrote Superintendent Crill (2) stating that the agreement would be violated if the proposal were carried out. The record does not show that either of these officers acknowledged the letter or made any reply thereto.

(1) "On November 16, 1956 Local Chairman Penney wrote Supt. Mr. Crill filing claim account the agency at Alvarado allegedly

abolished and the agent at Joshua instructed to work at both stations and furnish statement showing automobile mileage necessary to do so. I am furnishing you copy of Mr. Penney's letter for your information.

"Subsequent to a telephone conversation with your Mr. Brownell, the employees involved were placed back where they belonged and the agency at Alvarado was reopened on a full time basis in accordance with our Agreement.

"We have now received notice from the Railroad Commission of Texas dated January 4, 1957 that the Carrier has made application for authority to discontinue its full time agency at Alvarado and in lieu thereof to operate that point as a part time agency with an agent provided three hours each working day.

"It is our position that, irrespective of any action which may be taken by the Railroad Commission, the position of agent at Alvarado cannot be abolished as long as work thereof remains to be performed. And this is to be considered as advance notice that we insist that our Agreement must be respected.

"We would appreciate advice from you that the Carrier's application has been withdrawn."

(2) "We are in receipt of notice from the Railroad Commission of Texas dated January 4, 1957 that the Carrier has made application for authority to discontinue its full time agency at Alvarado, Texas and in lieu thereof operate that point as a part time agency with an agent provided for three hours each working day, hearing to be held at Cleburne January 27, 1957.

"On November 16, 1956 I wrote you that I had information that effective on that date the agency at Alvarado had allegedly been declared abolished and the agent at Joshua had been instructed to work both stations and furnish statement showing automobile mileage used between the two stations. I also directed attention to Award 556 and assert our position that the Agreement had been violated and filed claim in behalf of the affected employee.

"Subsequent to a telephone conversation between the General Chairman and Assistant to General Manager Mr. Brownell, November 16, 1956, the men involved were placed back where they belonged. Now it seems the Carrier is again attempting to do what the Adjustment Board has consistently held could not be done without violating the Agreement; namely, require one agent to perform work at two stations or abolish a position while work thereof remains to be performed.

"This is to serve as advance notice that the Organization will file claims in behalf of any employee adversely affected should an attempt be made to operate the agency on a part time basis. It is our position that the Telegraphers' Agreement requires that the agent at Alvarado be paid for 8 hours each day the position is assigned to work. (See Article XVII.)"

The requests of the Carrier (December 31, 1956 and January 10, 1957) were, by the Commission, consolidated for hearing purposes and on February 6, 1957 hearing was held at Cleburne, Texas. On March 13, 1957 the Commission entered identical orders granting the applications, conditioned;

“ * * * Provided, however, there shall be maintained at Alvarado an agent for not less than three (3) hours per day for 5 days each week.”
and;

“ * * * Provided, however, there shall be maintained at Joshua an agent for not less than four (4) hours per day for 5 days each week.”

The Carrier at Page 8 of its original submission (R 47) set forth how it went about complying with the Commission's order. (3)

This action of the Carrier unilaterally carried out gave rise to the claims set forth in the Statement of Claim in this docket.

DISCUSSION

The controversy presented in this docket has been before this Division many times. The first case was a dispute between Telegraphers' and Southern Pacific (Docket TE-274). Award 388 (Sharfman) was rendered thereon on February 25, 1937. The Board interpreted this Award in Serial No. 10 entered on April 16, 1938.

That dispute arose when the Carrier abolished the position of Agent-telegrapher at Edgewood, California and required the agent-telegrapher at Gazelle to go to Edgewood on a daily basis in conformity with the order of the California Public Service Commission, to perform the duties of agent-telegrapher. The opinion states:

(3) "In accordance with the Commission's orders (Carrier's Exhibits "C" and "D"), full time agency service was discontinued at both Alvarado and Joshua, effective with the close of work at those stations on Friday, June 14, 1957, and the position of agent (SNT) at Alvarado was abolished. Coincident thereto, as also provided by the Commission's orders, arrangements were made to maintain an agent at Alvarado for not less than three hours per day for five days per week and maintain an agent at Joshua for not less than four hours per day for five days per week. This was accomplished by assigning the Agent-Telegrapher at Joshua, effective Monday, June 17, 1957, to perform service as follows:

5:20 A. M. to 7:30 A. M.—Work at Joshua
7:30 A. M. to 8:00 A. M.—Travel to Alvarado
8:00 A. M. to 11:00 A. M.—Work at Alvarado
11:00 A. M. to 12:30 P. M.—Travel to Joshua and take one hour meal period.
12:30 P. M. to 2:20 P. M.—Work at Joshua.”

