

NATIONAL RAILROAD ADJUSTMENT BOARD

Third Division

Willard E. Hotchkiss, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT
HANDLERS, EXPRESS AND STATION EMPLOYEES
SOUTHERN PACIFIC LINES IN TEXAS & LOUISIANA**

DISPUTE.—

"(a) Claim of Frank Oglesbee, Beaumont, for payment currently and hereafter as Bill Clerk at \$5.60 per day instead of as Utility Clerk @ \$5.25 per day.

"(b) Claim of Frank Oglesbee for back pay adjustment of 35¢ per day, representing the difference between \$5.60 per day and \$5.25 per day, for services rendered as Bill Clerk from January 31, 1933, to date."

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

The carrier and the employee involved in this dispute are, respectively, carrier and employee 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.

As a result of a deadlock, Willard E. Hotchkiss was appointed as Referee and, at the request of the carrier, a second hearing was had on July 7, 1936, in which representatives of the parties argued the case before the Division with the Referee sitting as a member thereof.

There is in evidence an agreement between the parties bearing effective date of July 1, 1922, and Rules 52, 54, and 64 have been cited by the petitioners. Respondent in opposing has cited rule 27. These several rules are as follows:

RULE 52. "Employees temporarily or permanently assigned to higher-rated positions shall receive the higher rates while occupying such position; employees temporarily assigned to lower-rated positions shall not have their rates reduced.

"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 the 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."

RULE 54. "The wages of new positions shall be in conformity with the wages for positions of similar kind or class in the seniority district where created."

RULE 64. "Established positions shall not be discontinued and new ones created under a different title covering relatively the same class of work for the purpose of reducing the rate of pay or evading the application of these rules."

RULE 27. "Sec. (a) An employee disciplined, or who considers himself unjustly treated, shall have a fair and impartial hearing, provided written request is presented to his immediate superior within five (5) days of the date of the advice of discipline and the hearing shall be granted within ten (10) days thereafter.

"Sec. (b) A decision will be rendered within seven (7) days after completion of hearing. If an appeal is taken, it must be filed with the next higher official and a copy furnished the official whose decision is appealed, within fifteen (15) days after date of decision. The hearing and decision on appeal shall be governed by the time limits of the preceding section.

"Sec. (c) At the hearing, or on the appeal, the employee may be assisted by a committee of employees, or by one or more duly accredited representatives.

"Sec. (d) The right of appeal by employees or representatives in regular order of succession and in the manner prescribed, up to and inclusive of the highest official designated by the Company to whom appeals may be made, is hereby established.

"Sec. (e) An employee on request will be given a letter stating the cause of discipline. A transcript of the evidence taken at the investigation or on the appeal will be furnished on request to the employee or representative.

"Sec. (f) If the final decision decrees that charge against employee was not sustained, the record shall be cleared of the charge; if sustained or dismissed, employee will be returned to former position and compensated for the wage loss, if any is suffered.

"Sec. (g) Committees of employees will be granted transportation over the lines covered by these rules and necessary leave of absence for investigation, consideration, and adjustment of grievances."

PETITIONERS' POSITION.—Claimant, Frank Oglesbee, states that his seniority date is November 3, 1925. In the early part of 1929 he was assigned to service as Bill Clerk in the Beaumont freight and yard office at a rate of \$5.60 per day. Two years later, because of a reduction of force, he was replaced as bill clerk by J. W. Andrews, who took the position in the exercise of his seniority rights. In July 1931, Oglesbee was assigned to service as utility clerk at \$5.25 per day.

The normal duties of bill clerk, which position was held in succession by Oglesbee and Andrews, are to rate and bill carload and LCL freight, and to maintain transit records on transit freight. The duties of a utility clerk are what the name implies, to do such work in the clerical department as the demands of the service require. It is assumed that a utility clerk may properly be called upon for a variety of duties for which he is qualified, including, presumably, some billing, but if his work becomes predominately that of a higher-rated position he should have the title and the pay of that position.

