

Award No. 11901

Docket No. TE-10348

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Levi M. Hall, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

GREAT NORTHERN RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Great Northern Railway that the Carrier violated the Agreement between the parties when on April 19, 1957, it:

1. Declared abolished the four positions of agent-telegrapher at Hogeland - Turner - Loring and Whitewater when the work of these four stations continued to exist, and
2. The Carrier violated the Agreement between the parties when it bulletined as vacancies the four positions named in paragraph 1 on a consolidated basis, consolidating the positions at Hogeland and Turner into one position for one employe, and consolidating the positions at Loring and Whitewater into one position for one employe, requiring part time service at each of the four points, when in fact no vacancies existed within the meaning of the rules of the Agreement, and
3. The Carrier shall restore the four named stations to the status existing prior to the violation of the Carrier in declaring them abolished, and
4. The Carrier shall restore the four occupants of the respective positions to their positions from which they were improperly removed, and
5. These four employes, Mrs. Agnes A. Fortin, Hogeland - Edw. R. Fortin, Turner - R. D. Brandt, Whitewater - C. L. Thornton, Loring - shall be compensated in full by the Carrier in accordance with all applicable rules of the Agreement as pertains to this violation of the Agreement by the Carrier, and
6. All employes other than those herein named (to be ascertained by a joint check of the Carrier records as to individual names, displacement exercised) who are adversely affected by losing an as-

signed position, or otherwise, shall likewise be restored to their former status and compensated in full by the Carrier in accordance with all applicable rules of the Agreement as pertains to the violations of the Agreement by the Carrier.

EMPLOYES' STATEMENT OF FACTS: There is in full force and effect a collective bargaining agreement entered into by and between Great Northern Railway Company, hereinafter referred to as Carrier or Management, and The Order of Railroad Telegraphers, hereinafter referred to as Employees or Telegraphers. The Agreement was effective September 1, 1949 and by reference, the Agreement is 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 disputes and failed of adjustment. Under the provisions of the Railway Labor Act, as amended, this Board has jurisdiction of the parties and the subject matter.

1. On February 18, 1957, Mr. H. J. Surles, Superintendent of Carrier at Great Falls, Montana, wrote Mr. B. R. Moore, Local Chairman, The Order of Railroad Telegraphers at Boulder, Montana, as follows:

"Wish you would give the following your consideration:

We propose to abolish positions of agents at Hogeland, Turner, Loring and Whitewater, and re-establish these agencies as follows:

HOGELAND: Agt.-Telegr. 8 A. M. to 5 P. M.

5 days per week	Daily except holidays. Rest days Sat. & Sun., working 8 A. M. to 11 A. M. at Hogeland, 1 P. M. to 4 P. M. at Turner. One hour off for lunch. Allowing one hour travel time. Rate of pay \$2.18 per hour. Car mileage \$.07 per mile.
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LORING: Agt.-Telegr. 8 A. M. to 5 P. M.

5 days per week	Daily except holidays. Rest days Sat. & Sun., working 8 A. M. to 11 A. M. at Loring, 1 P. M. to 3:30 P. M. at Whitewater. One hour off for lunch. Allowing one hour 30 minutes travel time. Rate of pay \$2.18 per hour. Car mileage \$.07 per mile."
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2. On February 20, 1957, Mr. Moore responded to Superintendent Surles as follows:

"Your letter of the 18th re radical changes for the stations of Hogeland-Turner and Loring-Whitewater received.

In as much as this proposed change is not in accordance with any past practice nor does it agree with my interpretation of our agreement I would not be in a position to either agree or disagree with such change.

All of the evidence and data contained herein has been presented to the duly authorized representatives of the employees.

(Exhibits not reproduced.)