"There are no provisions in the agreement for the displacement of joint-agent nor is there authority for the displacement of a regularly assigned telegrapher in this way. The conditions under which such an incumbent may be displaced are set forth in various parts of the agreement or generally accepted as a matter of practice, and these conditions do not embrace such circumstances as are here disclosed of record."

After Award 388 the next dispute to reach the Board, directly in point, was Docket TE-400 a dispute between Telegraphers' and New York, New Haven & Hartford. Award 434 (Millard) was rendered on May 7, 1937. This dispute arose when Carrier on August 15, 1935 removed agent-telegrapher from his regular assigned position at Canton and required agent at Canton Junction to perform service as agent at Canton. The Board there said:

"In connection with the contention of the carrier that, 'it has the right to eliminate or combine positions; that such action is of long standing and recognized and agreed to as evidenced by Telegraphers' System Board of Adjustment decisions,' this Board submits its opinion that in any changes in which the rules of the agreement between the employes and the carrier are affected, or in which positions that have been negotiated into the agreement are concerned, the carrier is equally obligated with the employes in following the orderly process that has been provided in the rules when such changes are contemplated. Further, the Board concurs in the statement made in connection with the cases cited by the carrier that, 'each case must be decided upon its merits.'"

The next case on the point was Docket TE-443 involving dispute between Telegraphers' and New York Central. In Award 496 (Millard) rendered on September 16, 1937 it was stated:

"These agreement are binding contracts between the parties and where through economic or other conditions, stations that have been negotiated into an agreement are to be consolidated such action should only be taken by following the same orderly process of conference and negotiation as when the positions in dispute were placed in the schedule."

The next case directly in point was docket TE-526 a dispute between Telegraphers' and Santa Fe. Award 556 (Millard) was rendered on December 21, 1937. This dispute involved unilateral action by the Carrier in abolishing the position of agent-telegrapher at Kirkland, Arizona and thereafter requiring agent-telegrapher at Skull Valley, a point 6.2 miles distant, "to assume duties and the responsibilities of agent-telegrapher at Kirkland in addition to that at Skull Valley." In the opinion of Award 556 it is stated:

"It is not the opinion of the Board that all of the work for which an agency is created must disappear before an agency can be abolished; it is however the opinion of the Division that when the Carrier seeks, because of economic or other conditions, to combine or double-up agencies, such action should only be taken by following the same practice as was evidenced when the agreement was negotiated."

Award 388 has been cited in later Awards 814, 911, 1249, 1302, 1324, 1488, 1521, 1670, 3659, 4210, 4576, 5365, 5384, 5641. (4).

(4) "Award 814 (Spencer) ORT v. SP March 8, 1939

"The Division reaffirms the principle of Award No. 388 * * * ."

Award 911 (DeVane) ORT v. KCS July 27, 1939

"These *awards of this Division all dealt with efforts of carrier to place the work of two separate agencies under one agent in efforts to effect economies. The separate agencies were maintained but the time of one agent was divided between the two agencies. The Board held the practice to be a violation of the agreements."

*Awards 388, 434, 496 and 556.

Award 1249 (Tipton) ORT v RI December 6, 1940

"This *question has been before this Board on numerous occasions and under various facts, as the following awards will show: Numbers 53, 119, 120, 292, 293, 294, 295, 296, 322, 388, 444, 445, 507, 537, 539, 601, 716, 999, and 1023."

*Jurisdiction.

Award 1302 (Hilliard) ORT v. ATSF December 19, 1940

"Under the Agreement, as we interpret it, the carrier was required to supply that service through the employment of telegraphic help at the station where the demand originated. Its attempt otherwise was void of contractual approbation. We have benefitted by study of Awards 86, 388, 434, 496, 556, 636, 709, and many others referred to in presentation."

