

Award No. 5561

Docket No. CL-5257

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Alex Elson, Referee

PARTIES TO DISPUTE:

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

THE CHESAPEAKE AND OHIO RAILWAY COMPANY

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

(a) The Carrier violated provisions of current Agreement effective January 1, 1945, when for a three (3) work-day period, namely Monday, Tuesday and Wednesday, September 23, 24 and 25, 1946, it unilaterally abolished in name only a regularly established position of Record Clerk, 58th Street, (8:00 A. M.) Newport News, Virginia, to which Mr. C. M. Pritchard had been regularly assigned, and

(b)(1) Mr. Pritchard be returned to his regular position of Record Clerk at 58th Street, Newport News, Virginia, and

(2) Mr. W. S. Upshur, Jr., who was displaced by Mr. Pritchard on his regularly assigned position as Chief Clerk to Trainmaster, Newport News, Virginia, be returned to his position as Chief Clerk, and

(c)(1) Mr. Upshur, Jr. be compensated for all wage loss sustained subsequent to September 23, 1946, occasioned by his irregular displacement as Chief Clerk to Trainmaster at Newport News, and

(2) Mr. M. O. Clarke, Float Clerk, Newport News, be compensated for the difference between what he was paid for services as Float Clerk, namely, \$8.80 per day and \$9.22 per day, rate attached to the position of Record Clerk for services he performed as such, i.e., Record Clerk on September 23, 1946.

EMPLOYEES' STATEMENT OF FACTS: Prior to September 23, 1946, Mr. C. M. Pritchard was regularly assigned to position of Record Clerk, 58th Street Yard, Newport News, Virginia, with hours from 8:00 A. M. to 4:00 P. M., working in what is known as the Receiving Yard which is located at the west end of the Newport News Yard.

Mr. W. S. Upshur, Jr. was regularly assigned to position of Chief Clerk to Trainmaster and was located east of 58th Street in what is more or less known as the Central or Main Yard Office.

Mr. M. O. Clarke was regularly assigned to position of Float Clerk, which position was not attached to the 58th Street Yard Office.

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 the Carrier has not violated the Agreement.

Claim denied."

As in the instant case, a strike affected business to the extent that work disappeared or was substantially reduced. The duration of the strike in Award 3838 was indeterminable, and while it lasted only two days, the Board held that disappearance of the work justified the abolishment of the positions in question. And at Newport News, there was no way to determine just how long the embargo would be kept in effect. The work had practically disappeared entirely on the three days preceding the abolishment of the position and it was for that reason that notice was given abolishing the position.

The Carrier submits that it has fully complied with the agreement rules in abolishing the position in question and during the three day period of abolishment no work was performed in violation of the Clerks' Agreement.

The claim should in all respects be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: The material facts are not in dispute. The carrier maintains at Newport News, Virginia, a hump yard known as the 58th Street Office. A strike among Maritime workers was in existence from September 6, 1946 to September 21, 1946. Because of the strike, an embargo against shipment of coal to Tidewater, Virginia was imposed as a result of a directive from the Interstate Commerce Commission on September 9, 1946, and continued until September 25, 1946.

On September 19, 1946, carrier abolished effective September 23, 1946, three positions of tag clerk, not involved in this claim, and the position of record clerk, assigned 8:00 A. M. to 4:00 P. M. It is the abolition of the latter position which gives rise to this claim.

During the four-day period, September 17 to 20, no cars were received. In the month of August the average number of cars received during the period from 8:00 A. M. to 4:00 P. M. were 169.9. On September 23, the date when the abolishment notice was to take effect, 160 cars were received; on September 24, 40 cars were received and on September 25, 29 cars. The three day average was 85. The record shows that the work of the yard clerk during the three days in question, September 23, 24 and 25, was performed in part by the float clerk, by employees on the second shift and by the yard-master.

The carrier concedes that it failed to give the 4 days' notice required by Rule 18(f) and offers to pay for wage loss for September 23, the first date of the claim. The carrier also concedes that item c(2) of the claim is valid in that the float clerk performed the higher rated work of the displaced record clerk on September 23 without receiving the rate for record clerk.

The carrier justifies its abolition of the position in question by the fact that there was a strike in process and by its assertion that there was a sub-

stantial reduction in the work remaining to be done. In numerous awards we have established as a matter of principle that the carrier has a right to abolish positions under such circumstances.

