Award No. 5392
Docket No. CL-5118

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

J. Glenn Donaldson, Referee

PARTIES TO DISPUTE:

THE CHESAPEAKE AND OHIO RAILWAY COMPANY
CHESAPEAKE DISTRICT

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

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that the two positions of Yard Clerk established at Walbridge, Ohio, April 14, 1948, at rates of $9.56 and $9.74 per day were improperly rated, that they shall now be properly rated at not less than $10.14 per day, advertised and assigned in accordance with the terms of the Agreement and all employes adversely affected compensated for all wage loss sustained, retroactive to April 14, 1948.

CARRIER'S STATEMENT OF FACTS: A. **The Claim.** Due to a coal mining shutdown, position No. 84, a yard clerk position at Walbridge, Ohio, rate $9.74 per day, was temporarily discontinued on March 30, 1948. It was re-established on April 14, 1948, after the mines had resumed operations, with the same hours and duties and at the same rate. For the same reason, position No. 124, another yard clerk position, rate $9.56 per day, was discontinued on March 20, 1948, and similarly re-established on April 14, 1948, with the same hours and duties and the same rate. The employes claim that these positions should have been re-established at $10.14 per day, the rate which they claim was the then going rate for yard clerks in Walbridge, Ohio. The claim has been presented by the employes on the assumption that there is no material distinction in the type of work done by the various yard clerks at Walbridge, but that, as a matter of principle, lower-paid positions cut off because of a coal strike must be reinstated at a higher rate.

B. **Background.** The Chesapeake and Ohio Railway Company is largely a coal-carrying railroad, about two-thirds of its revenues being derived from the hauling of coal. When coal traffic is interrupted by mining shutdowns, only such employes as are actually needed for handling the remaining business are retained in service. The employes not needed during mining interruptions are "cut off" or temporarily suspended. When normal mining operations resume, the Carrier's forces are increased to take care again of normal coal-hauling operations, and it was under such circumstances that the yard clerk positions in question were restored. Much the same happens at certain points where river or lake traffic is temporarily interrupted during the winter.

Walbridge, Ohio, is one of the Carrier's coal-hauling gateways. As will appear more fully below, there were, in the early part of March, 1948, or just prior thereto, 31 yard clerks working at Walbridge. With roughly two-thirds of the volume of traffic gone, the Carrier retained 17 and laid off 14 of them. The temporary suspension of clerical employes at Walbridge in this instance was thus in keeping with the conditions and did not represent an unjustified trimming of the clerical forces.

The mining interruption in this particular instance became effective in the latter part of March, 1948, and that is the time at which the positions

in Rule 14 doing so. There is no provision in the Agreement for any temporary discontinuance, or subsequent re-establishment without regard to the rating provisions of Rule 46.

Rule 18—Reducing Forces and Abolishing Positions—Section (f), first paragraph, reads:

> "(f) In all cases of abolishment of regular assignments in Groups 1 and 2, employes affected shall be given notice by the proper officer of such intended abolishment as far in advance as possible, but in no case shall less than 4 working days' notice be given. Division Chairman will be notified when such assignments are to be abolished." (Underscoring supplied.)

This provision requires the Carrier to give employes affected not less than four working days' notice when their positions **are to be abolished**. Such notice was given the employes occupying Positions Nos. 84 and 124. The incumbent of Position No. 124 was given notice March 16, 1948, that his position was being **abolished** effective March 20, 1948. The incumbent of Position No. 84 was given notice March 26, 1948, that his position was being **abolished** effective March 30, 1948, (see our quotation of Bulletins Nos. 76 and 106 covering abolishment of Positions 84 and 124 on Pages 10, 11) Therefore, it can be clearly seen that the two positions when re-established were positions which had been **abolished** and which were later re-established.

Rule 45—Preservation of Rates—Section (a) implements the rating provisions to the extent that the Carrier is required, as clearly expressed in Section (a) of the rule reading as follows:

> "Employes temporarily or permanently assigned to higher rated positions for a full day or less, shall receive the higher rates for the full day * * *",

to pay the higher rate application and your honorable Board has rendered many Awards sustaining the position of the Employes in this respect.

Rule 65 provides the procedure which must be followed when either party to the Agreement desires to change its provisions. In the absence of such procedure being followed and agreement being reached, the effective provisions of the Agreement must be maintained and neither party can change them simply by the expression of its wish or unilateral action.

We believe Rule 46 is clear, that it leaves no room for question, that we have shown that the Carrier not only understands the rule, but has acknowledged the correctness of our position by settling identical disputes in accordance with its provisions, and claims made by our Organization, that its action in refusing to allow this claim is nothing more than plain disregard of the provisions of the Agreement.

We believe we have also clearly shown that your honorable Board as well as the old U. S. Railroad Labor Board have both rendered Awards on many similar disputes which clearly sustain the position of the Employes. We, therefore, most respectfully request your honorable Board to sustain the position of the Employes in this case.

(Exhibits not reproduced.)

OPINION OF BOARD: Carrier, two-thirds of its revenue being derived from the hauling of coal, abolished certain yard clerk positions during the mine strike of 1948. The positions in question were reestablished two to three weeks later when coal mining was resumed with the same hours and duties and at the same rates of pay as before, $9.56 and $9.74. The

Organization contends that the positions should have been reestablished at $10.14 per day, the rate which they claim was the then going rate for yard clerks at this seniority point. The Organization relies upon Rule 46 (a) among others, providing:

> "(a) The rates of pay for new positions or positions abolished and later re-established shall be in conformity with the rates of pay for positions of similar kind, or class, in the seniority district where created."

The Carrier shows frequent interruptions of its work by river or lake shipping conditions and mine shut-downs during which times employes not needed, it is alleged, are "cut-off" or temporarily suspended and restored at same rates which prevailed for such positions before their temporary discontinuance.

The Carrier states that the facts and positions involved in Docket No. CL-5031, (since subject of our Award 5163), "are substantially the same as those in the instant case; and the principles involved are identical." Later in its submission and after Award 5163 was rendered, Carrier contends that the present case is factually distinguishable because there the Division had to deal with three men working around-the-clock on the same position which involved only one cycle, two of whom were paid $9.74 and the third $9.24, while here we are not dealing with around-the-clock positions in one cycle only, but with different positions in different cycles.

We rejected Carrier's contention in the before-mentioned Award that the positions in question were not abolished within the meaning of the Agreement but merely discontinued temporarily. We also held there that Rule 46 is plain and unambiguous, hence unaffected by past practice. The factual differences lately noticed do not alter these basic conclusions and after study of the submission, we are constrained to reaffirm and follow our previously expressed Opinion.

We now will apply Rule 46(a) to the evidence at hand. Considerable wage data is contained in the docket, the pertinent portion of which reduces itself to the following:

Excluding the six coal dock clerks, (being paid a rate higher than $10.14), we have twenty-five remaining positions of yard clerks at Walbridge Yard paid as follows:

11	positions	at	$10.14	per	day
3	"	"	9.95	"	"
2	"	"	9.94	"	"
3	"	"	9.76	"	"
2	"	"	9.74	"	"
1	"	"	9.64	"	"
2	"	"	9.56	"	"
1	"	"	9.55	"	"

The above data shows a definite cluster of rates at $10.14 per day and substantiates the Organization's claim that it is the going, prevailing rate for positions of similar kind, or class, in the seniority district involved. Neither the duties nor the responsibilities need be identical in order for positions to be of similar kind, or class. See Awards 1861, 2678, 3447, 3485 and 4036.

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 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 Agreement was violated.

AWARD

Claims sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 18th day of July, 1951.