Award 1324 (Rudolph) ORT v SP January 10, 1941

"We are of the opinion that under Award 388 and Serial No. 10 being Interpretation No. 1 to Award 388, the claimant is entitled to reimbursement for any monetary loss sustained. "See also Award 814."

Award 1488 (Thaxter) ORT v ATSF June 30, 1941

"This is not a case such as is considered in Award 388 and 556 where one operator was assigned to do telegraph work in two agencies in violation of Special Rules of the Agreement."

Award 1521 (Shaw) ORT v SP July 21, 1941

"In that *case, as in this one, there was a consolidation of two agencies in California on the Southern Pacific Lines, one at Gazelle and the other at Edgewood, which resulted in the ousting of telegrapher Carey, whose work was turned over to another operator. His

*Award 388.

claim for compensation for monetary loss was similar to that made in this case on behalf of the estate of telegrapher Belt, and his claim was sustained. Much that is said in that award might well be quoted in this one, but since there is nothing to be gained by repetition and since the award is available for any interested person to read, it is sufficient to say that we must adhere to the principles therein annunciated. Nothing has been urged on this hearing of sufficient weight to require us to overrule our previous holding, and we will therefore abide by it."

Award 1670 (Garrison) (ORT v SP) January 5, 1942

"It departs from the situation in Award 388 in that the Winkelman station has been entirely closed, and all its equipment removed (with no evidence that any substitute office facilities in Winkelman have been arranged for); its separate accounts have been abolished; no telegraph service is rendered there; and the station is listed by the I.C.C. as a non-agency pre-pay station."

* * *

We intend by this decision no weakening of the principle of Award 388, nor to foreclose the consideration of cases whose facts may lie somewhere in between those presented in Award 388 and those presented here."

Award 3659 (Miller) ORT v Colorado & Southern Sept. 23, 1947

"What exists, in fact, is a joint agency, substituted ex parte by the Carrier for the two agencies called for in the agreement. Many times we have held that ex parte action in such cases constituted violation. Awards 388, 434, 496, 556, 1302, 3364. We so hold in the matter before us."

Award 4210 (Robertson) ORT v NYC December 3, 1948

"While the arrangement made by the Carrier was doubtlessly motivated by proper considerations of economy and operating procedures, its execution infringed upon the terms of the Agreement with its employes and the method of negotiation, rather than of ex parte action, should have been followed. See Award 388."

Award 4576 (Carter) ORT v DLW October 17, 1949

"Many awards of this Division hold that a joint agency may not be substituted ex parte for two agencies called for in the applicable agreement. See Awards 388, 3364, 2659. This requires a holding that the establishment of the joint-agency position on October 27, 1947, was in violation of the Telegraphers' Agreement."

Award 5365 (Munro) ORT v NYNH&H May 17, 1951

"This Board has many times held Carrier may not unilaterally do what was here attempted, see Awards 388, 434, 496, 556 and 1296."

Awards 5384 (Elson) ORT v Erie July 11, 1951

"Finally, Carrier views with great alarm a sustaining award. This Board in numerous cases has upheld claims similar to the one before us: Awards 233, 234, 388, 434, 496, 556, 1302, 3364, 3659, 4576, 5365, and others. The fact that this Board has consistently upheld claims of this character should relieve the Carrier of its expressed anxiety about the disastrous consequences which would follow a sustaining award."

Award 5641 (Wyckoff) ORT v SSW February 8, 1952

"It is clear that a violation of the Agreement would ensue if the agent-telegrapher were called upon to perform work at two stations. (Award 388, 3659, 4042, 4576, 4698, 4972, 5357, 5365, 5384, 5507 and 5515).

Award 434 in addition to the citations shown in Footnote 4 was cited in Awards 5375, 5507, 6451 and 8374 (5).

(5) Award 5375 (Donaldson) ORT v NYC June 28, 1951

"This case is to be distinguished from that subject to Award 1305 and relied upon by Carrier because there, with the abolition of the agency, both passenger and freight service were abolished at the point involved. Not so here. Both continued even though upon a steadily declining scale. This Division early suggested the means of solution to cases such as this (Award 434).