We are not satisfied by the record in this case that the principle so established is applicable here. To begin with, the carrier was informed that the strike was terminated on September 21, two days prior to the effective date of the abolition. While it is true that the embargo was not lifted at this time, the carrier could anticipate that the embargo would likewise be lifted shortly thereafter. On September 23, the number of cars received was 160, approximately equal to the August average. The record shows that the carrier in normal course would have information in advance of the first shift on that date of the number of cars which would be received.

But these facts do not stand alone. The organization charges that the carrier's motive in abolishing the position was to make it possible for the trainmaster to obtain the incumbent of the record clerk's position as chief clerk to him. This charge is not denied by the carrier. All the carrier says to the charge is that it has no bearing on the issue as to whether there was a sufficient decrease in the work to justify the abolishment of the position. It does perhaps explain why the carrier did not cancel its abolition notice when it had reason to believe that normal operations would ensue.

We believe the situation here involved is analogous to the facts in Award 4099. There we said, "With the cause for abolition removed action in treating the positions as abolished resulted in a temporary lay off which the Carrier knew would be of short duration." In this case, as in Award 4099, the action of the carrier violated the guarantee rules; Rule 42 in this case. See also Award 4001.

The record contains considerable material relating to the organization's charge that the carrier violated the scope rules of the agreement during the period in question. In our view of the case, it is unnecessary to discuss this issue.

The claim should be sustained. The Board is informed that during the pendency of this case, W. S. Upshur, Jr., who was displaced by the record clerk died.

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 Employee 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 Agreement.

AWARD

Claim sustained in accordance with the above opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 19th day of November, 1951.

DISSENT TO AWARD NO. 5561; DOCKET NO. CL-5257

This dispute was sustained on conclusions which, in our opinion, were erroneous.

The award holds (1) that because the Carrier was informed that the strike was terminated on September 21, two days prior to the effective date of the abolition, the Carrier should have cancelled its bulletin abolishing the position here involved. The termination of the strike is not controlling. **The duration of the embargo is.** The embargo was not cancelled until September 25. The fact that the strike terminated on September 21 did not mean that normal conditions were restored as of that date. A reasonable time was required to reduce the accumulation of coal for trans-shipment to vessel before the Carrier could cancel the embargo and permit a resumption of loading and movement of such coal to Newport News, Virginia.

The award holds (2) that between the hours of 8:00 A. M. and 4:00 P. M. on September 23 (assigned hours of the abolished position) a train entered the yard with 160 cars, which was approximately the average daily number of cars received during the month of August. The position in question was abolished at 8:00 A. M. September 23. When the Carrier issued the notice on September 19, abolishing the position, it was without knowledge of the duration of the strike. In abolishing the position on September 23, the Carrier failed to give the employees affected 96 hours' advance notice, as required by agreement. Recognizing its violation in this respect, it offered to make whole all the employees affected for that date, i.e., September 23. On September 24 a train consisting of 62 cars was received at 2:15 P. M., and on September 25 a train consisting of 34 cars was received at 1:50 P. M., which were all the cars arriving during the above-mentioned hours and which are far below the August average. The clerical work necessary in connection with the switching of these two trains on September 24 and 25 was performed by a clerk covered by the agreement, who was on duty at 4:00 P. M. The fact that the Carrier elected to hold up the switching of these two trains until after 4:00 P. M. does not violate any rule of the agreement.

The award holds (3) that the charge by the Employees, reiterated a number of times through the file and not denied by the Carrier, is that the motive behind the Carrier's action in abolishing the position of record clerk was to make it possible for the trainmaster to obtain the incumbent of the record clerk position as his chief clerk. No denial of this charge by the Carrier was necessary, because the incumbent of the abolished position of yard clerk exercised his displacement rights to the position of chief clerk to trainmaster. Further, when the abolished position was reestablished by bulletin on September 25, 1946, the employee had the right to bid in on the position and be assigned thereto in accordance with Rule 18(a), which protected him in his right to return to said position upon its reestablishment.

For the reasons set forth above, we dissent.

/s/ C. P. Dugan
/s/ J. E. Kemp
/s/ R. H. Allison
/s/ R. M. Butler
/s/ A. H. Jones