Award No. 5436
Docket No. CL-5433

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Jay S. Parker, Referee.

PARTIES TO DISPUTE:

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

ERIE RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that the carrier violated the Clerks' Agreement:

1. When on June 1, 1949, carrier abolished a position of Rate Clerk at Johnson City, New York, theretofore established as a position and filled pursuant to rules of Agreement between the carrier and the Brotherhood effective December 1, 1943 (amended July 1, 1945) and by unilateral action transferred the work normally attached to the Rate Clerk to be performed by:

(a) other than employes embraced within the Scope Rule of our Agreement with the Carrier.

(b) Part-time clerical worker.

2. When on June 1, 1949, Carrier abolished position of Comptometer Operator Typist, at Endicott, New York, theretofore established as a position and filled pursuant to the rules of Agreement between the carrier and the Brotherhood effective December 1, 1943 (amended July 1, 1945) and by unilateral action employed a part-time worker to perform the work normally attached to the position of Comptometer Operator Typist at Endicott.

3. That the position of Rate Clerk at Johnson City, as it existed immediately preceding June 1, 1949, be reinstated and that the regularly assigned occupant as of that date, namely H. C. Winters, be returned thereto and compensated for all wage losses sustained resulting from his irregular removal therefrom on June 1, 1949, and that all other employes affected by Mr. Winters' displacement from the position of Rate Clerk at Johnson City on June 1, 1949 be compensated for all wage loss sustained by them retroactive to June 1, 1949.

4. That the position of Comptometer Operator Typist at Endicott, as it existed immediately preceding June 1, 1949, be reinstated and that the regularly assigned occupant thereof as of that date, namely, Mr. G. F. Sullivan, be returned thereto and compensated for all wage loss sustained resulting from his irregular removal therefrom on June 1, 1949, and that all other employes affected by Mr. Sullivan's displacement from the position of Comptometer Operator-Typist at Endicott on June 1, 1949, be compensated for the wage loss sustained by them retroactive to June 1, 1949.

OPINION OF BOARD: Johnson City, N. Y., and Endicott, N. Y. are two distinct cities and agencies, located six miles apart. Prior to June 1, 1949, the Carrier's forces at Johnson City consisted of an Agent, Chief Clerk, and Rate Clerk, the latter position having hours 8 A. M. to 5 P. M. Its force at Endicott consisted of an Agent, Chief Clerk, Comptometer Operator-Typist, Clerk Typist, Cashier and Assistant Rate Clerk, Demurrage Clerk, Rate Clerk, Clerk Typist and Clerk.

On May 27, 1949, by three bulletins, all bearing the same date, the Carrier announced, effective June 1, 1949, the abolishment of the Rate Clerk's position at Johnson City and the Comptometer Operator-Typist at Endicott, also the establishment of a new position of Comptometer Operator-Typist at Endicott-Johnson City, hours 8 A. M. to 12 noon at Endicott and 1 to 5 P. M. at Johnson City. The Carrier asserts, and it is not denied, that thereafter this part-time clerk was carried on the payroll at Endicott and allowed from 4:45 P. M. to 5 P. M. to return to that location at the end of his day's work.

The record makes it clear that soon after the effective date of the two bulletins first above mentioned the occupant of this newly created position performed typing and clerical work at Johnson City in the afternoon, 1 P. M. to 4:45 P. M., daily except Sundays and holidays, and the ordinary duties of a Comptometer Operator-Typist at Endicott during the hours he was assigned to work at that point. It also shows that when the full-time Comptometer Operator-Typist position at Endicott was abolished the occupant of the newly created position at that point performed four hours of its work and the remaining four hours thereof was distributed among the Endicott clerical employes.

There is dispute between the parties as to what became of the work of the Rate Clerk's position at Johnson City when it was abolished. As heretofore indicated, the employe assigned to the new position performed three and three-quarters hours of its work. The Carrier states the remainder was performed by the Chief Clerk. On the other hand, the Employes concede part of it was assigned to the Chief Clerk but insist some of it was taken over by the Agent who occupied a position which was not covered by the terms of the current Agreement. For our purposes, as will presently be disclosed, we need not labor that disputed difference in the factual situation.

It is certain, however, that as a result of the Carrier's action (1) H. C. Winters, the Rate Clerk at Johnson City, displaced Clerk-Typist C. L. Brady at Endicott who was furloughed at that time account being unable to assert seniority over any junior employe. Just how long he was furloughed or what his wage loss has been does not appear; (2) G. F. Sullivan, occupant of the abolished Comptometer Operator-Typist position at Endicott, applied for and was assigned to the newly created position bearing the same title; (3) the Employes filed formal grievance with the Carrier on May 29, 1949, by letter, wherein they objected to the abolishment of the Rate Clerk position at Johnson City and claimed that action was in violation of "Rule 1 Paragraph 1" and Rule 31 of the Agreement; and (4) that this claim was rejected by the Agent to whom it was directed and Carrier officials at higher levels.

The Carrier suggests a violation of Rule 1 (c) (1) cannot be given consideration in disposing of the instant claim because it was not identified correctly in the grievance as originally filed in that it was there described as "Rule 1 Paragraph 1" whereas there is no such rule to be found in the Agreement. The claim lacks merit for a number of reasons. We choose to reject it on the ground that subsequent appeals to higher levels described the Rule as 1 (c) (1) and officials of the Carrier in denying them definitely indicated their knowledge of the rule relied on by specific reference thereto.

