

NATIONAL RAILROAD ADJUSTMENT BOARD

Third Division

Willard E. Hotchkiss, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT
HANDLERS, EXPRESS AND STATION EMPLOYES

BOSTON AND MAINE RAILROAD

DISPUTE.—

"Claim of the following Clerical employes and Storehelpers at Billerica, Mass., account of their positions being discontinued for the five-day period March 26 to 30, 1935, inclusive:

Lester H. Ela: Difference between his regular rate of \$5.00 per day and the rate of the telephone operator's position, \$3.67 per day, March 26 to 30, inclusive, five days, amount \$6.65.....	\$6. 65
Robin Buchan: One Day's pay at his regular storehelper's rate of 52¢ per hour, March 30, 1935, and the difference between his regular storehelper's rate of 52¢ per hour and the laborer's rate of 45¢ per hour, March 26 to 29, 1935, inclusive, four days, amount \$6.40.....	\$6. 40
J. J. Mahoney: Three days' pay at storehelper's rate of 52¢ per hour for March 27, 28, and 30, 1935, and the difference between his regular rate as a storehelper at 52¢ per hour and that of a laborer, rate 45¢ per hour, for March 26 and 29, 1935, two days, amount \$13.60.....	\$13. 60
E. R. Shepard: Difference between his regular rate as Receiving Foreman, \$6.00 per day, and the rate of position of Section Stockman, \$5.54 per day, March 26 to 30, 1935, inclusive, five days, amount \$2.30.....	\$2. 30
R. Thomas: Difference between the rate of his regular position, Assistant Stock Clerk, \$33.00 per week, and that of storehelper, rate 52¢ per hour, March 26 to 30, 1935, inclusive, five days, amount \$6.70.....	\$6. 70
Joseph Jacques: One Day's pay at Storehelper's rate of 52¢ per hour, March 30, 1935, and the difference between storehelper's rate of 52¢ per hour and the laborer's rate of 45¢ per hour, from March 26 to 29, inclusive, four days, amount \$6.40.....	\$6. 40
Thomas Rowe: One day's pay at storehelper's rate of 52¢ per hour, March 30, 1935, and the difference between the storehelper's rate of 52¢ per hour and laborer's rate of 45¢ per hour, March 26 to 29, 1935, inclusive, four days, amount \$6.40.....	\$6. 40

FINDINGS.—The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds 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.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

The parties to said dispute were given due notice of hearing thereon.

The dispute being deadlocked, Willard E. Hotchkiss was called in as Referee to sit with this Division as a member thereof.

The following statement of facts is jointly certified by the parties, and the Third Division so finds:

"For the period March 26 to 30, 1935, inclusive, five days, the shops of the Carrier at Billerica, Mass., were closed down. Resulting therefrom

certain clerical and storehelpers' positions were discontinued for this five day period, affecting the following clerks and storehelpers in the manner specified:

"Lester H. Ela held regular position in the Mechanical Department as I. C. C. Clerk, \$5.00 per day. For the five day period in question his position was discontinued. As a result of this he worked on the telephone operator's position at \$3.67 per day, March 26 to 30, 1935, inclusive, having been so assigned in the exercise of his seniority rights.

"Robin Buchan, who held regular position as storehelper, 52¢ per hour, was not permitted to work on his regular position on March 30 and received no pay for this day at all. On March 26, 27, 28, and 29 he was assigned to laborer's job and paid 45¢ per hour.

"J. J. Mahoney, whose regular assigned position was that of storehelper at 52¢ per hour, received no pay at all March 27, 28, and 30. On March 26 and 29 he was assigned to a laborer's position at 45¢ per hour.

"E. R. Shepard, holding a regular position of Receiving Foreman, rate \$6.00 per day, was assigned to the lower rated position of Section Stockman, \$5.54 per day, March 26 to 30, inclusive.

"R. Thomas held regular position of Assistant Stock Clerk, rate \$33.00 per week. For the period March 26 to 30, inclusive, he was assigned to the lower rated position of Storehelper at 52¢ per hour.