OPINION OF BOARD: It is quite important in the consideration of this controversy to set out chronologically the undisputed facts:

1. Prior to February 18, 1957, there were four agent-telegrapher positions at Hogeland, Turner, Loring and Whitewater in the State of Montana owned by the following employees — Mrs. Agnes A. Fortin, Hogeland — Edw. R. Fortin, Turner — R. D. Brandt, Whitewater — C. L. Thornton, Loring.
2. On February 18, 1957, the Carrier's Superintendent at Great Falls, Montana, wrote the Local Chairman asking him to give consideration to a proposal that the positions at the four locations mentioned heretofore be abolished and that agencies be re-established at Hogeland (working 8:00 A.M. to 11:00 A.M. at Hogeland, 1:00 P.M. to 4:00 P.M. at Turner) and at Loring (working 8:00 A.M. to 11:00 A.M. at Loring, 1:00 P.M. to 3:30 P.M. at Whitewater).
3. On February 20, 1957, the Local Chairman responded to the Superintendent's communication, indicating that (in his opinion) the proposed change was not in accordance with any past practice and did not agree with his interpretation of the agreement. He also stated that he would not be in a position to either agree or disagree with such a change and suggested that he send his request to the General Chairman for his position in the matter.
4. Under date of April 11, 1957, without further consultation with the representatives of the employees, the Superintendent directed the following communication to the agents at Hogeland, Turner, Whitewater and Loring:

"Effective April 19, present assignments of Agents: Hogeland, Turner, Whitewater, Loring are abolished. Incumbents may exercise seniority according to Telegraphers' Schedule.

Effective April 22, Agent's position Hogeland will be established as follows:

8 A.M. to 5 P.M., one hour off for lunch, daily except rest days, Saturday and Sunday and Holidays, working as follows:

Hogeland 8 A.M. to 11 A.M., Turner 1 P.M. to 4 P.M., rate of pay \$2.18 per hour, car mileage \$.07 per mile.

Effective April 22, Agent's position Loring will be established 8 A.M. to 5 P.M., 1 hour off for lunch, daily except rest days, Saturday and Sunday and Holidays, working as follows:

Loring 8 A.M. to 11 A.M., Whitewater 1 P.M. to 4 P.M., rate of pay \$2.18 per hour, car mileage \$.07 per mile."
5. On April 19, 1957, the General Chairman directed a letter to the Assistant to the President, protesting that no attempt has been made on the part of the Carrier to discuss this matter with him nor had he received any notification from the Carrier of its desire to change or modify the agreement of September 1, 1949.

6. On May 10, 1957, the Superintendent issued the following bulletin:

"Great Falls, Montana
May 10th, 1957

"AGENT AND TELEGRAPHERS
NOTICE NO. 5

* * * * *

"PERMANENT VACANCIES

* * * * *

"Hogeland-Turner
(Consolidated)

Agent-Telegrapher
Must be telegrapher

8:00 A.M. to 5:00
P.M. Daily except
Holidays. Rest Days
Sat and Sun. One hr.
off for lunch. Work-
ing as follows. Hoge-
land 8:00 to 11:00
A.M. Turner 1:00
P.M. to 4:00 P.M.
Allowed one hr. travel
time Hogeland to Tur-
ner and one hr. travel
time Turner to Hoge-
land. Rate \$2.21

"Loring-Whitewater
Consolidated

Agent-Telegrapher
Must be telegrapher

8:00 A.M. to 5:00
P.M. Daily except
Holidays. Rest days
Sat. and Sun. One hr.
off for lunch Working
as follows: Loring 8
A.M. to 11 A.M.
Whitewater 1 P.M. to
4 P.M. Allowed 1 hr.
travel time Loring to
Whitewater and 1 hr.
travel time White-
water to Loring Rate
\$2.21.

* * * * *

"H. J. Surles,
Superintendent"

7. On May 21, 1957, the consolidated positions were assigned in accordance with the bulletin.

8. On May 23, 1957, the Board of Railroad Commissioners of the State of Montana gave notice that a public protest had been filed against the curtailing of the service at the four stations and that a public hearing on the protest was set for June 24, 1957.

9. On August 26, 1957, the Commissioners filed Order No. 2669 in which the Carrier was authorized to maintain the curtailed services in respect to

the station and agent's hours at Hogeland, Turner, Loring and Whitewater that it maintained subsequent to April 22, 1957, from March 2 to August 31 of each year.

It was further ordered that during the remaining portion of the year, or years, from September 1 to March 1, inclusive, the Carrier should provide service to the public at these stations and at the agent's hours which it maintained prior to April 22, 1957; the order to be effective as of September 16, 1957.

