Award No. 16077
Docket No. TE-14715

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Nathan Engelstein, Referee

PARTIES TO DISPUTE:

TRANSPORTATION-COMMUNICATION EMPLOYEES UNION
(Formerly The Order of Railroad Telegraphers)

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

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

1. Carrier violated the Agreement when it declared abolished the four Telegrapher-printer-clerk positions at the Bowl Telegraph Office, Argentine, Kansas, effective March 6, 1962, when the duties and work thereof, in fact, continued to exist, and under the guise of abolishment transferred the duties of the four positions to employes of other crafts or to other seniority districts.

2. Carrier shall now restore the duties and work thereof to the scope of the Telegraphers' Agreement, and

3. For each and every day the violation continues to exist, the Carrier shall, effective March 26, 1962, compensate the following named employes whose positions were abolished in the amount of eight (8) hours' pay at the rate of their respective positions in the Bowl Telegraph Office: J. N. Robinson, J. R. Clark, J. L. Chambers, J. W. Walker.

4. Carrier shall further compensate all other employes adversely affected in the same manner as a result of their being displaced as a result of the alleged abolishment.

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

On page 65 of the printed Agreement we find:

"Argentine, AB...Telegrapher-Printer-Clerk..(3)..(L)... 1.765"

At the time the Agreement was made effective, there were employed three telegrapher-printer-clerks around-the-clock, in addition to a relief telegrapher-printer-clerk at Carrier's Argentine AB telegraph office, commonly known and hereinafter made refcrence to as the "Bowl."

that has been negotiated into the Agreement and assign the duties to another employe, even though the other employe is also covered by the Agreement. See Awards 3686, 3738, 4932, 5396, 5431, 5895 and numerous others of the Third Division.

It has also been held by the Board that the Carrier is not permitted to do piecemeal what it has agreed not to do as a whole. See Award 5100.

It has also been stated by the Third Division that a competent and fully qualified organization cannot be maintained if various little parts of its work are to be chiseled off and given to other crafts. See Awards 1501, 3684, 3688 and 9100.

This is to advise that your decision is not satisfactory, and the case will be appropriately appealed to the Third Division for a final determination.

Yours truly,

/s/ R. O. Norton
General Chairman"

(Exhibits not reproduced.)

OPINION OF BOARD: In 1949 new yard facilities were constructed at Argentine, Kansas, to expedite the switching and handling of trains on the Kansas City Terminal Division. The new facilities included a three-story building which was called the Bowl Yard office. On the first floor the Bowl Telegraph office was established to handle train orders and clearance cards for all eastbound trains and to operate interlocking equipment in the telegraph office in order to control crossovers. This office also performed duties formerly handled by telegraph service employes in the Relay Telegraph office located in the old yard office. Because the Relay and Bowl offices were in different seniority districts, the parties agreed to permit the work and three Morse printer clerks from the Relay office to transfer to the newly established Bowl Yard office.

On March 6, 1962 Carrier abolished four Telegrapher-printer-clerk positions at the Bowl Yard office and reassigned the remaining work. From this action the instant dispute arose.

The General Committee contends that Carrier violated the Agreement when it unilaterally abolished the four Telegrapher-printer-clerk positions while the work remained and improperly transferred it to employes not covered by the Telegraphers' Agreement and to telegraphers in another seniority district.

Carrier takes the position that with the removal of the interlocking facility from the Bowl Telegraph office the duties of the Telegrapher-printer-clerk assigned to that office diminished to a point where these employes were no longer needed and, therefore, it had the right to abolish these positions. It also asserts that the small amount of telegraph work that remained was properly reassigned to telegraphers, and that the clerical work which was not subject to the Telegraphers' Agreement was also properly reassigned to employes outside the Telegraphers' Agreement. Carrier further states that the Agreement does not prohibit it from discontinuing an interlocking operation to permit trainmen to handle switches by the hand thrown method again.

To resolve this dispute, it is necessary to determine whether the work attached to the four Telegrapher-printer-clerk positions had substantially diminished. The record establishes that Carrier removed the interlocking facility at the Bowl Telegraph office and installed hand thrown switches which were operated by train service employes not subject to the Telegraphers' Agreement. However, there is disagreement by the parties as to whether the remaining work at Bowl Telegraph office was diminished to the point where there was no longer need for the four Telegrapher-printer-clerk positions.