In fact while the claim was being progressed on the property and still under jurisdiction of the Carrier's Superintendent the employes specifically advised that official objection to the Carrier's action was based on the premise

the remaining duties of the Rate Clerk's position had not been reassigned in accordance with such rule by reason of the fact those duties were not assigned to be performed by another position or positions remaining at Johnson City, the location of the Rate Clerk abolished and that instead a position of Comptometer Operator-Typist, Endicott-Johnson City, was created for the express purpose of performing the remaining duties of such position. In such a situation it cannot be said the violation of such rule was not asserted on the property in the manner contemplated by the Railway Labor Act or the rules of this Board as interpreted by our decisions.

Nor do we find merit in the Carrier's contention this Board cannot consider the claims of unnamed persons under the general category "all other employes affected." We have held to the contrary many times—see Awards 5078 and 5107.

Rule 1 (c) (1) so far as pertinent to the issue now in question reads:

> "(c) When a position covered by this Agreement is abolished, the work previously assigned to such position which remains to be performed will be assigned in accordance with the following:
>
> 1. To another position or other positions covered by this Agreement when such other position or other positions remain in existence, at the location where the work of the abolished position is to be performed."

As we have heretofore indicated, it is conceded there was another position (Chief Clerk) in existence at Johnson City when the Rate Clerk position was abolished. For that reason subdivision c (2), relating to situations where no position exists at the location where the work of the abolished position was to be performed, has no application and need not be quoted.

The heretofore quoted provision of the rule has been construed so often that we believe there can no longer be any doubt regarding its meaning.

In Award No. 4045, where an identical rule was in question, we made the following statement:

> "We have here a rule peculiar to this Carrier and one other, and we have heretofore said, agreements are supposedly intended to be kept; therefore, we must deal with this dispute under the agreement of the parties which covers it."

and then said:

> "Sub-section (1) of the rule provides that such remaining work shall be assigned 'to another position or other positions covered by this Agreement when such other position or other positions remain in existence, at the location where the work of the abolished position is to be performed.' This is a plain and simple statement, the intent and meaning of which cannot, reasonably, be doubted, and must be applied to this dispute."

See also Award No. 3908 where this very same rule and Carrier were involved, we said:

> "Under this interpretation it follows that the Carrier had the right to abolish the clerical position. If, however, it did so and another or other clerical positions covered by the agreement remained at the place where the work was to be performed it was the duty of the Carrier to assign the remaining work to such position or positions . . ."

For additional decisions containing similar statements and adhering to the principle announced in those from which we have just quoted, see Awards

Nos. 3583, 3877, 3906, 4043 and 4044.

Based on the foregoing Awards we are convinced the confronting facts require a conclusion that when the Carrier abolished the Rate Clerk position at Johnson City and failed to assign its work to remaining clerical positions in existence at that location it violated the provisions of Rule 1 (c) (1).

Having concluded the Agreement was violated in the particular heretofore noted we turn to other phases of the claim as filed with this Board.

Claim 2 is based on abolishment of the Comptometer Operator-Typist at Endicott. Claim 3 asks for reinstatement of the position of Rate Clerk at Johnson City. Claim 4 seeks reinstatement of the position involved in claim 2. We have carefully searched a long and tedious record for the purpose of determining the basic claim as progressed on the property and are not disposed to labor arguments advanced by the parties with respect thereto. It suffices to say we find nothing therein to warrant us in concluding any of such claims, except a portion of claim 3 to be presently mentioned, were progressed on the property in the manner contemplated by the Railway Labor Act and the Rules and Regulations of this Board. From the date the initial claim was filed, while it was in the hands of the Carrier's Superintendent as heretofore indicated, and on up until the time it was submitted to the highest reviewing officer of the Carrier, it is clear the basic dispute the parties were attempting to settle was a claim the Carrier violated the Agreement when it abolished the Rate Clerk position and assigned its work in violation of Rule 1 (c) (1). In fact, when analyzed, the statement of claim and the position of the Employes as set forth in the appeal to the Carrier's highest reviewing officer so states. Such a situation, in our opinion, calls for application of the Rule announced and set forth in Awards Nos. 4346 and 5077, wherein we held that to sustain claims progressed on the property in a similar manner would not be in harmony with the general purpose of the Railway Labor Act. Therefore we hold that under the confronting facts and circumstances Claims 2, 4, and all that part of 3, except the portion claiming reparation, must be dismissed without prejudice to the Employes' right to bring up any other claim respecting the violations therein complained of that may be warranted by terms of the current Agreement.

We confess that in view of the manner in which portions of the claim must be disposed of our decision as to the penalty to be imposed for the violation of the Agreement heretofore found becomes somewhat difficult. The result of the Carrier's action has been stated and need not be repeated. Under all the conditions and circumstances we believe the fairest penalty to all parties that can be assessed is to allow H. C. Winters compensation for whatever wage loss he has suffered during the time the Carrier has failed to assign the Rate Clerk's work at Johnson City in conformity with the Agreement, also to allow C. L. Brady any loss of compensation he has suffered during that interim because of being displaced by Winters, the Carrier to have credit for all compensation received by him during that time, including outside earnings. Therefore it is so ordered.

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 Employe 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

(a) That Claim 1 should be sustained because the Carrier violated the Agreement in failing to assign the work of the Rate Clerk's position at Johnson City to other positions, covered by the Agreement, remaining in

existence at the location where the work of the abolished position was to be performed.

(b) That Claim 3 insofar as it relates to reparation should be sustained to the extent indicated in the Opinion but otherwise denied.

(c) That the parties should have 50 days in which to compute and agree upon the reparation payable under this decision, the Board retaining jurisdiction to determine such question upon submission of supplemental briefs in the event they fail to do so within that period of time.

AWARD

Claims 1 and 3 sustained but only as indicated in the Opinion and Findings. Claims 2 and 4 denied in accordance with the Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 6th day of September, 1951.