"Joseph Jacques, regular assigned storehelper, rate 52¢ per hour, was given no work at all March 30, and the period March 26 to 29, inclusive, he was assigned to the lower rated position of laborer at 45¢ per hour.

"Thomas Rowe, regular assigned storehelper, rate 52¢ per hour, received no work at all March 30, 1935, and March 26 to 29, inclusive, he was assigned to the lower rated position of laborer at 45¢ per hour."

There is in evidence an agreement between parties bearing effective date of July 15, 1925, and the following rules thereof have been cited:

RULE 1

"* * * Laborers: All laborers employed in and around stations, freight houses, warehouses, storehouses, and stock rooms, such as sealers, loaders, truckers, stowers, coopers, station cleaners, and other employees in places named whose duties are the handling of freight or company material (including both supplies and scrap) * * *."

RULE 22

"Reducing Forces: When forces are reduced or positions are abolished, the provisions of Rule 7 will govern.

"Six (6) days' notice whenever practicable will be given employees enumerated in Sections 1 and 2 of Rule 1 before reduction is made. Other employees will be given advance notice of lay-off to such extent as it can be done and not keep forces on which volume of business moving does not warrant.

"When forces are increased return of employees to service shall be subject to the provisions of Rule 7.

"Employees desiring to avail themselves of this rule must file their addresses with the proper official at the time of reduction, advise promptly of any change in address and renew address each ninety (90) days. Employees failing to renew address each ninety (90) days or return to the service within seven (7) days after being notified (by mail or telegram sent to address last given) or give satisfactory reason for not doing so, will be considered out of the service.

"Nothing in this rule shall be construed to prevent employees whose positions are abolished or transferred from exercising their seniority rights over junior employees, within ten (10) days. Employees affected may exercise their seniority in the same manner."

RULE 49

"Weekly Assignment: Employees, except those who are paid on an hourly basis enumerated in Section 4 of Rule 1, who have regular positions

and are a part of the regular force and who do not lay off of their own accord will not be paid less than six (6) days per week, excepting that this number may be reduced in a week in which holidays occur by the number of such holidays.

"NOTE.—Nothing herein shall be construed as changing practice of working certain employees about stations part time and paying them for time worked or preventing the excepting of certain employees that may be mutually agreed upon between the management and the duly accredited representatives of the employees."

RULE 69

(Revised by Arbitration Award, February 19, 1929.)

"Preservation of Rates: Employees temporarily or permanently assigned to higher rated positions shall receive the higher rates while occupying such positions, employees temporarily assigned to lower rated positions shall not have their rates reduced, except when a freight house clerk reverts to a freight handling of position under Rule 23. A 'temporary assignment' contemplates the fulfillment of the duties and responsibilities of the position during the time occupied, whether the regular occupant of the position is absent or whether temporary assignee does the work irrespective of the presence of the regular employee. Assisting a higher rated employee due to a temporary increase in the volume of work does not constitute a temporary assignment."

Petitioner contends that the discontinuance of the positions in question for the five-day period, March 26 to 30, inclusive, 1935, constituted a violation of Rule 49 for the reason that the action taken by the Carrier did not constitute a legitimate abolishment of these positions, i. e., the work on the jobs was still there, either to be done by someone else, or allowed, in part, to accumulate for the five-day period, thence to be caught up by the claimants upon their resuming work, Monday, April 1, on the same positions they occupied prior to March 26; that when the services of the employees were discontinued, it was a known fact that such discontinuance would extend for a period of five days only.

The petitioner further contends that employees temporarily assigned to lower rated positions during the period in question are entitled to not less than their regular rates, under the provisions of Rule 69.

Petitioner concludes his argument by contending that positions in question were not in fact abolished; that employees were only actually suspended temporarily from performing service thereon during the five days in question, and that the same principle applies in this dispute as was decided by the Third Division in Award No. 79.