On the one hand, Carrier shows that after the new yard facilities were put in operation in 1949, it could not handle all the eastbound trains there as initially contemplated. It, therefore, decided to operate more than fifty percent of the eastbound trains from the eastbound yard. The clearance cards for these trains were secured from the telegrapher at AY Tower, rather than from the Telegrapher-printer-clerk at the Bowl Telegraph office. Then in a study made by Carrier in 1961, as a result of which it made the decision to eliminate the interlocking facility in the Bowl Telegraph office, it also learned that other work in this office had decreased substantially. Carrier presents a tabulation listing the duties that were performed by the Telegrapher-printer-clerks before the abolishment of their positions, the time required to perform these duties, and the disposition of these duties. This chart indicates that the telegraphic work of these positions had diminished to two hours and twenty minutes, and was transferred to telegraphers. The clerical work amounting to approximately five minutes per trick was transferred to clerks.

On the other hand, Petitioner presents an itemized list of the duties of a Telegrapher-printer-clerk on the third shift on Saturday, March 3, 1962 to support its position that the work from the abolished positions remained to be performed. This time study includes fifty items of activities performed during a period of eight hours.

The removal of more than half of the train order and clearance card work of the four Telegrapher-printer-clerks, the elimination of the interlocking facility, and the reduction of other work persuades us that the work did diminish substantially. Petitioner has failed to offer clear and convincing proof that the work did remain, nor did it show how much work was reassigned to telegraphers and clerks.

We find that Carrier had the right to abolish the four Telegrapher-printer-clerk positions that were no longer necessary. The remaining telegrapher work was properly reassigned to members of the telegrapher craft and the remaining clerical work to employes of the clerical craft. In fact, some of this work was returned to the source from which it came when the Bowl Telegraph office was established in 1949. Furthermore, there is nothing in the Agreement that prohibits Carrier from discontinuing an interlocking operation and permitting trainmen again to handle hand thrown switches.

For the aforegoing reasons we hold that the Agreement was not violated.

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 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 1st day of February 1968.

DISSENT TO AWARD 16077, DOCKET TE-14715

This Award represents serious error in at least two important respects: (1) It reflects utter failure to comprehend the facts; and (2), it is in conflict with a number of principles so well established by awards of this Board that they have become axiomatic.

FIRST. The Referee correctly observed that one factor to be determined in resolving the dispute was whether the work attached to the abolished positions had substantially diminished. This determination must, of course, be made from the facts as set out in the record. Those facts were clear, but obviously were misunderstood by the Referee — with some assistance from the Carrier Member. To begin with, the fact that eastbound trains were operated from another location from shortly after the new office was established in 1949 had absolutely no relevance to the present dispute. The work involved amounted to but a small fraction of the total work load. The removal of this small amount of work took place twelve years prior to abolishment of the positions, and thus could not have been a factor in the abolishment.

Also, the Referee quite obviously considered elimination of the interlocking "facility" to be a substantial diminution of the work of the abolished positions when, in fact, the record clearly indicates otherwise. The Carrier presented a diagram of this interlocking plant, showing that there were only three crossovers with their accompanying signals, all controlled by a total of eight levers. The placement of these switches, together with the Carrier's description of their purpose and use, makes it perfectly clear that operation of the control machine consumed only a minute portion of the employes' time.

The Referee was plainly misled. The diagram referred to did not show the relationship of the interlocked switches or the area involved to the en-

tire yard. This made it appear that perhaps the "facility" was quite large. Then, too, with respect to both the train orders for some of the eastbound trains and the interlocking the Carrier Member's brief facilitated such a misunderstanding. For example, in connection with some of the Employes' contentions that there was no substantial diminution of the work, the Carrier Member said, at page 2 of his brief:

> ". . . however, in discussing the various facts asserted by Carrier, the Employes significantly either do not deny or frankly admit that over 50% of the communications work and all of the interlocking work which the abolished positions were created to handle no longer existed **at this point.**" (Emphasis mine.)

The words I have emphasized here were not emphasized in the Carrier Member's brief. However, their significance, in relation to the whole factual situation, was brought to the attention of the Referee during panel argument — with little effect, it appears.

Such efforts to mislead a Referee do not enhance the effectiveness of this Board, especially when they are successful and lead a Referee into an erroneous decision, as was the case here.

SECOND: This Board has long observed the principle that a position which has been negotiated into an agreement may not unilaterally be abolished unless a very substantial portion of its work has disappeared, or is eliminated. The facts here showed conclusively — if they had been properly understood — that none of the work of these positions had disappeared, and only the interlocking work, a small fraction of the total, was eliminated. Even there, the record indicated that some of this work may have been transferred to the car retarder operators, although the evidence was inconclusive.