When Oglesbee was assigned as utility clerk on July 6, 1931, Agent Walker issued the following instructions: "Mr. Oglesbee will report to warehouse each morning and when he is finished checking cars he will assist Mr. Andrews in the billing department." From the time of his assignment as utility clerk in 1931, to January 1, 1933, the date from which this claim begins to run, Oglesbee's hours were from 8 a. m. to 5 p. m., six days per week. Beginning January 1, 1933, the effective date of the discontinuance of the position of billing clerk, Oglesbee's hours were changed to run from 9 a. m. to 6 p. m. seven days per week, the same hours which had been assigned to Andrews in the position of bill clerk up to January 1, 1933, when the position was discontinued. When the position of bill clerk was discontinued, some of the duties of the position were combined with the duties of rate clerk whereupon Andrews, again exercising seniority rights, displaced the previous incumbent as rate clerk.

Petitioners contend that the importance of the station, Beaumont being a thriving city of more than 50,000 population, and the amount of work to be done would have made it physically impossible for Andrews to have combined the duties of the rate clerk and bill clerk to an extent to permit of dispensing with the services of a bill clerk. They contend further that Oglesbee not only took over the hours of the bill clerk on January 1, 1933, but predominately the duties as well, and that he continued to perform those duties from that day on. They say it was common knowledge in the Beaumont station that Oglesbee was performing the duties of bill clerk and that Agent Walker regarded him as a bill clerk. In support of their statement they cite instructions which agent Walker issued to Clerks Andrews, Hankins, and Oglesbee on March 29, 1935, in which he instructed these clerks to do certain checking

of bills and rates made necessary by a court decision to which reference was made. At the end of these instructions the agent used this language:

"Mr. Andrews and Mr. Oglesbee will please begin checking on this at once, making the corrections as you can." (Exhibit No. 2 original submission.)

Petitioners submit that these instructions were of a kind to be issued to a bill clerk and that the throwing of responsibility jointly on Andrews and Oglesbee at the end shows that the agent held Oglesbee responsible for the kind of work a bill clerk does. Petitioners also cite and particularly emphasize a letter which agent Walker wrote to a customer on March 20, 1935, in which he refers specifically to "Frank Oglesbee, my Bill Clerk." (Exhibit H, second brief.) A number of other exhibits including lengthy affidavits from various persons are submitted in support of petitioners' position.

CARRIER'S POSITION.—

(A) ON JURISDICTION

Carrier challenges the jurisdiction of the Board on the following grounds:

1. Petitioners have failed to comply with provisions of the Amended Railway Labor Act in not holding or requesting conferences with management as prescribed in the Act prior to bringing a case before the Board.
2. Petitioners failed to comply with rules of this Board by not advising carrier of data to be used in connection with their submission.
3. The case has not been handled in accordance with Rule 27, which carrier asserts is applicable.
4. Case does not involve "an interpretation or application of agreements concerning rates of pay, rules, or working conditions", but an effort to obtain a change in the rate of pay applicable to position of Utility Clerk held by claimant.
5. There is nothing in the current agreement which prohibits carrier from abolishing unnecessary positions, and the Board is without any right or authority to review an exercise of carrier's managerial discretion provided Rule 64 is not violated.

(B) ON MERITS OF CASE

Without waiving its position in respect to jurisdiction, carrier denies the merits of the claim on the following grounds:

1. Inroads of trucks and the depression made it necessary to reduce force and made it possible to do so without overburdening employees retained or impairing efficiency of the service.
2. The adjustment by which the bill clerk position was abolished and the incumbent Andrews exercising seniority rights became rate clerk, a position paying \$6.20 per day, while the former rate clerk became night ticket clerk and Oglesbee remained as utility clerk, was a proper procedure for achieving the legitimate ends above set forth.
3. The duties of bill clerk were taken over by six other employees, the most important one that of rating freight shipments by the rate clerk. Andrews as rate clerk also took over the duty of billing as many shipments as he could, Oglesbee assisting especially with late outbound billings offered between 5 p. m. and 6 p. m. Such duties had always been performed by Oglesbee as utility clerk. The duty of rating all shipments except those coming in between five and six o'clock has been assigned to and performed by the rate clerk since position of bill clerk was abolished. Both prior and subsequent to the discontinuance of position of bill clerk, Oglesbee as utility clerk has spent a substantial part of his time with outside duties in the warehouse and the yard.
4. The passing of waybills and ordering out of cars were never regular duties of the bill clerk, but at all times have been properly programmed; that is, distributed from time to time or from day to day to some employee. Most frequently they have been to utility clerks including Oglesbee.
5. Utility clerks perform various and sundry duties as the name implies and are properly assigned to many different duties.
6. Oglesbee has not performed all or a substantial portion of the duties formerly performed by the bill clerk, but has performed duties of the same character since discontinuance of the bill clerk's position as he did prior thereto.