Award 5507 (Whiting) ORT v NYNH&H October 3, 1951

"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."

Award 6451 (Whiting) ORT v ACL January 19, 1954

"In our Award No. 434 we held that to eliminate or combine positions, which have been negotiated into the Agreement, the Carrier is obligated to follow the procedures established 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. See also Award No. 5507."

Award 8374 (Lynch) ORT v NYNH&H June 13, 1958

"We do mean as was stated in Award 434, that,

' * * * any changes in which the rules of the agreement between the employees and the carrier are affected, or in **which positions that have been negotiated into the agreement** are concerned, the carrier is equally obligated with the employees in following orderly procedures that has been provided in the rules when such changes are contemplated * * * .'
(Emphasis ours.)"

Awards 496 and 556 were cited in several of the later awards as shown in footnote 4.

AWARD 556

The Railway Labor Act provides in Section 3 (First) (m) that "awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award." It is further provided "in case a dispute arises involving an interpretation of the award, the Division of the Board, upon request of either party, shall interpret the award.

The Board was requested to interpret Award 556 and did so in Interpretation No. 1 to Award 556 (Serial No. 12) entered on May 27, 1938. The Interpretation held that the position of agent-telegrapher at Kirkland, Arizona, should be restored, the position filled, at the rates of pay set forth in the agreement. (6)

It was not suggested that the Carrier did not fully comply with all of the requirements of Award 556 as interpreted in Interpretation No. 1. Of a certainty, it became a "final and binding" award as defined in the Railway Labor Act.

That Award 556 and Interpretation No. 1 thereto became a part of the agreement between the parties to the instant dispute does not admit of doubt. As was said in Award 5133:

"It does not admit of dispute that the Board's interpretation of rules becomes a part of the agreement to all intents and purposes as though written into the rule book."

At the time Award 556 was rendered and the interpretation given, an agreement dated February 5, 1924 was in effect between the parties. Effective December 1, 1938 the parties entered into a new agreement. The current agreement was entered into and made effective June 1, 1951. It was not suggested that there were any changes in either of these agreements that would in any manner detract from or change the agreement interpretation rendered in Award 556. Actually there was no controversy on this point. Carrier's only reference to Award 556 was in its second submission in the

(6) "In the original disposition of this claim, and as outlined in the Award specified, the Board sustained the claim of the General Committee on the basis that the result of such action by the Board was to restore those conditions which were violated by the Carrier, and which were sought to be adjusted through the presentation of the claim upon which the Award was based.

In view of this, it is the ruling of the Board that the only proper meaning and intent that can be placed upon Award No. 556, as defined in the opinion of the Board and the findings thereof, is that the position of Agent-Telegrapher at Kirkland, Arizona, covered by the Telegraphers' Agreement and listed in the wage scale at an agreed upon rate of 77 cents per hour, shall be restored to the Telegraphers' Agreement and the position filled and the rate applied in accordance with the wage scale and governing rules of said agreement, until such time as action is taken to reclassify the position in dispute in accordance with the requirements of the agreement existing between the parties."

instant docket (Pages 7 and 8) (R 92-93). The essence of its argument there was not that Award 556 was erroneous or not a part of its agreement with the Telegraphers' but, (1) that the Award had been reversed by Awards 6944 and 6945 and (2) superseded by orders of Railroad Commission of Texas.

With regard to effectiveness of awards in construction of subsequent agreements where there have been no changes in the rules in regard thereto, see Award 7968. There the referee called attention to the fact that the precedent awards were rendered prior to the current agreement between the parties, but also that there had been no change in the agreement respecting their applicability.

Just how an award involving interpretation of the Telegraphers'—Atlantic Coast Line Agreement or Telegraphers'—New York, New Haven and Hartford Agreement could effect or change an agreement in full force and effect between Telegraphers' and Santa Fe was not explained. Furthermore other than the bare assertion, no authority was cited that explained how an order of the Railroad Commission of Texas could pre-empt a federal statute. The Supreme Court of the United States has held (7) that collective bargaining agreements negotiated under provisions of the Railway Labor Act bear the "imprimatur of federal law." See also Awards 388 and 3738 holding that orders of state regulatory bodies are ineffective to change the collective bargain.

