Award No. 11511
Docket No. TE-10208

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Arthur Stark, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

NORFOLK SOUTHERN RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Norfolk Southern Railway that the Carrier violated the agreement between the parties when:

1. It improperly declared the position of agent at Bayboro, N. C., to be abolished effective December 31, 1956.

2. It improperly bulletined, under date of December 20, 1956, a position of agent at Bayboro-Grants, and improperly assigned Mr. L. H. Ballard to such position effective December 31, 1956.

3. It improperly suspended and continues to suspend Mr. L. H. Ballard from his agent's position at Bayboro in requiring him to perform service as agent at Grants beginning December 31, 1956.

That because of such violations, the Carrier shall be required to:

1. (a) Restore the agent's position at Bayboro to a minimum eight-hour daily basis as it existed prior to December 31, 1956.

2. (b) Annul or otherwise render void Bulletin No. 3842 and the assignments made thereunder.

3. (c) Compensate Mr. L. H. Ballard additionally for two hours and thirty minutes (2' 30") at straight time rate for each day he is required to perform additional service as agent at Grants; also, for any expense incurred for each day of such service.

EMPLOYES' STATEMENT OF FACTS: Bayboro, North Carolina, is located on the Carrier's Central District, on a branch line of track extending from Marsden, North Carolina, on the main line, to Bridgeton, North Carolina 29.6 miles, thence from Bridgeton to Bayboro for a distance of 15 miles. Carrier's main line traverses territory from Norfolk, Virginia to Charlotte, North Carolina, a distance of approximately 383 miles. Marsden is 130 miles out from Norfolk. The rough sketch below will serve to simplify the above description.

Respondent further assumes petitioners will contend that the carrier does not have the right to abolish a position shown in the wage scale without negotiation. In this instance, carrier points out that it has not abolished the position of agent at Bayboro; that position still exists, but it has been made a joint position so that the agent at Bayboro would have jurisdiction also over Grants. Grants, N. C., as hereinbefore stated, was a non-contract star non-telegraph agency, and was not listed in the wage scale. Respondent, however, points out that nowhere in the agreement can petitioners cite a rule that restricts the Management in abolishing positions when there is no longer any work for that position, and where the work has diminished to a point where it can be taken care of by another employe of the same class. (See Award 6944)

Respondent holds that the claim is entirely without contractural basis or merit, is based on fallacious premises, and should be denied, and we urge your Division to so hold.

All of the data contained herein has been made known to the petitioners, either by correspondence or in conference, and/or is known and available to them.

OPINION OF BOARD: Since 1921 Petitioner's Agreements with this Carrier have covered a position at Bayboro, North Carolina, on the Central District. From 1921 to 1942 this was an Agent's position; in 1942 it was reclassified to Agent (non-telegraph, non-telephone). In 1956, when the present grievance arose, Bayboro Agent L. H. Ballard received $296.50 per month; his hours of work were from 8:00 A. M. to 5:00 P. M., Monday-Friday, with a one hour lunch period.

About four miles from Bayboro lies Grants, another small town on the same branch line. Petitioner's Agreements have not covered a position at Grants although, until 1956, an agency position was maintained there.

Due to a marked decline in business (a hard-surfaced highway parallels the rail line between Bayboro and Grants) the Carrier, in August, 1956, sought permission from the North Carolina Utilities Commission to provide service at the two locations for only a portion of each day, thus allowing for the elimination of one agent (the remaining one to handle the two stations). On November 6, 1956 the Commission granted Carrier's request, noting, in part, that: (1) the volume of property handled did not warrant the full-time services of an agent at either location, and (2) convenience and necessity did not require the full-time services of an agent at either location. The Commission found that the following hours of service would be sufficient:

Bayboro — 8:00 A. M. to 11:45 A. M. and 3:45 P. M. to 5:00 P. M.

Grants — 1:00 P. M. to 3:30 P. M.

On December 20, 1956, Management bulletined a position of Agent at Bayboro-Grants, 8:00 A. M. to 5:00 P. M. with one hour for lunch, salary $296.50. Ballard, the incumbent at Bayboro, was the successful bidder and, on December 31, 1956, was placed in the new dual position. As a result, the former separate agent positions at the two locations were abolished.

On February 24, 1957, the Organization presented a claim on Ballard's behalf which was later declined and processed in accordance with the Agreement. It was submitted to this Board on February 25, 1958. The Organization argues that Carrier has abridged the Agreement in the following major respects:

1. It violated the Scope Rule (Article I) when it required Ballard to perform work at Grants which did not come under the Agreement.

2. It violated Article 2 (Basic Day) by reducing Ballard's basic day at a one-shift office to less than eight hours.

3. It violated Article 9 (Guarantee) by not paying Ballard a minimum day's pay for work performed in the Bayboro position.

4. It violated Article 11 (Suspension of Work) by suspending Ballard from his Bayboro position for 2½ hours each day (the time spent in Grants).

5. It violated Article 23 (Promotion) by removing Ballard from his regular assignment and bulletining his position out from under him when his qualifications were sufficient and his seniority prevailed.