Failure to observe this principle arose from failure to comprehend the facts, but it is inexcusable error none the less.

Perhaps the most glaring error of the award is its failure to observe the long established principle that work can be transferred from one seniority district to another only by negotiation and agreement of the parties.

When the positions were established the parties negotiated and reached an agreement providing for transfer of certain work from the Relay Division Seniority District to the Bowl office in the Road Division Seniority District. The agreement provided also for transfer of employes, on an optional basis, from the Relay District to the Road District, and some employes were so transferred.

With abolishment of the Bowl positions, a considerable portion of the work was transferred to the Relay Division Seniority District, but without benefit of negotiation and agreement. Thus the seniority rights of employes in both districts were changed unilaterally. But the only references to this aspect of the case to be found in the entire award are in the first and last paragraphs of the Opinion. In the first paragraph, the Referee noted that by agreement both work and employes were transferred across seniority district lines. Even so, he apparently failed to understand the reasons for negotiation and agreement. In the last paragraph of the body of the Opinion of Board the Referee said:

". . . In fact, some of this work was returned to the source from which it came when the Bowl Telegraph office was established in 1949."

During panel argument of this case a considerable amount of time was spent in reciting to the Referee the holdings of this Board with respect to the necessity for negotiation and agreement to accomplish the transfer of work from one seniority district to another, and the following awards on the subject were furnished him: 1611, 2354, 3964, 4210, 4987, 5437, 6451, 6453, 9193, 9419, 14387. Apparently it all went for naught.

No less an authority than the Supreme Court has held that seniority rights have some of the attributes of property rights. When such rights are taken away by unilateral action when agreement is required, the injured employes have been denied due process. This Board lacks jurisdiction to approve such an unlawful action.

Thus, by placing its stamp of approval upon the Carrier's unilateral invasion of the seniority rights of the affected employes, the majority that adopted Award 16077 — the Referee and the Carrier Members — exceeded the Board's jurisdiction and rendered the award a nullity.

For all of the reasons given, I hereby register most emphatic dissent.

J. W. Whitehouse
Labor Member

CARRIER MEMBERS' ANSWER TO LABOR MEMBER'S DISSENT TO AWARD 16077, DOCKET TE-14715
(Referee Engelstein)

The dissenter proceeds on the theory that if he says black is white and says it often enough, both the Referee and the world should accept that falsehood as true.

He opens his Dissent by conceding, as he must on the record, that the

". . . factor to be determined in resolving the dispute was whether the work attached to the abolished positions had substantially diminished. . . ."

We take this as an admission of the obvious fact that there was no violation of the agreement so long as there was a substantial diminution in the work of the abolished positions.

While he emphatically denies there was any diminution in the work of these positions, the dissenter is compelled to admit facts that conclusively prove the contrary. He attempts to brush these controlling facts aside with suggestions of irrelevancy and lack of substance.

Concerning the change in operation of eastbound trains, he states:

". . . the fact that eastbound trains were operated from another location from shortly after the new office was established in 1949 had absolutely no relevance . . ."

Contrary to this allegation of irrelevancy, the record shows without contradiction that the operation of the eastbound trains from another location resulted in a substantial diminution of the work of the abolished positions. The unrefuted facts, as stated in Carrier's Statement of Facts, are:

> "The Bowl Telegraph Office was established **primarily to handle train orders and clearance cards for all eastbound trains and to operate the small interlocking facility** consisting of a control machine located in the telegraph office that controlled the traffic over crossovers A, B and C . . .
>
> **The transfer of more than fifty percent of the telegraph work issuing train orders and clearance cards to eastbound trains from the Bowl Telegraph Office to AY Tower materially reduced the need for the newly established Telegrapher-Printer Clerk positions** in the Bowl Telegraph Office **other than to operate the control machine controlling traffic** over crossovers . . ."

In 1962, the control machine was eliminated, thus diminishing the work of the positions to a point where there was no sensible basis for continuing them.

The dissenter tells us that we should disregard the elimination of the work of operating the control machine for the sole reason that:

> ". . . operation of the control machine consumed only a minute portion of the employes' time."

The record shows that the occupants of these positions spent 30 minutes per shift operating the control machines, and they had no assigned duties to perform for Carrier during the vast majority of their remaining tours of duty. (Performance of all other assigned duties required only 1 hour and 50 minutes.)