The United States Court of Appeals for the Fifth Circuit recently held (8) that an order of the Interstate Commerce Commission did not pre-empt the provisions of the Railway Labor Act.

AWARD 11294

There are two Findings of Fact set forth in the award and they are not consistent. The Referee finds:

(1) On June 17, 1957, the positions of agent at Joshua and Alvarado were abolished.

(2) In effect, on that date the Carrier established the position which required the agent at Joshua to work 5:20 A. M. to 7:30 A. M. to Joshua, drive eighteen miles to Alvarado and work from 8:00 A. M. to 11:00 A. M. then to return to Joshua to complete his eight hour assignment. His tour of duty ended at 2:20 P. M.

The dictionary defines "abolish" to mean "to do away with completely; put an end to; make null and void." It denotes a "complete doing away with something." The word "abolish" means just that to the parties to this dispute. There is not a scintilla of evidence in the record consisting of 99 pages to support finding (1).

It is true the Carrier does contend that the "position of Agent (SNT) at Alvarado was "abolished." It carefully points out, however, that it means

(7) Railway Employees vs. Hanson 351 US 225

(8) Texas and New Orleans vs. Brotherhood of Railroad Trainmen 307 F2d 151

the "assignment" held by Mrs. Stewart was "abolished" and not the agency or its work at Alvarado. Nowhere in the record, does Carrier contend that the position of Agent-telegrapher at Joshua was "abolished," on June 17, 1957, or any other date. Let this be shown by the following:

At Page 21 (R 23) of Employees Original Submission, it is pointed out that should the Carrier contend that the "position" of Agent (SNT) at Alvarado had been abolished, that Article I, Section 2, would prohibit the performance of agency work at Alvarado, by the employe sent from Joshua to perform the work, Section 2 provides:

"At stations where agencies have been or may be abolished, care-takers or other persons employed at such stations by the Railway Company will not be required nor permitted to sell tickets, check baggage, receipt for or bill freight, take receipt for freight delivered, keep records, or do any such related clerical work; nor will care-takers or other persons employed at such stations by the Railway Company be required by it to act as agent of the Express Company."

Carrier replied to this point in its second submission at Page 12 (R 97) as follows:

"While the position of Agent-SNT was properly abolished, the agency at Alvarado has not been abolished and is still being maintained three hours per day, five days per week, as ordered by the Railroad Commission of Texas. Article I, Section 2, simply provides that at stations where agencies have been or may be abolished, care-takers or other persons employed at such stations by the Railway Company will not be required nor permitted to sell tickets, etc. The agency at Alvarado has not been abolished, therefore, Article I, Section 2, is not applicable."

At Page 8 (R 47) of Carrier's original submission it was stated that beginning June 17, 1957, agency service at Alvarado and Joshua was provided as follows:

5:20 A. M. to 7:30 A. M.—Work at Joshua
7:30 A. M. to 8:00 A. M.—Travel to Alvarado
8:00 A. M. to 11:00 A. M.—Work at Alvarado
11:00 A. M. to 12:30 P. M.—Travel to Joshua and take one hour meal period.
12:30 P. M. to 2:20 P. M.—Work at Joshua

In view of these admissions by the Carrier, how could the Referee make a finding that either of the positions were abolished? In view of the absolute provisions of Article I, Section 2 and the admission that agency work continued to be performed, how could the Referee reconcile his finding with the plain agreement provisions?

Finding (1) was the predicate for what the referee designates issue (1) does the agreement prohibit "abolishing the position at Alvarado? It does not require a great deal of mental ability to understand that if the position at Alvarado had been abolished, Article I, Section 2 would prohibit any employe of the Carrier to perform agency work. The Carrier admits this, but denies that the agency at Alvarado had been abolished. Now then if the agency at Alvarado has not been abolished as stated by the Carrier, how was Mrs. Stewart deprived of her position or assignment? She holds seniority, she

was assigned to the position of agent (SNT) at Alvarado in the exercise of seniority rights as provided in the agreement. Carrier says:

"Prior to close of business on Friday, June 14, 1957, Mrs. M. H. Stewart, with seniority date of August 3, 1944, was the regular occupant of position of agent (SNT) at Alvarado."