10. The positions of agent-telegrapher at Hogeland, Turner, Loring and Whitewater were re-established and the consolidated agencies abolished by a letter from the Chief Train Dispatcher to the Local Chairman on September 9, 1957. (The positions were later bulletined in accordance with the rules.

The position of the Petitioner in the instant case is, as follows:

"The basic question involved in this dispute is whether the Carrier violated the collective bargaining agreement in declaring abolished the four positions of agent-telegrapher at Hogeland, Turner, Loring and Whitewater, effective April 22, 1957."

Carrier states the controlling question to be:

"I. The primary issue in this case is whether or not Carrier violated some specific agreement rule when it abolished the four agent-telegraphers' positions at Hogeland, Turner, Loring and Whitewater and established in their stead one position of agent-telegrapher to cover Hogeland and Turner, and one position of agent-telegrapher to cover Loring and Whitewater."

It must be conceded that prior awards have held that "it is not only the right but the duty of Management to operate a railroad efficiently and economically; it must be conceded also that under certain circumstances the Carrier has the right to abolish a position," nor is there anything in this agreement which would prevent the consolidation of stations by the Carrier under certain facts and circumstances.

However, in the determination of the issues presented in this controversy we must take into account this entire agreement, effective September 1, 1949, and the rights the employes have under the agreement.

Rule 1 provides:

"This agreement will govern the employment, working conditions and compensation of all * * * Agent-Telegraphers, * * * and all others named in the wage scale, including clerical work ordinarily performed in conjunction with their other duties."

Rule 33 provides:

"BUTTE DIVISION [Page 76]

"Location	Occupation	Hourly Rate
Whitewater	Agent-Telegrapher	\$1.61
Loring	Agent-Telegrapher	1.61
Turner	Agent-Telegrapher	1.61*
Hogeland	Agent-Telegrapher	1.64*

"*The Negotiated hourly rate as of April 22, 1957, was \$2.15 per hour.

**The Negotiated hourly rate as of April 22, 1957, was \$2.18 per hour."

There is no question but that under the rules the agent-telegraphers occupying positions at these four stations had proper seniority, had properly bid for and been assigned to these locations. It cannot be denied that each of the positions involved in this dispute was separately and individually listed in the agreement under Rule 33. The principal question is whether under the agreement, taken as a whole, the parties intended that the employees should have any possessive rights to the positions shown in the schedule to which they were assigned.

It is our Opinion that under Rule 1, the employees coming within that rule held positions listed in the schedule, Rule 33, and that such positions were protected by the seniority rules of the agreement. We do not hold there is a guarantee of positions. There is nothing in the agreement which prevents the Carrier from abolishing positions when no work or a minimal amount of work remains to be done in the position. So long as there is a substantial amount of work to be performed in the position, the seniority rights of an employee attaches to that work. Seniority rights may not be destroyed unilaterally. See Award 5384 — Elson.

So we come now to the question of the application of the foregoing declaration to the facts in this case. Carrier contends that even during the busiest season, the work at these four stations occupied only a small fraction of the agent's time, that a study showed that the work performed by these four agents could be accomplished by two agents working part time at two stations.

It is of some significance that no application was made by the Carrier to the Board of Railroad Commissioners to abolish any of these stations. It cannot be questioned that there was work remaining at all of these stations and none of the stations were closed. What Carrier apparently was attempting to do was to curtail the service at these stations and reduce its forces. We appreciate that the Board of Railroad Commissioners has nothing to do with the working agreement between Carrier and its employees but there were certain findings of fact at the hearings held which might be helpful to us in our evaluation of the facts. (Both Carrier and Petitioner have included transcripts of the proceedings in their respective submissions.) In a "Discussion of Evidence" on a review of the facts presented, the Commissioners made the following observation: "The evidence produced by the Railway regarding the small amount of hours required to do the work at the various stations is somewhat unrealistic."

"Furthermore, it is difficult to ascertain whether there is an out-of-pocket loss sustained by the Railway in the operation of the four stations since figures were not supplied showing the revenue produced by each station and the actual expenses of each station's operation."

