# NATIONAL RAILROAD ADJUSTMENT BOARD
## Third Division

Arthur M. Millard, Referee

**PARTIES TO DISPUTE:**

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

**NORTHERN PACIFIC RAILWAY COMPANY**

STATEMENT OF CLAIM.—

"Claim of A. J. Froelich, dated April 18, 1934, that position of yard clerk at Mandan, N. D., was improperly abolished, and that he should be paid for time lost on April 9, 10, 11, 12, 13, and 14, 1934, based on Rules 1, 11, 71, 78, and 88 of Clerks' Schedule."

STATEMENT OF FACTS.—The following statement of facts was jointly certified by the parties:

"The position of yard clerk, hours of service 12:00 midnight to 8:00 A. M., at Mandan, was abolished as a regular position effective April 8, 1934. Mr. Froelich occupied this position prior to its discontinuance. On April 15th Mr. Froelich exercised his seniority over a junior employe. Subsequent to the date that the position was abolished the work on the position was performed when needed by extra employes."

There is in evidence an agreement between the parties bearing effective date of August 15, 1922, and the following rules thereof are cited:

"SCOPE.—EMPLOYES AFFECTED.—RULE 1. These rules shall govern the hours of service and working conditions of the following employes, subject to the exceptions noted below:

"(1) Clerks—

"(a) Clerical workers.

"(b) Machine operators.

"(2) Other office and station employes—such as office boys, messengers, chore boys, train announcers, gatemen, baggage and parcel room employes, train and engine crew callers, operators of certain office or station appliances and devices, telephone switchboard operators, elevator operators, office, station, and warehouse watchmen and janitors.

"(3) Laborers employed in and around stations, storehouses, and warehouses.

"* * *."

"BULLETIN.—RULE 11. New positions or vacancies will be promptly bulletined in agreed upon places, accessible to all employes affected, for a period of five (5) days in the districts where they occur; bulletin to show location, title, hours of service, and rate of pay. Employes desiring such positions will file their applications with the designated official within that time, and an assignment will be made within five (5) days thereafter; except that in the general offices at Saint Paul and Seattle positions will be bulletined for a period of three (3) days, and an assignment will be made within three (3) days thereafter. The name of the successful applicant will immediately thereafter be posted for a period of five (5) days where the position was bulletined.

"The provisions of this rule shall apply to all positions or vacancies except that of truckers and similarly rated or lower positions; provided, however, the senior employe in this class of service will be given an opportunity to

lish an additional regular position. It requires no argument to convince your Board that such a method of force adjustment is something that has never been done on any railroad, and is absolutely impractical of operation.

As stated in connection with the previous docket, the Railway Company adjusts its forces to conform with business to be handled, and this applies not only to those who are covered by the Clerk's Agreement, but to train and enginemen, car repairmen, roundhouse forces, and others whose work is directly affected by business to be handled.

As stated in connection with the previous docket, Mandan is a main line terminal from which point branch lines diverge where large quantities of lignite coal are produced. In addition to this Mandan is also located in a large agricultural district. Shipments of agricultural products are seasonal. Furthermore, these shipments commence to move in small quantities. These increase until the crest of the shipping season is reached and then taper off, depending upon various conditions. These circumstances were fully known by those who made the schedules and neither the Employes nor the Carrier had in mind when negotiating schedules that employes would be used when their services were not necessary. This has been recognized by the Clerks' Organization.

The Carrier, in connection with the previous docket, has submitted evidence to show that the Clerks' Organization not only concurred in this method of adjusting forces, but insisted that in such adjustments seniority rights of employes should be respected. Carrier's Exhibit "A" in this case shows that there has been an uncontroverted custom of adjusting forces precisely the same as was done in the present case, and that neither the Employes at Mandan including Mr. Froelich, nor the Clerks' Organization took any exception to this method or contended that it was in contravention with schedule rules until Mr. Froelich presented his claim in April 1934. This is not only persuasive but conclusive evidence that there has heretofore been no dispute between the Northern Pacific Railway and its clerical and station employes on the question that is now before your Board.

In the preceding docket the Carrier referred to the opinion of Referee Corwin in connection with Awards Nos. 1082, 1083, 1084, and 1085 of the First Division, National Railroad Adjustment Board. What the carrier said in connection with that opinion in the preceding docket is applicable in the present case. We desire to add, however, that in this case the same man, Mr. Froelich, worked under identical conditions in the years 1932 and 1933 and neither he nor his representatives presented any claim that schedule rules entitled him to compensation for services rendered. This further corroborates the Carrier's statements made in the previous docket with respect to concurrence by the Employes in a custom of many years standing in the adjustment of forces.