How could this admission, coupled with the admission that commencing June 17, 1957, and at all relevant times thereafter, a minimum of three hours "agency" work, as illustrated in Article I, Section 2, was performed at Alvarado, permit a finding that Mrs. Stewart's position was abolished?

Since the "agency," the position of agent (SNT) at Alvarado, was filled, each and every assigned work day Monday through Friday, on and after June 17, 1957, Carrier violated Article XVII (Guarantee Rule) (9) in failing and refusing to compensate Mrs. Stewart thereunder. This rule specifically provides for payment if the employee is available and ready for service and it is not disputed that she was so ready and available. It provides for payment at the rate of pay of "location" (position) to which entitled. It provides for full payment of 8 hours (Article 3, Section 1) (10) "if required on duty less than" the regular assigned tour of duty. Article 3, Section 4 provides "employees will not be required to suspend work during regular hours." The consistent interpretation of this rule is illustrated in Award 5473 (Carter) (ORT vs MP) September 21, 1951:

"Claimant owned the Telegrapher's position assigned 8:00 A.M. to 4:00 P.M. She had a right to work this position until such right was terminated, in accordance with the provisions of the controlling Agreement. This was not done. The position was blanked and Claimant was directed to work the Late Night Chief position. Claimant is entitled to be paid for the time lost on her regular assignment at the assigned pro rata rate."

One may infer from the record that Carrier, in some manner, directed Mrs. Stewart not to report for duty beginning June 17, 1957. It is likely that she was told that the position of agent (SNT) at Alvarado was abolished. One may also infer from the record that she went to the station at Alvarado to make application for benefits under the federal statutes providing certain payments in the event of unemployment. There, on any day Monday through Friday and each week she would have found an employee on duty 8:00 A.M. to 11:00 A.M. holding himself out to the world as agent of the Carrier and performing any and all of the duties of agent (SNT) at Alvarado.

As she filled out the forms, if she did, it is likely that she wondered why she was told her position was abolished when obviously it was not so. She may have looked at Page 85 of the agreement covering rates of pay, rules,

(9) "Regularly assigned employees will receive one (1) day's pay within each twenty-four (24) hours, according to location occupied or to which entitled, if ready for service and not used, or if required on duty less than the required minimum number of hours as per location, except on their rest days and the designated holidays."

(10) "Except as specified in Section 5 of this Article III, in one-shift offices eight (8) consecutive hours, exclusive of the meal hour, shall constitute a day's work; where two (2) or more shifts are worked, eight (8) consecutive hours shall constitute a day's work."

and working conditions of her employment and found there that the position of agent (SNT) at Alvarado was specifically covered with a negotiated rate of pay. She may have noted other provisions including one that she could not be dismissed from the service of the Carrier except after a formal investigation. (Article V). Yet, she had been deprived of her job and replaced by a younger employe (in point of service). She probably mused that it was strange when the agreement provided that it could not be changed except after due notice and in accordance with the provisions of the Railway Labor Act.

If these were her thoughts they are true and yet it did not impress the Referee rendering the decision herein. Attention is directed, however, to the similarity of the situation here with regard to depriving Mrs. Stewart of her right to work to that found in the United States Court of Appeals (Seventh Circuit) decision. (11) This referee thought well of that case and cited it in his Award 11293. In that court case the employe was laid-off by the Company simply because he had reached the age of 65. The collective bargain provided for seniority rights; it provided against dismissal except for cause. There was no mention of retirement in the agreement. In sustaining the award of damages to the employe, the court stated an elementary rule of law (12) which was quoted by this referee in the foregoing award.

The conclusion reached by the referee:

"We have construed the facts and expressly found that a substantial portion of the work of the involved positions had disappeared. The positions were abolished under circumstances disclosing an intent on the part of Carrier to permanently abolish them. Thus, it follows that the Carrier had the right to abolish the two positions."

not only is not supported in the record but is directly contrary to the facts stated by the Carrier and its position. This conclusion, when considered in the light of the actual facts, amounts to a collateral impeachment of the findings of the Railroad Commission of Texas that Public convenience and necessity require services of an agent at Alvarado for a minimum of three hours daily and at Joshua for a minimum of four hours daily. This referee has no authority to go behind the order of the Commission. He has no power or right to make a finding that the order of the Commission procured at the request of the Carrier was not bona fide and fully supported by evidence before the Commission.

