Award No. 34
Case No. 26

PUBLIC LAW BOARD NO. 1790

PARTIES TO DISPUTE: Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes

and

Norfolk and Western Railway Company

STATEMENT OF CLAIM:

1. Carrier violated the Agreement between the parties, when the position of second trick Telegrapher at Brewster, Ohio, was abolished and the hours of the first trick Telegrapher position were changed to coincide with the abolished position (3:00 PM to 11:00 PM).

2. Carrier shall pay Mr. H. R. Gamble for each day beginning May 6, 1975 and continuing, until the violation is corrected.

3. Any employes affected, either directly or indirectly, by the above action shall be allowed the protective provisions they are entitled to under the March 21, 1966, April 7, 1965 and the April 8, 1971 Agreements.

FINDINGS: By reason of the Agreement dated July 22, 1976, and upon the whole record and all the evidence, the Board finds that the parties herein are employe and carrier within the meaning of the Railway Labor Act, as amended, and that it has jurisdiction.

The parties entered into a Memorandum of Agreement on April 8, 1971 wherein employes assigned to "BX" yard office and "D" message office at Brewster, Ohio were given protection against elimination of work occasioned by the installation of "Telex, IBM or other similar machines". Such employes "will only be reduced by normal attrition ...".

That Agreement also contains the following:

> 2. In making force adjustments by attrition the parties recognize that the position vacated at the time may not necessarily be abolished, but the Carrier will have the right to abolish one position in "D" or "BX" office for each employe attrited under the provisions of this Agreement. In making force adjustments by attrition under this Agreement it may be necessary to continue the position vacated by an employe, but under such circumstances a position which is not needed can be abolished and the vacancy remaining filled by advertisement first to employes in "D" and "BX" offices ...

On April 24, 1975, Clerk R. Caveslio bid off his regular assigned telegrapher position in "BX" Office, Brewster Yard, Brewster, Ohio. He was assigned to an Extra Board No. 3. Pursuant to the provisions of the April 8, 1971 Memorandum of Agreement, Carrier had the right to abolish that position or another position.

Carrier abolished the telegrapher position previously occupied by Caveslio effective on May 5, 1975. That position was scheduled to work from 3:00 P.M. to 11:00 P.M. with rest days Thursday and Friday. At that time two first trick positions existed. One was occupied by the Claimant and the other by E. J. Gamble. Claimant's hours were changed from 7:30 A.M. to 3:30 P.M. to 7:00 A.M. to 3:00 P.M. and his rest days were changed from Sunday and Monday to Thursday and Friday. The hours of the position occupied by E. J. Gamble were changed from 7:00 A.M. to 3:00 P.M., to 3:00 P.M. until 11:00 P.M.

In the meantime, on May 2, 1975, Claimant advised the Carrier in writing that he had exercised his seniority to a first trick Clerk-Caller position, 7:30 A.M. to 3:30 P.M. with Saturday and Sunday as rest days.

Carrier had every right to abolish any position which in its judgment best utilizes its forces. It matters not whether Clerk E. J. Gamble's position was changed to the same hours of the

former abolished position. The mere fact that the Carrier did not formally abolish the first trick position occupied by E. J. Gamble does not give the Claimant any superior rights. Certainly, the Carrier had every right under the schedule agreement to change Claimant's starting time and rest days. He is, in any event, not a proper claimant. Displacing to a slightly lower paid position was of his own volition.

Also, if, as the Employes, say, that abolishment of the second trick position circumvented the Agreement of March 21, 1966, then they are before the wrong forum. That agreement provides that any disputes arising out of the interpretation or application of that Agreement are referred to an arbitration committee established by the parties.

For all the reasons herein stated, the Board finds that the Carrier did not violate the Agreement and that E. J. Gamble is not a proper claimant. The Board also finds that the alleged violation of the March 21, 1966 Agreement is before the wrong forum and this Board has no authority to adjudicate that issue.

AWARD

Claim 1 is denied.

Claim 2 is dismissed.

Claim 3 is dismissed.

PUBLIC LAW BOARD NO. 1790

DAVID DOLNICK, Chairman and Neutral Member

S. G. BISHOP, Employe Member
Dissent attached

J. D. GEREAUX, Carrier Member

DATED: April 19, 1977

EMPLOYE MEMBER'S DISSENT

TO AWARD NO. 34, CASE NO. 26

The last two paragraphs of the findings of Board states that:

"Also, if, as the Employes say, that abolishment of the second trick position circumvented the Agreement of March 21, 1966, then they are before the wrong forum. That Agreement provides that any disputes arising out of the interpretation or application of that Agreement are referred to an Arbitration Committee established by the parties."

". . . in any event, the claim is before the wrong forum and that this Board has no authority to adjudicate the issue."

In the handling on the property the issue of jurisdiction of this Board's right to handle Case No. 26 was never raised. The parties agreed in paragraph (1) of Agreement dated July 22, 1976 that:

"Effective July 22, 1976, there is hereby established in accordance with Section 3, Second of the Railway Labor Act, as amended by Public Law 89-456, a Special Board of Adjustment, hereinafter referred to as the "Board". This Board shall have jurisdiction of, and shall hear and decide, claims and grievances (including discipline cases) arising out of the interpretation or application of agreements governing wages, rules or working conditions which are identified in Attachment "A" attached hereto."

Case No. 26 is identified on Attachment "A" as follows:

"Carrier File: CLK-BRS-75-42
Claim of H. R. Gamble, Carrier abolished a needed position and changed the hours of an unneeded position to escape application of the Rules."

Third Division Award 18071 of the National Railroad Adjustment Board states that:

"OPINION OF BOARD: Carrier attacks the jurisdiction of this Board to decide this dispute on the grounds that any dispute involving the application of the March 21, 1966 Memorandum Agreement is subject to the provisions of Section 13 (b) of said Agreement, which provides the procedure to be followed in resolving a dispute as is involved herein. However, close perusal of said Section 13 (b) shows that the word "may" is used, thus making it voluntary rather than mandatory for a party to use the grievance machinery so provided for in said section. Carrier's member of this Board cited a U. S. District Court case of the Southern District of West Virginia, Parsons v. Norfolk & Western Railway Company, in support of Carrier's position that this Board lacks

jurisdiction to decide this claim. However, said Court decision can be distinguished from the jurisdictional dispute facing this Board in that in the Parsons case the Court held that the petitioner was compelled under the provisions of the Railway Labor Act, first (i) to submit his claim to the appropriate Division of the Railroad Adjustment Board rather than to the Courts. Here, the Organization, under the permissive provisions of said Section 13 (b) of the March 21, 1966 Agreement elected not to have an Arbitration Committee settle this dispute, but selected this Board to adjudicate this controversy, and, therefore, we have jurisdiction to hear the claim."

Third Division Award 18292 of the National Railroad Adjustment Board states that:

"It is the position of the Carrier that this Board does not have jurisdiction in this case. However, following the finding in Award 18071 (Dugan), we agree that the question raised is properly before us."

I respectfully submit that Award No. 34 is erroneous. Award 18071 reflects the proper interpretation on authority to adjudicate the issue and should be followed in future cases.

For the foregoing reasons I dissent.

S. G. Bishop

S. G. Bishop, Employee Member
Public Law Board No. 1790

DATED: Roanoke, Virginia
April 19, 1977