The fact that the Commissioners authorized Carrier to maintain the curtailed service on the same basis as the service maintained subsequent to April 22, 1957, from March 2 to August 31, and ordered 8 hour station service at these same stations from September 1 through March 1, when taken into consideration with the Commissioners' "Discussion of Evidence" and other factors presented in the Record would indicate that there was a substantial amount of work remaining at these stations after Carrier attempted to abolish the assignments of the four agent-telegraphers. Obviously, the manner in which the directive of the Commissioners should be carried out was to be determined in conformity with the agreement between the parties. Under all of the facts and circumstances of this case, we feel the agreement has been violated and

the seniority rights of the Claimants under this agreement were taken away from them unilaterally. If there is to be a curtailment of services and a consolidation of stations or positions the manner in which it is to be accomplished is by negotiation between the parties in this instant case.

The four positions of agent-telegrapher at the stations involved having been restored, the questions presented by paragraphs 3 and 4 are moot and need be given no further consideration.

We come now to a consideration as to what damages should be allowed Claimants under paragraph 5 of the Statement of Claim. For the breach of a contract or agreement, the one who is responsible for the breach is liable only for consequences which are reasonably foreseeable at the time when it was entered into, as probable if the contract were broken. Applying this rule, we are of the opinion that each of these four Claimants is entitled to any loss of earnings that may have resulted from the attempted abolishment of the positions; furthermore it must have been anticipated that when as a result of the discontinuance of their positions and in the exercise of their seniority they were required to work away from their home stations they would be entitled to a mileage allowance at the rate of 7 cents a mile to and from their home stations and the station to which they were assigned and return which can be determined on the property. (We have arbitrarily set the rate at 7 cents a mile as that appears to be, from the Record, an acceptable allowance).

With relation to paragraph 6 of the Statement of Claim, an objection was made by the Carrier to a consideration of this issue before this Board on the ground that the Claimants have not been properly identified. As this objection was not raised on the property it cannot be considered by us now. It appears that as the ultimate result of Carrier's action in violating the agreement two of its employees were deprived of their positions by the exercise of seniority rights by those occupying the allegedly abolished positions. These employees should be compensated at the pro rata rate for 8 hours for each day that such employee was idle to be determined by a check of the Carrier's records.

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 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 has been violated.

AWARD

Paragraph 1 — Claim sustained.

Paragraph 2 — Claim sustained.

Paragraph 3 — Moot (See Opinion)

Paragraph 4 — Moot (See Opinion)

Paragraph 5 — Claim sustained in accordance with the Opinion.

Paragraph 6 — Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 20th day of November 1963.

**CARRIER MEMBERS' DISSENT TO AWARD 11901
DOCKET TE-10348**

This award correctly indicates that it is not only the right but the duty of Management to operate a railroad efficiently and economically. Such a holding is entirely consistent with many prior awards—see Award 11776, with Referee Hall participating, in which the Board said:

“Carrier had the privilege of conducting its business in the manner prescribed by good business practices unless it has limited itself by Agreement or otherwise.”

After specifically stating that the award does not hold there is a guarantee of positions, and recognizing the right of the Carrier to operate its property, the award then proceeds to place limitations on that right, despite the fact the Agreement contains no such limitations.

It is a well-settled principle that the freedom of action of a Carrier is restricted only by law or by the terms of an effective Agreement. The conclusion in the award that changes made by the Carrier in the instant dispute must be accomplished by negotiation between the parties is not supported by the record. The conclusion that there is nothing in the Agreement which would prevent the consolidation of stations should not have been qualified by the words, “under certain facts and circumstances.” In the absence of any statutory requirement or rule of the agreement precluding it, and in the absence of any rule requiring negotiation, there was no prohibition against the action taken by Carrier in this case.

Moreover, even if the controlling Agreement had restricted Carrier from abolishing positions listed in the Agreement where a substantial amount of work remained, the award would still have been in error in ruling that a substantial amount of work remained in this case. The evidence does not support such a ruling.

We have no quarrel with the general proposition that a Carrier may not unilaterally destroy seniority rights of its employees, but it is not pertinent in this case. The employees' argument that Claimants' seniority rights were violated was based on the erroneous premise that Carrier was precluded by the Agreement from abolishing the positions which Claimants held. The Agreement, properly construed, did not preclude abolishment of the positions.

The provision in the award for the allowance of automobile mileage would have been improper even if the claim had otherwise been valid.

We dissent.

G. L. Naylor
W. M. Roberts
R. E. Black
W. F. Euker
R. A. DeRossett