Yet, this conclusion is made the basis for the finding that there is a factual distinction in the dispute involved in Award 556 and the present case. The referee holds that here the work had "disappeared" while in Award 556 the work "continued to exist."

The Carrier did not, in its two submissions to this Board, attempt any distinction between what was done in Award 556 and in the instant case. On Pages 7 and 8 of the Carriers second submission are found the only

(11) United Protective Workers vs. Ford Motor Company 223 F2d 49

(12) "The fundamental basis for an award for damages for a breach of contract is just compensation for those losses which necessarily flow from the breach. Compensation for breach of contract should place an injured party in the position such party would have been in had the contract been fully performed."

references to Award 556. These are shown in Footnotes 13 and 14. At Page 15 of Carrier Member's brief it was stated:

"Other awards, including Award 556, might not be distinguishable from the instant case, but a mere reading of those awards will show that they are void of any rule authority for the conclusions reached."

It seems rather strange, if not astounding, that the Referee could find a valid distinction in this case when the Carrier and its representative on this Board were unable to do so.

But, little need be said in regard to the unsupported conclusion:

"We find no provisions of the agreement which prohibit the Carrier from establishing a joint agency."

Precedents established over the years, and to which this Referee gives his assent, (16) negates such conclusion. This precedent was strong enough that the Referee, in Award 8211, rendered much later than Award 6944, adhered to the established interpretation. Awards 6944 and 6945 were pressed upon him without avail. The Referee in case of Special Board of Adjustment No. 372 rendered on the day of October, 1960 found:

"The Third Division N.R.A.B., has consistently interpreted agreements like that in effect between these parties, wherein positions have been established by negotiation, to obligate the Carrier, in eliminating or combining positions, to follow the established procedure for modification of the agreement except when such action is due to a substantial disappearance of the work and duties for which the position was created or to a substantial change in the service required since

(13) While the Employees have placed considerable emphasis on Third Division Awards 556 and 1302, which they contend constitute "an official interpretation of the applicable rules on this property," the decisions rendered in those Awards have been overturned or reversed by the Third Division in more recent Awards 6944 and 6945. It is thus evident that the pattern has not been set by Awards 556 and 1302, notwithstanding the Employees' allegation to the contrary.

"The effective date of the handling complained of in the dispute covered by Award No. 556 was July 27, 1932, and the effective date of the handling complained of in Award 1302 was April 30, 1938, almost twenty-five and twenty years, respectively, prior to the effective date of the handling complained of in the instant dispute. Conditions in general, particularly in the railroad industry, have changed considerably within the past twenty or twenty-five years. Many methods of handling and operating conditions which were considered sound and feasible in past years are no longer practical in the light of present-day competition and restrictions. This was recognized by the majority in Third Division Awards 6944 and 6945, when the decisions rendered in earlier Awards 556 and 1302 were reversed."

(14) "After giving due consideration to the foregoing, it should be apparent that the decisions rendered in Awards 556 and 1302, which have been reversed by more recent Awards 6944 and 6945, should not be considered in any manner as being applicable or controlling in the instant dispute."

(16) Awards 10679, 11140 and 11141.

the position was negotiated into the agreement. Awards 388, 434, 496, 556, 1521, 3659, 5384, 5507, 5641, 6451 and 8211."

Awards 6944 and 6945 were pressed upon him without avail.

Award 10950 is not in point. This is clear from the Findings of Fact made by the Referee in that case. (17) There the position had been abolished months prior to the origination of the claim. The claim arose only when an adjacent agent was required irregularly to accept bills of lading for cotton for one gin operator. The facts there more resemble the dispute that resulted in Award 5641. It is to be noted, however, that the agreement involved in Award 10950 did not contain a rule relative performance of clerical work at abolished stations as did the agreement involved in Award 5641. (See Page 493 Volume 54 Awards Third Division). That rule, for practical purposes, is identical with Article I, Section 2 of the Agreement in the instant case.