7. For more than two years Oglesbee recognized that he was properly rated as utility clerk after his change of hours on January 1, 1933, as he was prior to that change, as shown by the fact that he accepted the situation without protest or objection.

8. The reason for the change of hours was stated by the assistant agent, E. B. Wilson, to-wit, because someone was needed around the office on Sundays and because someone was needed after 5 p. m. to take care of the late outbound billing offered after that time.

HISTORY OF THE CLAIM.—In order properly to dispose of certain phases of the jurisdictional issue raised by the carrier, it is necessary to scrutinize the succession of events by which the claim found its way to this Board. Sketched as briefly as the circumstances permit, these events are about as follows:

I. The first documentary item of note is Mr. Oglesbee's letter to Chairman Harper dated March 10, 1935, in which he calls attention to the work he is doing and asks advice about filing a claim (Exhibit "A" Petitioners' Supplementary Statement).

II. March 11, 1935, Oglesbee sent following letter and claim to Agent:

"BEAUMONT, TEXAS, March 11, 1935.

"Claim of Frank Oglesbee—Beaumont. For Payment as Bill Clerk @ \$5.60 per Day Instead as Utility Clerk at \$5.25 per day

"MR. M. D. WALKER,

"Agent, Beaumont, Beaumont, Texas.

"DEAR SIR: Effective January 1st, 1933, the Bill Clerk job at Beaumont, paying \$5.60 per day, was abolished. The assigned hours on the Bill Clerk job were from 9 a. m. to 6 p. m. I was employed at that time as utility clerk at \$5.25 per day, and my assigned hours were from 8 a. m. to 5 p. m., six days per week.

"When the Bill Clerk job was abolished, my assigned hours on the Utility Clerk job were changed from 8 a. m. to 5 p. m., six days per week, to 9 a. m. to 6 p. m., seven days per week, to conform to hours theretofore assigned to the Bill Clerk job. As is known to you, it is regularly my duty to pass waybills, order out cars, and bill and rate LCL and CL waybills, all of which are duties regularly performed on the Bill Clerk job. Both my hours and my duties are those of the former Bill Clerk job.

"Rule 64 provides that established positions shall not be discontinued and new ones created with *relatively* the same duties for the purpose of reducing rates of pay as I believe you will agree has been done in this case. Accordingly, under the rule, I am making claim for payment at the rate of \$5.60 per day and for an Adjustment of 35 cents per day for the period from January 1st, 1933, to date to cover underpayment during that period. Will you please advise if the claims will be allowed.

"Yours truly,

(S.) FRANK OGLESBEE."

III. March 20, 1935, Agent replied as follows:

"File D-1600

"BEAUMONT, TEXAS, March 20th, 1935.

"Claim of Frank Oglesbee—Beaumont for payment as Bill Clerk at \$5.60 per day instead as Utility Clerk at \$5.25 per day

"MR. FRANK OGLESBEE, Building.

"DEAR SIR: I have your letter of March 11th captioned as follows:

'Claim of Frank Oglesbee—Beaumont for payment as Bill Clerk at \$5.60 per day instead as Utility Clerk at \$5.25 per day.'

"This claim is without basis and is respectfully declined.

"Very truly,

"(S.) M. D. WALKER, Agent."

IV. March 21, 1935, claim was carried to superintendent by division chairman L. I. Smith, in a letter in which the claim is outlined in some detail and Rule 64 cited (copy to agent). (This letter is a part of Exhibit 1, petitioners' original submission, Board's record page 13.)

V. March 27, 1935, superintendent replied as follows:

"HOUSTON, TEXAS, *March 27, 1935.*

220-123

"MR. L. I. SMITH,
c/o *Southern Pacific Lines, Beaumont, Texas.*

"DEAR SIR: Your letter of March 21st, captioned 'claim of Frank Oglesbee—Beaumont for payment as Bill Clerk @ \$5.60 per day instead as Utility Clerk at \$5.25 per day.'

