

Award No. 5931
Docket No. CL-6018

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**

NORTHERN PACIFIC RAILWAY COMPANY

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

(1) Carrier violated the Clerks' Agreement when on January 19, 1949, it abolished position of Car Distributor, rate \$12.38 per day, in Car Office, Spokane, Washington, and concurrent therewith established position of Asst. Car Distributor, performing relatively the same class of work; and

(2) The position of Car Distributor at scheduled rate attached thereto, namely, \$12.38, be re-established and the occupant of the position, namely, E. J. O'Connor (and his successor or successors, if there be any) be allowed the difference in wages paid between the \$11.24 rate and the \$12.38 rate per day, retroactive to January 19, 1949.

EMPLOYES' STATEMENT OF FACTS: Prior to January 19, 1949, there were regularly established in the Superintendent's office at Spokane, Washington, the following positions with designated payroll classifications:

Car Distributor—East End, handling east end of the Idaho Division, Central Washington and Palouse and Lewistown branch, rate \$12.60 per day;

Car Distributor—West End, handling west end of the Division—Cheney to Yakima Yard, including all branches, rate \$12.38 per day;

Asst. Car Distributor, handling report work, rate \$11.24 per day.

Effective January 24, 1949, the Carrier discontinued position of Car Distributor, rate \$12.38 per day, and concurrently therewith created position of Asst. Car Distributor to perform relatively the same class of work.

The normal duties assigned to the position of Car Distributor preceding, as well as prior and subsequent to, January 19, 1949, were:

OPINION OF BOARD: The historical background of the events responsible for this dispute is stated at length in the attached submissions of the parties and will not be repeated. For our purposes it can be said that prior to January 19, 1949, on its lines between Yakima and Paradise, Washington, known as the Idaho Division, the Carrier maintained two Car Distributor positions and one Assistant Car Distributor position at Spokane. One of the occupants of the two positions of Car Distributor handled the west end of this territory Cheney to Yakima, at a rate of \$12.38 per day, and the other the east end thereof Cheney to Paradise at a rate of \$12.60 per day. The Assistant Car Distributor handled the clerical work attached to the Car Distributor desks and was paid \$11.24. Effective January 19, 1949, the Carrier gave notice the two positions of Car Distributor were being abolished and effective the same day notice was also given it was establishing one position of Car Distributor at a rate of \$12.60 per day, assigned to the entire territory, and one position of Assistant Car Distributor at a rate of \$11.24 per day assigned to the territory from Cheney to Yakima. Thereafter, in conformity with the notice one position of Car Distributor was assigned to the entire territory, at a rate of \$12.60, one Assistant Car Distributor was assigned to the territory from Paradise to Cheney at rate of \$11.24 and another Assistant Car Distributor to the territory from Cheney to Yakima at a rate of \$11.24. E. J. O'Connor, who had formerly occupied the position of Car Distributor, Cheney to Yakima, at the \$12.38 rate was assigned to the latter territory as Assistant Car Distributor, at the rate of \$11.24 per day, thus reducing his rate of pay to the extent of \$1.14 per day.

Although other rules of the current Agreement are mentioned the parties seem to be in agreement that the controlling rule in this case is Rule 49 which reads:

"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."

It cannot be denied, in fact the parties inferentially admit if they do not actually concede, that an established position of Car Distributor, Yakima to Cheney, was discontinued by the Carrier as of January 19, 1949; that a like position Cheney to Paradise was discontinued at the same time; that a new position of Car Distributor for the entire territory and an Assistant Car Distributor position for the territory Yakima to Cheney were established as of that date; that as a result of such action Claimant, the former occupant of the discontinued Car Distributor position Yakima to Cheney, was assigned to the newly established Assistant Car Distributor position at the reduced rate; and that as a further result thereof Carrier, with the same number of positions, but under different titles, was able to and did secure performance of the same service therefore rendered over the identical territory for \$1.41 per day less than it had paid for that service prior to the date of making the changes in such positions.

Thus it appears the sole question we have to determine is whether the Carrier's action resulted in discontinuing established positions and the creation of new ones covering relatively the same class of work for the purpose of reducing rates of pay.