6. It violated Article 35 (Change in Agreement) by changing rules, wages, and working conditions without conference or agreement and without following the requirements of the Railway Labor Act.

The Organization also contends that the Carrier, by its own actions, acknowledged the need to obtain ORT agreement before proceeding in the manner it did. It points to these facts: (1) in 1949 Management asked the Organization to discuss the "consolidation of certain non-telegraph offices; (2) At ensuing talks Management suggested consolidating Grants and Bayboro (among others) under one agent, providing a $215.00 monthly salary (the Bayboro Agent then received $199.92) and reimbursement for travel between stations; (3) When this proposal was rejected by the Organization, Carrier's representative stated that "if we cannot reach some satisfactory agreement there is no alternative except for me to move to discontinue several non-telegraph agencies and reclassify several telegraph agencies"; (4) In August, 1950, the Organization expressed its willingness to agree to changes at four existing stations, one of which was Bayboro-Grants; more specifically, "to continue the present non-telegraph agency at Bayboro, at a salary of $215.00 per month, the incumbent to handle the business at Grants, making such trips to Grants as might be necessary . . ."; (5) The ORT's proposals were not accepted since they included only two of Carrier's proposed consolidations; (6) Thereafter the matter was dropped until 1956, when Management turned to the Utilities Commission.

The Carrier denies that it was obligated to negotiate a modification of the Agreement or that its 1956 actions violated any contractual provision.

Insofar as can be determined, the situation giving rise to this controversy is not duplicated in any prior case submitted to this Division. The principal cases relied upon by Carrier (Awards 6944, 10950, 11294 among others) all concerned two positions covered by an Agreement, one of which was abolished when the work declined substantially, and the remaining work given to the employe at the other location. (The Board held, in these cases, that Management could eliminate a covered position listed in the schedule and assign work at two locations to a position listed in the schedule as covering only one location.) The cases cited by the Organization, in large part, also concerned two positions covered by an Agreement, one of which was dropped and the remaining work given to the employe at the second location (Awards 388, 3659, 5365, 5834 and others). In these cases the claims were sustained

on various grounds, including (1) The contract contained no provision for a "Joint-Agent"; (2) The contract contemplated retention of two regular positions even though full-time work was not available; (3) Management could not unilaterally abolish a contractual position when work remained and assign whatever work was left over to another employe.

In all these cases, it may be seen, Management's actions resulted in one less contract-covered position. But in the instant case, no such result followed Carrier's 1956 moves. Disregarding, for the moment, the procedure which was utilized, it is clear that the net effect of these procedures was to add to Agent Ballard's daily work assignment a 2½ hour stint at Grants, with the requisite round-trip between Bayboro and Grants. The contract contained no fewer positions in 1957 than in 1956 as a result of this additional assignment. Ballard's daily hours of work remained the same; he retained the same one-hour lunch period; he was not asked to perform duties not customarily performed by an Agent.

Under these circumstances, then, what damage was caused by Management's action? Certainly no work was removed from the Agreement. Quite the contrary, a little work was added. Was this a violation? We think not. There is nothing in the contract which prohibits Management from assigning additional tasks to an employe, tasks which fall within the purview of his craft and which can be comfortably performed within his scheduled work day. (Here, significantly, the record shows that in 1955 the actual work at Grants required about 40 minutes a day; at Bayboro, all business could be handled in less than 1½ hours per day. Of course, the time on duty, as required by the Utilities Commission, was more.)

There are several Awards, moreover, which hold it permissible for a Carrier to assign work to an employe at more than one location. Thus, in Award 10950 the Board noted, in part:

> "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. . . ."

In Award No. 39, Special Board of Adjustment No. 259 said:

> "There is no barrier by virtue of distance and amount of time involved which hinders the performance of the disputed work by the . . . Agent within his regularly assigned hours."

While these and other decisions (where, as a result of Management's actions, an employe was required to spend part of his work day at a second location) all concerned work at two contract-covered locations, we can find no persuasive reason for reaching a different conclusion just because the work at the second location was not hitherto covered. (In this regard it may be noted that we are not dealing here with a position outside the Agreement. The Grants position was no longer in existence when Ballard was assigned his daily 1½ hour chore there.)

What, then, of the procedure which was followed? Again, this case appears to differ from most of those where similar problems have been considered. In the cited disputes, the abolishment of a position led to the removal of an employe. Not so here, since Claimant Ballard remained at Bayboro and continued to perform work there. In most of the prior cases, moreover, the

position which remained was not reconstituted. The only change, from the viewpoint of the incumbent, was that some tasks at another location were added to his assignment. Here, the Carrier actually abolished the position where the bulk of the work remained; then it established a new position.

This procedure, in our opinion, was erroneous. While it is true that only about 1½ hours per day of actual work remained at Bayboro, the Utilities Commission required that agency to be open five hours a day. Under the circumstances, the many awards which state that a position may not be abolished when the work remains are controlling.