"This claim is without basis and is respectfully declined.

"Yours truly,

"K. C. MARSHALL."

VI. April 4, 1935, General Chairman Harper carried claim to Assistant General Manager in a letter apparently identical with the one sent by division chairman to superintendent on March 21, 1935. (This letter is also a part of Exhibit 1, Board's record page 11.)

VII. April 9, 1935, Assistant General Manager replied asking for further specifications. (Also part of Exhibit 1, Board's record, page 10.)

VIII. July 10, 1935, General Chairman wrote Assistant General Manager and referred to a conference on July 9, 1935, in which Asst. General Manager had requested additional information. General Chairman also reverted to his letter of April 4, 1935. In essence, General Chairman reiterated the position there taken and suggested a joint investigation in the event of disagreement as to just what duties Oglesbee performed during the period under consideration.

IX. August 12, 1935, Asst. General Manager replied as follows:

"HOUSTON, TEXAS, *Aug. 12, 1935.*

"Claim of Utility Clerk Frank Oglesbee, Beaumont, for payment at the rate of \$5.60 per day instead of \$5.25 per day

"MR. H. W. HARPER,
General Chairman, B. of RC., 711-A, M&M Bldg.,
Houston, Texas.

"DEAR SIR: Your letter July 10th.

"As stated in my letter of April 9th, it is our position that the claim for any service performed by Oglesbee prior to March 11, 1935, is not properly before us, as the provisions of rule 27 were not properly complied with.

"With respect to any claim subsequent to March 11, 1935, wish to advise that it is wholly without basis and is respectfully declined.

"Yours truly,

"(Signed) J. G. TORIAN."

X. September 14, 1935, Grand President served written notice bringing the case to National Railroad Adjustment Board. Statement amended October 23, 1935, and correspondence referred to above attached, as Exhibit 1, and letter of instructions March 29, 1935, from agent Walker to Clerks Andrews, Hankins, and Oglesbee, as Exhibit 2.

XI. October 19, 1935, carrier responded and submitted brief with following exhibits:

1. Correspondence substantially as above outlined.
2. Letter from R. B. Parkhurst, Sec'y, Fourth Division, National Railroad Adjustment Board, to J. G. Torian, declining to hear a case because subject matter had not been handled as required by amended Railway Labor Act.
3. Decision 4173 U. S. Railroad Labor Board of similar import to Exhibit 2.
4. Decision 3195 by same Board, also of similar import.
- XII. January 3, 1936, carrier's first supplemental brief, with Exhibits, to-wit:
 - 1 to 5, inclusive, pay roll data.
 6. Affidavit by rate clerk Andrews dated January 2, 1936, to the effect that he, not Oglesbee, has been responsible for billing and has done most of it except from 5 to 6 p. m., since January 1, 1933.
 7. Affidavit by Agent Walker, January 4, 1936, opposing petitioners' contentions in re Oglesbee's work.

Exhibit A, copy of statement alleged to have been written in script by Oglesbee to Asst. Supt. Spence as to his duties about April 24, 1935, bearing legend "Frank Oglesbee 4-15-35."

8. Affidavit by E. B. Wilson, Asst. Agent, January 4, 1936, opposing contention of petitioners in re Oglesbee's work and containing this statement:

"I personally supervised the carrying out of the instructions contained in that letter and I know they were carried out."

This in reference to Agent Walker's letter of December 29, 1932, redistributing duties in contemplation of discontinuing bill clerk position January 1, 1933.

9. Affidavit by Cashier W. E. Adams, January 2, 1935, to the effect that instructions just referred to were carried out.

10. Affidavit L. M. Mothner, Asst. Claim Clerk, January 2, 1936, somewhat corroborative of above statements.

11. Letter Asst. General Manager to General Chairman January 30, 1935, in regard request concerning seniority rights when position is changed from six to seven day assignment or vice-versa.

