

Award No. 13074
Docket No. TE-12227

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Daniel House, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY
(Western Lines)

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on The Atchison, Topeka & Santa Fe Railway, that:

1. The Carrier violated the terms of the Agreement between the parties when, on May 31, 1959, it unilaterally declared abolished the position of first trick telegrapher-clerk at Syracuse, Kansas, and assigned the work of this position to the reclassified position of Agent-telegrapher and to a newly established clerical position not covered by the Telegraphers' Agreement.

2. The position of the first trick telegrapher-clerk at Syracuse, Kansas, shall be restored and the work thereof returned to the Agreement.

3. Carrier shall now be required to compensate R. C. Carroll for 8 hours' pay at the rate of the first trick telegrapher-clerk position at Syracuse each work day in addition to pay at the time and one-half rate for work performed outside the assigned hours of the first trick telegrapher-clerk position at Syracuse; and pay J. L. Lewis on basis of 8 hours at the rate of the third trick telegrapher-clerk position at Syracuse each work day in addition to pay at the time and one-half rate for work performed outside the assigned hours of the third trick telegrapher-clerk position at Syracuse plus actual expenses incurred on each day he is required to work at a station other than Syracuse; and further pay R. L. Maddux for 8 hours' pay at the rate of the second trick telegrapher position at Lakin, Kansas, each work day in addition to pay at the time and one-half rate for work performed outside the assigned hours of the second trick telegrapher position at Lakin, Kansas, plus actual expenses incurred on each day he is required to work at a station other than Lakin, Kansas.

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

individual who could have possibly been adversely affected thereby, and would, moreover, under repeated awards of the Third Division only be entitled to any loss in compensation he may have suffered by reason thereof, and which the Board held in its Award Nos. 6701, 7309, 8673 and 8674 was the proper measure of penalty compensation to be assessed for an agreement violation.

Since the Employees have not in their handling of the instant dispute with the Carrier advanced the specific contention that the seniority displacements that occurred following the abolishment of Telegrapher Position No. 6325 were violative of the displacement rules of the Telegraphers' Agreement, and the Carrier asserts that those displacements were in conformity with the agreement rules, it is obvious that the excessive penalties claimed in behalf of Messrs. Carroll, Lewis and Maddux is an attempt by the Petitioner to pyramid the penalties claimed and have the Board levy a fine against the Carrier, which the Third Division held in its Award No. 3651 it had no authority to do in the absence of a rule so providing.

Moreover, the penalty of "8 hours' pay" in addition to "pay at the time and one-half rate for work performed outside the assigned hours * * *", etc., claimed in Item (3) of the Employees' claim is an obvious attempt to assess the Carrier with a double penalty under two or more agreement rules for the same alleged violation.

In its Award No. 8004 the Third Division denied a claim in behalf of a second employe who was, like the claimants referred to in Item (3) of the Petitioner's claim in the instant dispute, alleged to have been adversely affected by the handling which gave rise to the claim and held that it constituted a claim for a double or pyramided penalty. See also Second Division Award No. 2222.

The Third Division has also consistently held that penalties may not be pyramided and claimed under two or more agreement rules for the purpose of assessing the carrier with double penalties for the same alleged violation. (Awards Nos. 3146, 4710, 5333, 5652, 6021, 8004 and others.)

Attention is next directed to the Petitioner's claim for "actual expenses incurred" in behalf of Messrs. Lewis and Maddux in Item (3) thereof in disregard of the Third Division's denial of similar claims for expenses incurred by reason of the alleged wrongful displacement of the claimants in Awards Nos. 2029, 4431 and 6024. See also Awards No. 1 of Special Board of Adjustment No. 305 and No. 46 of Special Board of Adjustment No. 29.

In conclusion, the Carrier respectfully asserts that the Employees have, in their presentation and handling of the instant claim on the property, failed to meet their burden of proof of an agreement violation and it is wholly without support under the agreement rules and should be either dismissed or denied for the reasons previously set forth herein.

OPINION OF BOARD: This claim arises out of the Carrier's reassignment of work at its Syracuse, Kansas, station. Effective on June 1, 1959, the Carrier:

1. Reclassified the Agent to Agent-Telegrapher and assigned the incumbent the telegraphing and other communications work on the first trick, changing his hours from 8:00 A.M. to 5:00 P.M. to 7:30 A.M. to 3:30 P.M.;

2. Abolished the first trick (7:30 A. M. to 3:30 P. M.) Telegrapher-Clerk position; and

3. Established a Cashier-Clerk position 8:00 A. M. to 5:00 P. M., not covered by the Telegrapher's Agreement, and assigned to it clerical duties formerly performed by the Agent and by the first trick Telegrapher-Clerk.

As a consequence of these actions by the Carrier, the occupant of the abolished first trick Telegrapher-Clerk position, Carroll, displaced Lewis, the third trick Telegrapher-Clerk; he, in turn, displaced Maddux, the second trick Telegrapher-Clerk at Lakin, Kansas; as a result, Maddux went on the extra board.

The Carrier raises a question of the jurisdiction of the Board because of lack of notice of pendency of the instant dispute to the Clerks' Organization. This contention is without merit because notice prescribed in Section 3, First (j) of the amended Railway Labor Act was given.

The Organization contends that the position of first trick Telegraph-Clerk was not properly abolished; that until the position is restored damages have accrued and will continue to accrue to the three Claimants; and that this Board should therefore award as requested in the claim.