The Employes in this docket and in the preceding docket are attempting to secure through your Board a new interpretation and application of schedule rules which is contrary to the interpretation and application of these rules, which have been mutually agreed to and accepted by the Carrier and the Employes over a period of many years, and which is also contrary to the previous contentions of the Employes.

OPINION OF THE BOARD.—In the questions at issue in this case both employes and carrier submit that the same general arguments as used in Award 439, Docket CL–419, apply equally in this case. Both claims originated in the Mandan, N. D., yard office of the Northern Pacific Railway Company, and many of the rules and decisions which were cited and submitted in case Docket CL–419 apply equally to this present case.

The claim made in this docket is that of A. J. Froelich, who alleges that the position of yard clerk which he held at Mandan, N. D., was improperly abolished, and that he should be paid for time lost on April 9 to 14, 1934, inclusive, based on Rules 1, 11, 71, 78, and 88 of the agreement between the Northern Pacific Railway Company and the The Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes.

Many of the conditions presented in this dispute were discussed at length in the Opinion of the Board in Award 439, Docket CL–419, and are similar in many respects. There are, however, certain differences which again emphasize the statements previously made before this Third Division "that each case should be decided upon its merits."

In the present instance, as in Award 439, Docket CL–419, the claim is made that work continued to be done by extra employes on a position after such position

had been declared abolished by the carrier and various rules have been cited in support of the respective contentions of the parties.

In addition, however, to the claim made in Award 439, Docket CL–419, that extra employes continued to perform intermittent work on the position in question after the position had been abolished by the carrier, the claim is made by the employes that the yardmaster performed the major duties of car clerk on certain specified days or shifts of the period involved following the abolition of this position.

The position of car clerk is not specifically mentioned as such in the scope of the agreement in Article I, but comes under the classification of clerical workers; and this fact is fully understood by the parties concerned in the claim; and while no representations have been made as to the classification of yardmasters, the fact is understood that these positions are not included in the scope of the agreement under which this claim is made.

So far as the discontinuance of a regularly assigned six day position is concerned, and the substitution therefor of the intermittent use of an extra employe, the Board reiterates its opinion as contained in Award 439, Docket CL–419, that such action is proper, provided it can be shown by the carrier that in abolishing an established position it is neither evading the application of an established rule or taking an undue advantage of the employes by discontinuing positions when there is a real necessity for their continuance.

In the opinion of the Board a carrier is justified in abolishing a regular full-time position or positions and in substituting extra employes to carry on intermittent work of the same class when, and only when, the duties of the position fall off to such an extent as to require no service to be performed in the position covering a majority of the time in shifts, hours, or days—and for a reasonably sustained period—which would otherwise be a part of the abolished position.

In this instant case the evidence submitted is that during the period covered by this claim; viz, from April 9 to 14, 1934, inclusive, extra yard clerks were employed on April 9, April 11, and April 13, 1934, or three days or shifts out of six. In addition to this, however, the undisputed testimony presented by the employes is that on alternate days or shifts, or on April 10, 12, and 14, the major duties of the abolished position were performed by the yardmaster, an employe not included in the scope of the agreement affected by this claim.

In this direct testimony as it applies to the period included in this claim, no evidence is presented as to the quantity of work belonging to the abolished yard clerk's position that was done by the yardmaster, either as it affected his own duties or the conditions surrounding the service rendered, whatever it may have been. However, the fact remains as it applies to this case that any work belonging to the abolished position that was done by the yardmaster brings irrefutable evidence that, coupled as it must be to the intermittent work rendered by the extra employe, a preponderance of the work of the abolished position continued to exist and arouses grave doubt as to whether the necessity for the service of a full-time yard clerk was not definitely indicated at the time when the position was abolished by the carrier.

In the opinion of the Board the transfer of a portion of the duties pertaining to this position to a yardmaster's position constitutes, in this instance cited, a direct violation of the principles of Rule 88 of the agreement, which provides that "established positions shall not be discontinued * * * for the purpose of * * * evading the application of said agreement," and the board so rules in this case.

With respect to compensation for the loss of work during the period indicated, the Board calls attention to the testimony that the practices introduced in this claim have to a more or less extent been an uncontested custom over a period of years, and this should not be disregarded. The responsibility for the application of the proper rates and schedules is one that rests mutually upon the employes and carrier. The parties therefore are directed to determine through negotiation such adjustment of compensation as is or is not to be made, in view of the conditions of an uncontested custom, a mutual responsibility for the conditions developed, and the readjustment of the situation indicated to a proper and equitable basis.

FINDINGS.—The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the carrier and the employe 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 facts of record sustains the claim of the employes that the carrier violated the rules of the agreement.

AWARD

Claim sustained, with question of compensation referred back to parties as outlined in final paragraph of the Opinion of the Board.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: H. A. JOHNSON
*Secretary*

Dated at Chicago, Illinois, this 13th day of May, 1937.