12. Award No. 101, Docket CL-122, of this Board.

13. Award No. 125, Docket CL-168, of this Board.

XIII. February 13, 1936, Hearing before National Railroad Adjustment Board, Third Division.

XIV. March 30, 1936, Petitioners submitted general chairman's Rebuttal Brief with Exhibits to-wit:

A. Affidavit of Frank Oglesbee dated March 21, 1936, setting forth in detail his version in which he takes issue with statements contained in affidavits of Walker, Wilson, Andrews et al. attached to carrier's brief.

A-1, 2, and 3: Letters of instruction from Agent Walker to various clerks respectively July 6, 1932, December 29, 1932, and April 13, 1935.

A-4. Copy of statement by Oglesbee outlining his daily duties.

A-5. Letter Agent Walker to Oglesbee, December 23, 1935, abolishing Utility Clerk position and reminding Oglesbee of seniority rights.

A-6. Copy of letter Agent Walker to certain clerks, December 24, 1935, in re new duties on account of reduction of force. Dupuy to handle waybills previously handled by Oglesbee.

B. Affidavit by Clerk Hankins, March 21, 1936.

C. Affidavit by Clerk Lisotta, March 21, 1936.

D. Affidavit by Clerk Pressley March 21, 1936.

E. Affidavit by Clerk Dupuy, March 21, 1936.

F. Affidavit by Clerk L. I. Smith, March 21, 1936.

G. Affidavit by Rate Clerk Andrews, March 21, 1936.

H. Copy letter Agent Walker to M. E. Middleton, March 20, 1935, in which he uses the expression "Frank Oglesbee, my Bill Clerk", above referred to.

Exhibits B to E, inclusive, containing chiefly statements corroborative of Oglesbee's statements and in opposition to contention and affidavits submitted by carrier.

Exhibit G is significant as coming from the same Rate Clerk, Andrews, who on January 2, 1936, made affidavit in behalf of carrier. Comparison of the two affidavits and of subsequent affidavit of April 18, 1936, Exhibit No. 4, of carrier's Second Supplemental Submission, will be made later.

XV. April 25, 1935, carrier's Second Supplemental submission with Exhibits, to-wit:

No. 1. Affidavit by Agent Walker April 18, 1936, in re following subjects.

(a) Consolidations at Beaumont station effective March 8 and July 15, 1932, due to decline in total freight and ticket revenue from \$155,425 in December 1930 to \$96,823 in December 1931, to \$70,256 in December, 1932.

(b) Various statements by Oglesbee and others concerning Oglesbee's duties.

(c) Reiterations that instructions concerning distribution of Oglesbee's duties were carried out.

(d) Noting abolition of position of utility clerk on December 24, 1935, and distributing work exactly as had been done in earlier reduction in force. Noting also "that a volume of business, so small, in December 1935, as to require further reduction in force shows there was not enough work for a bill clerk."

(e) Minimizing importance of reference to "Frank Oglesbee, my Bill Clerk", as a loose statement.

There are eight papers attached to this Exhibit, the first four being different statements of Oglesbee's work at different times of the day, the fifth and sixth

showing the same for Rate Clerk Andrews, the seventh and eighth the same for Clerk Hankins.

No. 2. Affidavit by Assistant Agent Wilson, April 18, 1936, corroborating Agent Walker's affidavits of January 4 and April 18, 1936, and containing the statement about discussion with Local Chairman L. I. Smith referred to later.

No. 3. Affidavit by Asst. Superintendent Meeks, April 20, 1936, containing statement about visits to Beaumont Station August 20 and December 23, 1935, and noting inaccuracies in Oglesbee's statement of his duties; also citing rate clerk Andrews' statement that Oglesbee had grossly overstated amount of time devoted to different duties. Says he considered there was not enough business to justify payroll expense and instructed Agent Walker to discontinue position of utility clerk effective following day. Attached are copies of statements of work distributed over day as of August 20 and December 23, 1935, respectively, by Andrews, Oglesbee, and Hankins.

No. 4. Affidavit by Rate Clerk Andrews, April 18, 1936, to the effect that Oglesbee's several statements do not show him to be performing all the duties that Andrews performed when he was bill clerk.