Carrier contends that it "adjusted its station force to afford the most practical and economical operation" and in so doing it violated no rule in the Telegraphers' Agreement.

The Carrier argues: that the reclassification of the Agent created a situation in which the work of the first trick Telegrapher-Clerk (insofar as it belonged exclusively to the Telegraphers) was totally eliminated; that the Organization did not protest this reclassification; and that the abolishing of the Telegrapher-Clerk position was proper.

It would be equally valid to read the sequence of events with the abolition of the Telegrapher-Clerk position first, leaving the telegraph work of the first trick to be done, thus requiring reclassification and change in assignment of the Agent. But the cause and effect relationship is not correctly stated either way: the record shows that the changes were intended by the Carrier to be simultaneous, and they were. The record further shows that neither the payroll nor the work of the Syracuse facility changed in any substantial respect after the adjustment of the force, which Carrier stated was undertaken to "afford the most practical and economical operation." All that happened was that one position covered by the Telegraphers was abolished, and one position not covered by the Telegraphers was added and the same work continued to be done.

The issue here does not turn, as suggested by the Carrier, on whether all clerical work belongs exclusively to the Telegraphers in those places where there is a Telegrapher who does some clerical work. The issue here turns on whether the clerical work assigned to the cashier at this station belongs to the Telegraphers.

Considering the Scope Rule, which lists the four Telegrapher positions at this station, together with the clear long time practice of the Telegraphers doing this clerical work up to their capacity to perform it, it is the opinion of this Board that the clerical work at this station does belong exclusively

to the Telegraphers up to their capacity to perform it with the crew bargained into the Scope Rule; and may not unilaterally be taken from the coverage of the Agreement and assigned outside that coverage. In Award 5014, where the factual situation tended more to support the Carrier's contention than the facts here, but in which the facts were basically similar, we said: "... as between a telegrapher-clerk position to which clerical duties were originally assigned and a clerk's position to which a portion of such duties were subsequently assigned, the telegrapher has the right to the position, including the assumption of its remaining clerical duties when it becomes necessary to abolish one or the other of the two positions . . ." (note that this choice could exist only when no communications work remained for the Telegrapher).

Put another way, the question here is whether or not, in the absence of compelling reasons, the Carrier may "by slight shift of the duties involved, arbitrarily abolish a position existing for many years under the Telegraphers' Agreement, and create a new position under the Clerks' Agreement to take over its work." (Award 4734)

Our answer here, as it was there, is "No!"

Organization's Claim No. 2, requests that the abolished job be restored and that the work thereof be returned to the Agreement. For the same reasons we gave in Award 11489, among many others, we will not order the restoration of the job: after the time lapse we cannot dictate just how best to restore the work of the job to the coverage of the Agreement; the parties can best determine this. Therefore we will sustain that portion of Claim No. 2 that requests that the work removed from the coverage of the Agreement be restored thereto.

Since the Claimants listed in Claim No. 3 include only those who suffered damages clearly as a consequence of the Carrier's breach of the Agreement (clearly, that is, so that there need be no speculation as to the cause and effect relationship of the breach to the injury to each individual named) we will sustain Claim No. 3 with the modifications as to computing damages set forth below.

Organization sets up a basis for computing damages with which this Board cannot agree. Absent any showing that the added expenses to a Claimant are such as Carrier is required to pay under a specific and applicable Rule, such expense cannot be awarded as part of damages. It is well established that the amount of damages in cases such as this one is the amount needed to make an employe whole for the wage loss he suffered as a consequence of the breach of Agreement. The amount may easily be determined on the property from Carrier records and simple computation by subtracting from the amount each Claimant would have earned had the change in status resulting from the breach of Agreement not taken place, the amount he did earn, all for a period beginning with the changed work status and ending with the restoration of the work to 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 Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was violated.

AWARD

Claim No. 1 sustained.

Claim No. 2 denied in part and sustained in part as indicated in Opinion above.

Claim No. 3 denied in part and sustained in part as indicated in Opinion above.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION**

**ATTEST: S. H. Schulty
Executive Secretary**

Dated at Chicago, Illinois, this 18th day of November 1964.

**CARRIER MEMBERS' DISSENT TO AWARD 13074,
DOCKET TE-12227 (Referee House)**

Carrier properly reassigned all of the train order and communication work from the abolished position to the agent-telegrapher. The remaining clerical duties were assigned to a clerk in accordance with Award 615, among many others, including Awards 5 and 6 of Special Board of Adjustment No. 174 involving disputes on this railroad.

The majority completely ignores the precedent awards supporting the proposition that under a general scope rule having system-wide coverage, as here, the organization must prove by competent evidence that the disputed work has historically, traditionally and customarily been exclusively performed by the claiming class of employees throughout the carrier's system. No such proof was offered in this case.

Both Awards 4734 and 5014 are distinguishable. Award 5014 cited by the majority in support of this decision is based squarely on distinguishable facts that

"the carrier took telegraphic work clearly within the scope rule . . . and assigned it to employees of another railroad. . . ."

Absent the telegraphic duties assigned to employees of another carrier, the facts, which included the reassignment of telegraphic work to members of the same craft, as in Award 13074, would have dictated a denial under the reasoning included in the last paragraph of the opinion in Award 5014.

For these and other reasons, we dissent.

**W. M. Roberts
G. L. Naylor
W. F. Euker
R. A. DeRossett
C. H. Manoogian**