

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Bruce Blake, Referee

PARTIES TO DISPUTE:

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

THE COLORADO AND SOUTHERN RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated and continues to violate the Agreement when on or about February 1, 1944, it abolished position of Per Diem Statement Clerk, Car Accountant's Office, and substituted therefor position designated as "Chief Clerk, Car Accountant's Office"; and, that

(2) The senior qualified employe, Doris Shumsky, who has suffered monetary loss by this schedule violation, be compensated for such loss.

JOINT STATEMENT OF FACTS: Prior to February 1, 1944, there existed in the office of the Car Accountant, Denver, Colorado, position designated as "Per Diem-Statement Clerk", carrying a rate of \$7.09 per day, which produced approximately \$180.80 per month. This position was abolished and a new position titled "Chief Clerk to Car Accountant" was substituted at a rate of \$203.36 per month.

The Organization protested this action and claimed violation of Rules Nos. 4, 5, and 63.

POSITION OF EMPLOYES: The organization contends that Rules 4, 5 and 63 were violated. Rule 4 (Promotion Rule) is intended to protect the rights of the employes to promotion. This action removed the position of Per Diem Statement Clerk from the Promotion Rule and gave carrier the right to fill without bulletin.

Rule 5 provides:

"Assignments and displacements under these rules shall be based on seniority, fitness and ability; fitness and ability being sufficient, seniority shall prevail, except, however, that this provision shall not apply to the excepted positions listed in paragraph (a) of Rule 4."

Paragraph (a) of Rule 4 gives to the Car Accountant's Office positions of Chief Clerk and Secretary, both being excepted from the Promotion Rule.

Rule 63 provides:

"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."

When the position of Per Diem-Statement Clerk, rated at \$7.09 per day, or an average of \$180.80 per month, was abolished and the position of Chief Clerk to the Car Accountant re-established at a rate of \$203.36 per month, the rate was not reduced, but was increased. Therefore, in that respect, Rule 63 was not violated.

As previously stated, the Carrier had a right to re-establish the position of Chief Clerk, which position is covered by the agreement. Therefore, when this position was re-established and assigned certain clerical work, it was not taking any work out from under the agreement. The position was filled in accordance with rules applicable to excepted positions. Therefore, there was no violation of Rule 63 in connection with evading the application of rules.

The right of the Carrier to abolish a position and establish another position with a different title, performing relatively the same class of work, when the rate of pay is not reduced or the work taken out from under the agreement, is not a violation of the agreement. This was well established in dispute between this Carrier and the Brotherhood of Railway Clerks in award rendered by your Board Numbered 304.

As the Carrier did not violate any of the rules of the agreement, this protest and claim should be denied.

OPINION OF BOARD: It appears from the record that the position of Per Diem Statement Clerk in the Car Accountant's Office of the Carrier became vacant January 11, 1944, by reason of resignation by the incumbent. The position remained vacant until January 25th when the position was abolished by the Carrier.

Shortly thereafter the Carrier re-established the position of Chief Clerk which had been abolished during the depression years. The position of Chief Clerk is excepted from the provisions of Rules 4, 5, and 8, relating to promotion, assignment and displacement and bulletining of positions.

The Chief Clerk took over the duties appertaining to the position of Per Diem Statement Clerk. We think that it is circumstantially established, by the record that the Chief Clerk is doing "relatively the same class of work" as that performed by the Per Diem-Statement Clerk. February 16, 1944, the Organization made demand on the Carrier to re-establish the position of Per Diem-Statement Clerk and bulletin it in accordance with Rule 8 of the Agreement. This was the substance of the claim as it was presented to the Carrier and in negotiations on the property. As presented to this Board it has been expanded to embrace a demand for compensation in behalf of Doris Shumsky.

In re-establishing the position of Chief Clerk and assigning to it an employe covered by the Agreement without regard to the provisions of Rules 4, 5, and 8, the Carrier acted within its rights. For the position of Chief Clerk is expressly excepted from provisions of those rules. It does not follow, however, that it had the right to abolish the position of Per Diem-Statement Clerk, to which the provisions of those rules do apply, and transfer the work appertaining to it to the position of Chief Clerk.

In so doing we think the Carrier violated Rule 63 which provides:

"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.** (Emphasis supplied.)

In considering the Carrier's action in the light of this rule it is to be remembered that the record satisfactorily establishes the fact that the position of Chief Clerk covers "relatively the same class of work" as did the position of Per Diem-Statement Clerk before it was abolished.

This Board has uniformly held that a clerical position cannot be abolished and the work appertaining thereto be assigned to an employe not covered by the agreement. The carrier cannot escape this principle even when the new position is created under the pretext (as in the instant dispute) of creating a supervisory position. See Award No. 139.

Indeed, the Board has gone so far as to hold that a clerical position may not be abolished and work appertaining thereto be assigned to another clerical employe whose position is excepted from the agreement. Award No. 751. We fail to see why the principle applied in that Award is not equally applicable in a case such as this where a clerical position is abolished and the work assigned to another clerk whose position is excepted from the provisions of the agreement relating to promotions, assignments, displacements and bulletins. Certainly, the seniority rights of other clerical employes are impaired as much in one instance as in the other.

The Carrier denies, in taking the action it did, any "purpose of . . . evading the application of these rules". Of course, intent is a state of mind and can rarely be established by direct evidence. However, the intent with which an act is done maybe, and usually is, determined by the effects resulting from it. See Awards 139 and 3301. Clearly, the effect of the Carrier's action in this instance was to impair seniority rights established by Rules 4, 5 and 8. Its action, therefore, constituted an "evasion" of those rules in contemplation of Rule 63.

We think the claim for compensation on behalf of Doris Shumsky is without merit. The Carrier asserts, without controversion, that no such claim was suggested during the conferences and negotiations had on the property.

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 parties waived oral hearing thereon;

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;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Carrier violated the Agreement.

AWARD

Paragraph (1) of the claim sustained.

Paragraph (2) of the claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 20th day of January, 1947.