XVI. May 11, 1936, Request of Carrier to be represented when case is heard with Referee sitting with the Board.

XVII. July 7, 1936, Hearing before Third Division with Referee sitting with the Board.

OPINION OF REFEREE

QUESTION OF JURISDICTION.—1. *Conferences.*—It is true that any conferences between the parties before this case was brought to the Board appear from the record to have been rather sketchy. It is also true that petitioners may be assumed to have known the provision of the law and that they should technically have made such definite requests for conference as would have removed all doubt concerning the correctness of their procedure. Petitioners say that the attitude of the carrier made conference difficult, if not impossible, and they advance the curtness of carrier's replies to letters in support of this statement. The legalistic framework in which the carrier's case is built up suggests that carrier may have been acting on advice of counsel. Be that as it may, the record indicates that the parties were in contact with each other for some time before the case was brought and that at least one conference was held. This, together with the exchange of correspondence, goes so far toward complying with the basic intent of the law as to make it unnecessary and unwise to throw the case out of court on this ground.

2. *Advice to Carrier concerning data submitted.*—This omission has been corrected.

3. *Rule 27.*—Logically, a failure to comply with the agreement in rating or paying an employee might be regarded as unjust treatment or a grievance. However, the heading and the text of Rule 27 link it up closely with discipline. Moreover, the strict application of its provisions to violations of the agreement would in many cases make the rule unworkable and improperly defeat redress for violations.

Aside from Rule 27, ordinary rules of procedure would properly bar claimants who had slept on their rights or been dilatory in advancing their claims. However, the purpose of such a public agency as this board is to remove causes of stress, and in cases of doubt, it is safe to take a middle ground between throwing down the bars to indiscriminate charges arising from circumstances long past and undue nicety in drawing a line between cases which are dead and not dead. The Board and respondents to charges have reasonable protection against imposition in insistence on substantial prima facie evidence to support charges, and in the fact that undue delay tends to prejudice a case on its merits. As the Referee interprets Rule 27, and the rules of this Board, and the past precedents in respect to those rules, they do not estop the Board from hearing this case on its merits.

4. *Case does not involve interpretation, etc., but an effort to change a rate of pay.*—This contention cannot be taken seriously since practically no case involving the proper rating and pay of a position could be heard on its merits if the contention were upheld.

5. *Nothing in agreement to prohibit carrier from abolishing positions in exercise of managerial discretion provided Rule 64 is not violated.*—Likewise not a serious contention for reasons cited in respect to contention No. 4.

The Referee holds that this Board has the right and the duty to take jurisdiction.

MERITS OF THE CASE.—The record of this case does not lend itself easily to judicial analysis. Arguments are unnecessarily long, labored, and legalistic. On both sides, numerous affidavits which respectively have the earmarks of common authorship consume needless pages in covering points, many of which do not appear highly relevant and which if relevant are stated in a way to confuse rather than to clarify the main issue. Paraphrasing language used by one member of the Board, the case is replete with charges and counter charges of misstatement and misapplication by one party of statements made by the other, and vice versa. The fact that this Board is not a court of law but an agency of adjustment seems to have been overlooked.

Discussion within the Board brought out the suggestion that among the witnesses who have testified, Rate Clerk Andrews is perhaps in as good a position as anyone to know the facts accurately and at the same time he presumably has as little personal interest as anyone in the outcome of the case. Since both the facts and the credibility of witnesses are in sharp dispute, it becomes especially important to consider the testimony of an informed person whose testimony has not been seriously assailed. The assumption that Andrews was in a position to give important testimony is borne out by the fact that both parties drafted him as a witness.

It is clear that Andrews was in a difficult position. His testimony would probably have been more valuable if it had been given in an informal atmosphere of a joint investigation of pertinent facts, without the implication involved in a sworn statement made in a tense situation. The fact that he was called upon to make affidavit for first one side and then the other suggests that he was probably under conflicting pressures which would tend to make him cautious, if not constrained. However, his three statements do not appear to contain any material inconsistencies. For what they are worth, they may be summarized as follows:

AFFIDAVITS BY RATE CLERK J. W. ANDREWS

For Carrier, January 2, 1936.—Primary duty of bill clerk consuming on an average of five or more hours per day is to rate C. L. and L. C. L. shipments.

Rating shipments only duty of bill clerk requiring special training and experience.

Billing subsequent to rating merely requires general clerical ability plus typing.

Effective January 1, 1933, rate clerk took over all rating of freight previously done by bill clerk, also as much of billing as possible.