The Carrier contends that under the budget system in force on the Boston and Maine Railroad, there were no funds allocated for shop operation at Billerica the latter part of March 1935; that forces were reduced under the provisions of Rule 22 through notice issued by the Shop Superintendent on March 19, 1935, and the employees involved elected to and did exercise seniority rights under the provisions of the agreement.

The facts in this case are clear. The question to decide is whether the action of the carrier in abolishing the positions at issue for a period of six days was acting within its rights under the agreement.

Labor Board decisions 2814 and 2826 were cited. Both these cases involved abolition of positions under a six day guarantee. In both cases the Carrier was sustained. Petitioner's representative also cited several Labor Board decisions and referred to others cited by petitioners at oral hearing.

It is not necessary to analyze all these various decisions. On the basis of both common sense and past decisions there can be no question of a Carrier's right to make bona fide abolition of positions when, because of the small amount of work to be done, he needs to reduce his force.

As to whether short time suspension of positions constitutes a bona fide abolition, Labor Board decisions are not in agreement even when the facts appear to be essentially similar. In any case, to the extent that a decision in this case should rely on precedent, previous decisions of this Division should doubtless be given more weight than earlier decisions.

In none of the cases cited from this Division are the facts exactly parallel to the facts of the instant case, but in all of them the Carrier was reversed in attempting to abolish positions which were held not to have been bona fide abolitions.

Applying the rule of reason to the instant case, it is inconceivable that abolition of positions with the avowed intent and purpose to re-establish them within a few days was contemplated when this agreement was made. If it had been contemplated, it is reasonable to suppose that the representatives of the employees would have made every effort to protect the employees against a practice which so obviously would tend to break down the guarantees and safeguards which the agreement was intended to provide.

If the abolition of positions had been caused by some force beyond the control of the Carrier and it had been found after the event that the positions could be re-established sooner than could have been anticipated, there would be at least some color of intent to conform with the obvious purpose of the guarantee rule, and the fact that the abolition proved to be of short duration would not necessarily govern. Or again, to use the language employed in Labor Board decision 1759: "The Carrier would have been well within its rights to have undertaken proper negotiations for suspension of clerical forces during the period the shop was closed down or for their use in other departments on special clerical work." If the problem which the B. & M. Railroad felt it had to meet had been approached in some such way as this and the employees had been found not amenable to reasonable adjustment, the Carrier would then have been in a better position to take positive action and await an interpretation of the rules thereon.

Petitioner's representative on the Board referring to oral hearing says, the representatives of employees submit that no consideration was given to any budget system during the negotiations and that any system the Carrier chooses to employ for handling its funds has no bearing on a rule of the agreement between the parties. *The Referee is of the opinion that this position is well taken. He is somewhat familiar with budget systems and considers a good budget system essential to the proper management of large enterprises. It is perhaps gratuitous for him to comment on this Carrier's handling of its budget, however, it is not believed that approved practice would contemplate having a budget system upset normal operating requirements as appears to have been done in this case.*

It has been stated that at least some of these employees could have increased their earnings during the six day interval by making better use of seniority rights. Considering the short period of time and the moderate amounts involved it would be going into needless minutiae to review each individual claim to determine whether the employee in question earned the maximum amount which it would have been possible for him to earn. If these were claims in which back pay in case of a decision against the Carrier were accumulating over a considerable period of time, it would be in order to consider whether any employee had piled up back pay claims needlessly. Aside from the small amounts involved the Referee finds nothing in the record to indicate that any employee involved in this case purposely restricted his earnings during the six day interval.

The Referee is of the opinion, and the Third Division finds that the so-called abolition of positions covered by these claims was not an abolition in fact and it was, therefore, in violation of the agreements.

AWARD

Claim sustained.

By Order of Third Division:

NATIONAL RAILROAD ADJUSTMENT BOARD.

Attest:

H. A. JOHNSON, *Secretary*.

Dated at Chicago, Illinois, this 13th day of August 1936.