

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Benjamin C. Hilliard, Referee

PARTIES TO DISPUTE:

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

**THE DENVER AND RIO GRANDE WESTERN
RAILROAD COMPANY**

Wilson McCarthy and Henry Swan, Trustees

STATEMENT OF CLAIM: "Claim that Mr. Les Mathews, Assistant Foreman, Salida, Colo. be reimbursed for all monetary loss sustained by him from May 13th to July 9th, 1936, inclusive, account illegal abolishment of his position and the filling of same on part time basis by an employee holding no seniority in that group."

JOINT STATEMENT OF FACTS: "Prior to May 13, 1936, position of Assistant Foreman existed at Salida, Colo., the principal duties of which were to operate what is known as the barrel transfer and which position came within the scope of Group 1. Under date of May 13, 1936, position was abolished and was reinstated under date of July 10, 1936, during which interval the work of the position was handled by an employee in Group 2 on a part time basis.

"The Organization requested that the position be reestablished and that Mr. Mathews be compensated for all time lost, which request was refused by the Management."

POSITION OF EMPLOYEES: "Our claim is based on Rules 1, 43 and 61 of the current agreement.

RULE 1.

"These rules shall govern the hours of service and working conditions of the following employees, subject to the exceptions noted below:

'(1-a) Clerks.

'(1-b) Ticket Sellers, Weighmasters, Car Sealers and Carders, Warehouse, Transfer and Store Foremen, except Foremen who supervise Assistant Foremen or Sub-Foremen, Station Helpers and Warehousemen, Supervisors of Refrigeration and Heater Service, Sectional Storekeepers.

'(2) Other office, store and station employees, such as office boys; messengers; chore boys; baggage and parcel room employees; telephone switchboard operators; engine dispatchers and train and engine crew callers; office, station and warehouse watchmen and janitors;

July 1—8 hours as Ticket Clerk (\$4.56 per day)
 2—Regular day off
 3—8 hours as Ticket Clerk (\$4.56 per day)
 4—8 hours as Ticket Clerk (\$4.56 per day)
 5—8 hours as Ticket Clerk (\$4.56 per day)

"There are only two employees at Salida other than Mr. Matthews who are qualified to operate the barrel transfer, these men being Tom and Chris Nasious. Mr. Tom Nasious is regularly employed as Transfer Foreman, therefore, when necessary to operate the barrel transfer it was necessary to place Mr. Chris Nasious on the job.

"The position of Asst. Transfer Foreman is a group 1 clerical position and at the time this job was abolished Mr. Matthews, who has a seniority date of July 11, 1912, could have used his seniority to displace any one of seven junior group 1 employees, including Tom Nasious who was at that time employed as one of our transfer foremen.

"The Carrier holds it has the right to abolish jobs when there is not sufficient work to justify such positions and contends in view of the small amount of time the barrel transfer was operated during the period May 13th to July 10th it was justified in abolishing the regularly assigned position of Assistant Transfer Foreman in charge of this work. In view of Mr. Matthews established seniority he could had he so desired secured a higher rated position than the job he occupied which was abolished. As a matter of fact the job on which he did exercise his seniority paid \$4.56 per day as against \$4.48 per day as Assistant Foreman, and had he not taken a leave of absence when his job was abolished on May 13th and had he not been ill when disqualified as a Ticket Clerk on July 5th he would not have suffered any monetary loss.

"The Carrier contends there is no justification for the instant claim."

There is in evidence an agreement between the parties bearing effective date of February 1, 1926.

OPINION OF BOARD: Prior to Wednesday, May 13, 1936, a position designated as assistant transfer foreman existed at the Salida, Colorado, station. The principal duties consisted in operating what is termed a "barrel transfer" of car load commodities from narrow to standard gauge cars. Pay for the position, daily rated, was \$4.48 per day. On the date mentioned the carrier, as claimed abolished the position, the immediate effect of which, and regardless of whether for present purposes abolishment resulted, was to prevent the employee occupying the position from performing the duties thereof. July 10, 1936, the carrier restored the position and reinstated the employee who had been separated therefrom in the manner indicated. The question has to do with the status of the employee who was prevented from serving in the position which he held pursuant to the existing agreement and in virtue of his seniority rights during the time of the abolishment, and the carrier's obligation to him, if any.

The carrier justifies its action on "decrease in coal loading on the narrow gauge lines," said to have obtained during the period. It appears that for the week of Monday, May 11, the position was worked by the complaining employee full shifts on Monday and Tuesday, and that for the remaining weeks of the period the position was worked by a transfer laborer holding no seniority in the premises, as follows: The week of Monday, May 18, three one-half shifts, the week of Monday, May 25, three full shifts, the week of Monday, June 1, one full and one one-half shift, the week of Monday, June 8, one full shift, the week of Monday, June 15, one full shift, the week of Monday, June 22, three full shifts, the week of Monday, June 29, one one-half shift and four full shifts, and there was one holiday, and the week of Monday, July 6, full shifts on the 6th, 7th, 8th, 9th and by the restored employee on the 10th and 11th.

While performing the "barrel transfer" duties proper, and only while so engaged, the laborer assigned thereto was paid at the daily wage rate established for the position, but when performing the other duties of the position, he only received his normal rate of pay—considerably less. Considering rules 1 and 61 of the agreement, both quoted above, we cannot think the position was competently abolished. By virtue of rule 1 the position was daily rated, and by rule 61 it was agreed that any position so rated assured to the employee assigned thereto employment of six days per week, holidays excepted. Reasonably construed, we think the rules operate to guarantee six days of employment per week, and there is no agreement to the effect that reduced business, speaking generally, or "decrease in coal loading," as here, shall operate to negative such guarantee. Award No. 783. Other Awards, more or less pertinent, and helpful to our study, are Nos. 79, 289, 332 and 449.

We do not regard the leave of absence taken by the employee involved as equivalent to an acceptance on his part of the situation unilaterally established by the carrier. The employee was helpless to enforce his right to serve against the order of the carrier. Therefore, the employee's attempt to meet the embarrassment occasioned by the action of the carrier, should not work to his wage loss. It follows that he is entitled to receive the difference between a sum equal to what would have been his earnings in the questioned position for the period involved, and the sum of wages paid him, in whatever position he worked, during such period. See Award No. 735.

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 employees involved in this dispute are respectively carrier and employees 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 carrier violated the current agreement as indicated in the opinion.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 12th day of December, 1940.