What, then, should be the remedy? Ballard might have lost his job (since he had to bid on a newly-bulletined position to which, conceivably, a more senior man could have been appointed). But he did not. As already noted, he lost no time and no pay. He has been compensated for expenses incurred in going from Bayboro to Grants. There is thus no warrant for giving him an additional 2½ hours' pay for each day. (In this regard it may be noted that, in most cases where the Organization's position was sustained, claimants were men who actually lost compensation and were deprived of work as a result of Management's actions. In Award 3859, interestingly, the monetary claim by the Agent who had been required to perform some work at another location was denied.)

In view of these considerations it is unnecessary to rule on the significance of the 1949-50 discussions, although it seems unlikely that Carrier's effort to resolve rather extensive problems covering many locations can be considered determinative of an obligation to obtain Organization consent before proceeding in a certain way at one location where some unusual circumstances prevailed.

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 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 by following the wrong procedure (abolishing one position and establishing another) in assigning additional work to the Agent at Bayboro.

AWARD

The Organization's claims respecting the abolishment of one and bulletining of another position at Bayboro are sustained. All other claims are denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 14th day of June 1963.

SPECIAL CONCURRENCE TO AWARD NO. 11511

We concur in this Award insofar as it follows Award 10950 and otherwise denies all monetary features of the claim, but we do not agree that the procedure followed by the Carrier was either erroneous or in violation of the Agreement. No rule in the Agreement prohibited the action taken by the Carrier and as both the abolishment and bulletining were carried out in conformity with the applicable rules, the Carrier in no manner violated the Agreement.

P. C. Carter
W. H. Castle
D. S. Dugan
T. F. Strunck
G. C. White

DISSENT TO AWARD 11511, DOCKET TE-10208

It appears to me that the Referee, in attempting to accommodate his thinking to a considerable number of more or less inconsistent awards dealing with other issues on other railroads rather than applying the tenets of logic and rules of contract construction to the facts of this record and the parties' agreement, has produced an award with which no one is pleased.

The Carrier Members joined with the Referee in adopting the award, but their approval was less than enthusiastic as shown by their so-called "Special Concurrence."

The record before us, as well as the clear statement of its position by the Carrier in Docket TE-8453, leaves no doubt that these parties treat the work and positions not specifically covered by their agreement as agreed to exclusions therefrom. It follows that the only valid method of bringing such excluded work or positions within the scope of the agreement is by negotiation.

This view is positively supported by the facts surrounding inclusion of those positions and their work comprising what is known as the "Beach District," the subject of the above-mentioned Docket TE-8453. The parties did exactly what the Carrier contended had to be done to bring the work within the scope of the Agreement — they negotiated the work and positions into the Agreement and then withdrew the dispute from the Board. All of this was brought to the attention of the Referee, but apparently was ignored.

The work and position of the agency at Grants was — and still is, in my opinion — in the same relative position as the "Beach District" prior to its inclusion by agreement within the coverage of the parties' schedule.

Further support for my view lies in Award 11435 where the Board found, in a dispute involving these same parties, as an admitted or uncontroverted fact, that:

> "Addenda to the Agreement establishes that it has historically been the practice to make changes in positions at the Stations listed in and covered by the Agreement by negotiations and supplementary agreements."

But in Award 11511 this all-important factor is brushed aside with an observation that it does not merit consideration. Such inconsistency can only

have the opposite effect from that intended by Congress when this Board was created.

It should be noted, however, that Award 11511 is in agreement with Award 11435 on the proposition that Carrier's action of abolishing a position that is covered by the Agreement for the purpose of adding work that is not included therein is contrary to the Agreement.

It follows that in complying with this award the Carrier must undo what was improperly done. It must restore the status quo ante. And where does that leave us? Exactly where we were before — a situation requiring negotiation to accomplish what the Carrier desires.

Obviously, Award 11511 is not only largely erroneous but is so contradictory in its overall effect that it can be intelligently considered only as a nullity, leaving the dispute unsolved, and the parties still with an admitted obligation to negotiate.

For the reasons stated and to the extent indicated I hereby register dissent.

J. W. Whitehouse
Labor Member

CARRIER MEMBERS' REPLY TO DISSENT TO AWARD 11511, DOCKET TE-10208

The greater portion of the dissent is taken up with rehashing arguments presented by the Dissenter which were found to be lacking in merit. No useful purpose can be served in further arguing issues that have been decided.

However, in the ninth and tenth paragraphs, by the use of false logic, the Dissenter erroneously concludes that further action by the Carrier may be necessary to comply with the Award. Nothing in the Award requires the Carrier to "restore the status quo ante" or requires further negotiation to accomplish what was done. While the Award erroneously held, hence our special concurrence, that the procedure used by the Carrier was erroneous, under the circumstances no damage resulted to the Claimant so that in essence the procedure followed by the Carrier was one of form and not substance. If the Dissenter had thoroughly read the Award he would have found without too much trouble that the Award very clearly upheld the Carrier in assigning the work it did to the Agent at Bayboro.

P. C. Carter
D. S. Dugan
W. H. Castle
T. F. Strunck
G. C. White