The Railway Labor Act prohibits any change in the collective bargaining agreement except in accordance with the provisions of Section 6. The Supreme Court in *Order of Railroad Telegraphers vs. Railway Express Agency* 321 US

(17) "The Board found as facts:

1. That Carrier was authorized by Georgia Public Service Commission to discontinue Agency service at Stephens, Georgia, on February 1, 1956.

2. That carrier closed the agency at Stephens on February 1, 1956, and abolished the Agent position there.

3. That the Order of the Commission 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. (Emphasis ours.)

4. That prior to 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. (Emphasis ours.)

5. That the arrangement for the Agent-telegrapher at Crawford to provide service at Stephens began on September 6, 1956 and continued through October, 1956.

From the foregoing Findings of Fact the Board stated the following Conclusion:

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 Public Service Commission'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."

342 has specifically held that this provision is applicable to the exceptional as well as the routine rates, rules and working conditions. (18)

One does not have to cite authority to show in this case that at Joshua there was a change in negotiated rate of pay and working conditions. The Carrier unilaterally, and without so much as an offer to confer, required the agent-telegrapher to furnish to the Carrier an automobile 5 days per week. The Carrier unilaterally fixed the allowance for the use of such automobile. Implicit in this requirement was making it a condition of continued employment as occupant of the position that the automobile be furnished on the terms granted by the Carrier and the occupant of the position hold a license from the state of Texas as operator of a motor vehicle.

It therefore begs the issue to ignore these facts which were inherent to the claim pending before this Referee.

CONCLUSION

This dissent is aimed not only to the erroneous decision, but also to the incorrect Findings of Fact and obvious errors in the conclusions based thereon. The award is not representative of the quality of decision expected from this Board. This is not to infer that other errors have not occurred in awards rendered over the years. It may be doubted, however, that any have been more glaring in utter disregard of the record, the positions of the parties and the agreement involved.

The United States Court of Appeals (Fifth Circuit) recently referred to this Board as possessing "awesome powers." (19). Specifically the Court was referring to the fact that when claims are denied, the claimant and the Organization are without further recourse. (20) The Referee here was made aware of the holdings of the Supreme Court in the Day and Price cases cited in Footnote 20. The Referee's attention after, his first proposed award, was called to the errors therein in a written memorandum. After issuance of his revised proposal, another memorandum was filed with him followed by oral presentation.

(18) "From the first the position of labor with reference to the wage structure of an industry has been much like that of the carriers about rate structures. It is insisted that exceptional situations often have an importance to the whole because they introduce competitions and discriminations that are upsetting to the entire structure. Hence effective collective bargaining has been generally conceded to include the exceptional as well as the routine rates, rules, and working conditions." (Emphasis ours.)

19. Hodges vs. Atlantic Coast Line 310 F.2d 438

20. "The dissenting opinions in the recent Day and Price cases, supra, 360 U.S. 548, 554, 79 S.Ct. 1322, 3 L. Ed. 2d 1422 and 360 U.S. 601, 617, 79 S.Ct. 1351, 3 L. Ed. 2d 1460, in pointing up the questions of constitutionality of the Act, emphasizes what is they describe as the one-sided nature of judicial review: the employe loses, he has no right of review whatsoever; the employe wins, the carrier loses, the carrier has unlimited review on facts and law. See also, cited therein, *Barnett v. Pennsylvania Reading Seashore Lines*, 3 Cir., 1957, 245 F.2d 579; and *Brotherhood of Ry. & Steamship Clerks v. Railway Express Agency*, 6 Cir., 1956, 238 F.2d 181."

This member was mildly rebuked by the Carrier Member handling this docket, for his persistence. Yet, when the shoe is on the other foot the same Carrier Member does not always enthusiastically accept the decisions of the same Referee. In Carrier Members dissent to Award 11295 (Moore) adopted on the same date and immediately following Award 11294, the same Carrier Member says:

"In view of these controlling authorities by experienced Referees, Award 11295 is a shameful exercise of authority."

Award 11294 is not a correct interpretation of the agreement involved based on the Findings shown in the record and prior interpretation thereof. It is at odds with the consistent interpretations by this Board of similar factual situations and agreement rules.

J. M. Willemin

Labor Member