Oglesbee rates and bills shipments after 5 p. m., but prior to 5 p. m., does so only on his own responsibility.

I personally know Oglesbee has performed a substantial amount of outside clerical duty each day in the warehouse and/or yards since January 1, 1933.

While I was bill clerk I never did perform such duties.

I personally know that only duty formerly performed by bill clerk and performed by Oglesbee since January 1, 1933, for a substantial portion of his time (2½ hours per day) is typing waybills from bills of lading.

For Petitioner, March 21, 1936.—Oglesbee's duty as utility clerk is to check freight in warehouse, usually from 8 a. m. to 2 p. m.

Oglesbee assisted me in billing department until 5 p. m. This was from July 6, 1931, to January 1, 1933.

Oglesbee's duties in warehouse were assigned to Dupuy January 1, 1933, and Oglesbee was assigned to serve in billing department.

Besides duties in billing department Oglesbee was assigned to protect yards from 11 a. m. to 1 p. m. Oglesbee was not assigned to any service in the warehouse.

Above assignments in effect from January 1, 1933, to December 23, 1935, except for ten days after April 15, 1935, while job was temporarily abolished.

Oglesbee's hours were changed on January 1, 1933, to correspond with those of the former bill clerk from 9 a. m. to 6 p. m., seven days per week.

Oglesbee's statement attached to Walker's sworn statement of January 1, 1936, lists duties during ten days after April 14, 1935, and is not representative of his work during the rest of the period from January 1, 1933, to December 23, 1935.

For the Carrier April 18, 1936.—Have reviewed Oglesbee's statement of March 21, 1936. He was not assigned to perform all the work in rating and billing assigned to me prior to January 1, 1933, when I was bill clerk.

While Oglesbee was relieved of regular warehouse duties January 1, 1933, he has never since then been required to spend as much time billing as I spent before checking freight in warehouse, since there was not enough business to consume so much time.

Since January 1, 1933, Oglesbee has been required to perform various and sundry duties which had no direct relation to rating or billing.

I have reviewed Oglesbee's statement of April 15, and August 20, 1935. Assuming them to be correct as of the times they were made, none of them shows that he was performing all or the more important duties of the position of bill clerk which I performed when I held that position.

Taken as a whole, the three affidavits of rate clerk Andrews are to the effect that Oglesbee did not perform all or a substantial portion of the work which Andrews had previously performed as bill clerk, and that Oglesbee's statements were inaccurate insofar as they made it appear that he did perform substantially those duties. It may also fairly be concluded from Andrews' statements that several statements made by carrier's witnesses were likewise inaccurate and more or less misleading. These inaccuracies are sufficient, in the judgment of the Referee, to throw considerable doubt around all alleged facts which are seriously in dispute.

Disputed statements on either side are accepted with judicious reservations. Assistant Superintendent Meeks, in his affidavit, dated April 20, 1936, makes this statement:

"After discussing Oglesbee's duties with him (referring to Agent Walker) as reflected in his statement of December 23, I discussed these duties with rate clerk Andrews and showed him Mr. Oglesbee's statement, and Mr. Andrews informed me that Mr. Oglesbee had grossly overstated the amount of time devoted to the various duties as enumerated in his statement, and did have a considerable amount of idle time as I have personally observed."

This obviously is a considerably stronger statement than the statement which Mr. Andrews included in his affidavit, although in some measure corroborative of the affidavit.

Facts submitted by the carrier, in reference to the business of the Beaumont station, as reflected in freight and passenger revenue, are capable of verification and since they are not contested may be accepted. They show a serious decline of business over the periods covered by them (December 1930, about \$155,000; December 1931, about \$97,000; and December 1932, about \$70,000). If these figures are typical of other periods during the years in question, this fact would go far toward justifying substantial reduction of forces and reassignment of work among employees as of January 1, 1933. We know, however, that the trough of the general depression was reached early in 1933, and it would therefore be particularly helpful to have had in the record a statement concerning the business done at the Beaumont station at typical periods subsequent to January 1, 1933.