The dissenter's passion for telling us black is white is equally evident in his arguments that the "Referee was plainly misled" by certain conduct of the Carrier and of the Carrier Member of the Board.

As the sole basis for his accusation against the Carrier Member, the dissenter quotes a statement of facts concerning diminution of the work which appears in the memorandum that the Carrier Member submitted to the Referee. Since the dissenter admits that the issue is whether or not there had been a diminution in the work, and since the facts quoted from the Carrier Member's memorandum merely note diminution of work which is admitted by the Employes in the record, it is manifestly self-contradictory for the dissenter to say that directing these true and controlling facts to the attention of the Referee had a tendency to mislead him.

The charge that the Carrier misled the Referee is likewise obvious sham. The dissenter states that Carrier's diagram of the interlocker "facility" may have led the Referee to believe that the facility was "quite large." In the first place, the Employes had equal opportunity with Carrier to submit a diagram, and had there been any inaccuracy, they could have demonstrated that in the record. In the second place, the size of the facility was not in issue. The material fact was the requirement that an operator be present at this location so long as the machine was in operation, but not thereafter.

After thus discussing the true issue in a completely false light, the dissenter turns to false issues. He refers to so-called "axiomatic" principles regarding "transfer of work" and "negotiated" positions.

There was no "negotiated" position involved in this case, and there was no contractual restriction on the transfer of work that took place. Apparently, the positions listed in the wage scale of the controlling agreement were generally established by unilateral action of the Carrier on the basis of requirements of the service. Carrier tells us in its initial submission that:

> ". . . Carrier has, throughout the years, not only abolished many of the positions that were listed in the Wage Appendix of the current and predecessor Telegraphers' Agreements, but has also established and abolished many other positions that were never listed in the Wage Appendix of the present and past agreements, and all without negotiation and agreement with the Order of Railroad Telegraphers."

We find no denial of the foregoing statement in the Employes' rebuttal. The Employes submitted no evidence on the point, and they do not even assert that any of the positions listed in the wage scale were not originally established by unilateral action of Carrier. Thus, there is nothing whatever in the record from which we could reasonably conclude that the positions in the wage scale were "negotiated" into the agreement or that the parties intended such positions should remain in existence until "negotiated" out of existence. The question is no longer an open one. It has been repeatedly presented to this Board by the Employes and the Employes' contentions have consistently been rejected in decisions upholding Carrier's right to unilaterally abolish positions listed in the wage scale. See Awards 15443 (Dorsey), 13762 (Weston), 13622 (Mesigh), 13614 (Moore), 13518 (O'Gallagher), 9209 (McMahon), 8143 (Elkouri), 1148 (Sharfman).

Concerning the transfer of certain work from the abolished positions to telegraphers in another seniority district, the dissenter states this half-truth:

> "When the positions were established, the parties negotiated and reached an agreement providing for transfer of certain work from the Relay Division Seniority District to the Bowl office in the Road Division Seniority District. . . ."

The whole truth is that when the abolished positions were set up in the "Bowl office", a transfer of positions from one seniority district to another was involved. Carrier's unrefuted statement of the facts on this point reads:

> "The telegraph service employes in the Relay Office in the old Yard Office and the Telegrapher-Printer Clerks in the new Bowl Telegraph Office were in separate seniority districts, the former in the Relay Division Seniority District and the latter in the Road Division Seniority District. The proposed plan not **only contemplated the transfer of the work of the three train order positions from the Relay Office to the Road Division, but in addition thereto the transfer of three qualified Morse printer-clerk operators,** who so desired, with their seniority from the Relay to the Road Division seniority district, . . ."

Thus, when the involved positions were "created" at the Bowl Office, a transfer of positions took place within the purview of Section 4 of Article XIX, which reads:

> "SECTION 4. . . . When part of one seniority district is transferred to another, thirty (30) days' advance notice shall be given the General Chairman and the affected employes. Within twenty (20) days thereafter, each employe regularly assigned to a position which is to be transferred must elect, in writing, either to go to the district to which transferred or remain on the former district and take his place on the extra list thereof . . ."

The foregoing rule could not be more clear on the point that it applies only in case portions of districts or established positions are transferred.

By application of the universally accepted rules of construction in such cases, the mere transfer of some of the work from one seniority district to another remains completely unrestricted, and this Award is absolutely correct in so holding.

G. L. Naylor
R. E. Black
P. C. Carter
W. B. Jones
G. C. White

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