The carrier has naturally placed emphasis on the delay of more than two years between the time the position of Bill Clerk was discontinued on January 1, 1933, and Oglesbee was assigned as Utility Clerk and the time of bringing this case. Insofar as this contention refers to the jurisdictional issue, the Referee, in ruling on that issue, has set it aside. The fact may, however, have some presumptive bearing on the merits of the case during at least part of the period between January 1, 1933, and March 11, 1935, when Oglesbee presented his claim to Agent Walker. In his sworn statement of April 18, 1936, Assistant Agent E. B. Wilson uses this language:

"At the time the bill clerk's position was abolished effective January 1, 1933, I discussed with Local Chairman L. I. Smith of the Clerk's Organization, the matter of abolishing this position and distributing the work around among the other employees of the office, and Mr. Smith stated that he did not consider this action on the part of the company as being in violation of any of the provisions of the Clerk's agreement. Mr. Smith was at the time, and is still, a regular employee in the freight station at Beaumont, and continued to represent the clerical employees as local chairman after January 1, 1933, until the latter part of 1935, and was aware of the changes made in the forces from time to time and the fact

that no complaint or protest was made against this change until sometime in March 1935, is, I think, conclusive evidence that the Organization concurred in the arrangement."

The fact that petitioners sharply attack the accuracy of Mr. Wilson's statements in other particulars would perhaps subject this one to the reservations in respect to disputed facts above suggested—assuming the statement to be seriously contested.

The accepted facts applicable to the earlier portion of the time during which this claim runs are that Oglesbee's hours were changed effective January 1, 1933, and that orders were given then as to the distribution of the former bill clerk's work among the remaining employees. What else happened, and whether the orders were carried out, remains a matter of sharp controversy.

In trying to resolve this controversy, absence of protest for more than two years cannot be ignored. Petitioners have attributed this silence to conditions on the property, and belief that protest would have been useless prior to the passage of the Amended Railway Labor Act in June 1934. This, of course, does not explain the long delay after that date. Assuming, however, that there was ample reason for the delay both before and after June 1934, the case illustrates the difficulty of securing satisfactory evidence concerning events long since past. It is notorious in legal proceedings that intelligent and unbiased observers can seldom give accurate and dependable testimony about past events. Testimony in this case was gathered in 1935 and early in 1936, and except as it relates to specific facts susceptible of definite corroboration the Referee is compelled to give it more weight as applying to the general period during which it was gathered than it can possibly have in respect to a more distant period.

The Referee is unable to find in the record sufficient evidence to warrant a conclusion that Oglesbee performed a substantial portion of the duties formerly pertaining to the position of bill clerk for a considerable time subsequent to January 1, 1933. On the contrary, the Referee is of the opinion that the record, unsatisfactory as it is, indicates that he did not perform relatively the same duties during that period as those pertaining to the former position of Bill Clerk.

As regards the latter part of the period for which Oglesbee's claim runs, statements concerning the work he did, in view of the fact that they related to relatively present facts as distinguished from memory, suggests that Oglesbee may have dropped into enough of the bill clerk's duties to justify further consideration of his claim—this in spite of the fact that most of the statements concerning his work are highly contested. The Referee is not inclined entirely to ignore the fact that the Agent during this period seemed to regard Oglesbee as his Bill Clerk. If it were shown that the business of the carrier had revived to the extent that many other lines of business revived in 1935, the force of such a supposition as the one just made would be enhanced. Because of the confusion resulting from the record as it stands, and because the general chairman suggested the correct procedure of making a joint check, which procedure the carrier rejected, the Referee in disallowing the whole claim for the present is doing so without prejudice to reopening the case as it pertains to a period not to exceed six months prior to the date of filing the original claim.

If the case should be reopened, it would be helpful for the record to reveal, among other things, authentic data as to the comparative condition of the carrier's business in 1934 and 1935 in relation to the earlier dates for which facts were given. It would also be desirable to replace the conflicting arguments of the present record by brief, clear, authenticated statements of pertinent and agreed facts.

AWARD

Claim dismissed without prejudice to reopening that part of it which pertains to a period running from not to exceed six months prior to the filing of the original claim.

By Order of Third Division:

NATIONAL RAILROAD ADJUSTMENT BOARD.

Attest:

H. A. JOHNSON, *Secretary*.

Dated at Chicago, Illinois, this 17th day of September 1936.