Touching the first phase of the foregoing question we are not limited under the facts of this case, as Carrier's arguments assume, to ascertaining whether the new position of Assistant Car Distributor, Cheney to Yakima, covers relatively the same class of work as the discontinued position of Car Distributor for that territory. Our duty is to survey the overall picture in all its aspects for the purpose of determining whether the Carrier's action in discontinuing the positions to which we have referred resulted in the creation of new ones covering the same class of work. If it did, assuming for the moment the action was for the purpose of reducing rates of pay, Rule 49 of the Agreement was violated.

Heretofore, it has been thoroughly demonstrated the newly created positions covered the same class of work as those discontinued. In fact that they cover the identical work. Therefore, without laboring that subject further we turn to the phase of the question remaining, namely, whether Carrier's action was for the purpose of reducing rates of pay. The record on this point is devoid of concrete evidence as to what Carrier's purpose was in making the change. It claims, as might be expected, that such changes were made without any thought of reducing the rate of pay in Claimant's position or any other position. But all its statements to that effect are unsupported by actual proof. On the other hand, also without evidence of probative value, the Organization asserts just as vehemently that the action complained of was taken solely for the purpose of reducing the rate of pay on Claimant's position. In that situation all we can do is disregard the unsupported statements, accept the cold hard facts of record and apply the rule frequently adhered to in our decisions under similar conditions. The rule is that in the absence of other evidence the intent and purpose of action must be determined by its natural consequences and results. The undisputed facts are that the Carrier discontinued established positions and created new ones under different titles covering the same class of work, and thereby procured the same overall service at a reduced overall rate of pay, ie., \$1.14 per day. Applying the rule to these undisputed facts we are forced to the conclusion that under the particular conditions and circumstances of record the Carrier's action was taken for the purpose of reducing rates of pay in violation of Rule 49 of the Agreement and so hold.

In an attempt to forestall the foregoing conclusion Carrier seeks to justify its action in consolidating the two positions of Car Distributor by the terms of an understanding, purported to have been reached into between the parties and reduced to writing in December 1932, more than thirteen years prior to the date of the execution of the current Agreement, effective June 1946. There are several reasons why claims advanced by the Carrier respecting the alleged 1932 understanding lack merit but we are not disposed to labor them. It suffices to say that if such understanding ever was subject to the construction the Carrier now seeks to give it the terms thereof no longer have force and effect because of Carrier's failure to have them incorporated in subsequently executed Agreements to which it is a party.

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 violated the Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 12th day of September, 1952.

DISSENT TO AWARD 5931, Docket CL-6018

The Award of the majority herein is based upon erroneous conclusions as follows:

The Opinion states—

"* * *; that as a result of such action (discontinuing a position of Car Distributor and creating a new position of Assistant Car Distributor) Claimant, the former occupant of the discontinued Car distributor position Yakima to Cheney, was assigned to the newly established Assistant Car Distributor position at the reduced rate; and that as a further result thereof Carrier, with the same number of positions, but under different titles, was able to and did secure performance of the same service therefore rendered over the identical territory for \$1.14 per day less than it had paid for that service prior to the date of making the changes in such positions.

"* * * *

"Heretofore, it has been thoroughly demonstrated the newly created positions covered the same class of work as those discontinued. In fact, that they cover the identical work. * * * The undisputed facts are that the Carrier discontinued established positions and created new ones under different titles covering the same class of work, and thereby procured the same overall service at a reduced overall rate of pay, * * *."

The record shows as follows:

1. That prior to December 31, 1948 the following positions were assigned at Spokane on the Idaho Division:

Position	Territory	Rate
Car Distributor	Paradise to Cheney	\$12.60
Asst. Car Distributor	" "	11.24
Car Distributor	Cheney to Yakima	12.38
Asst. Car Distributor	" "	11.24

2. That, because of a decrease in car loadings in the latter part of 1948, the Assistant Car Distributor position assigned to the territory Cheney to Yakima was abolished December 31, 1948, and effective January 19, 1949, the two Car Distributor positions were abolished and a new position as such was established to cover the entire Idaho Division and the Assistant Car Distributor position was re-established covering the territory Cheney to Yakima the incumbent of which latter position reports to and performs his duties under the direction of the Car Distributor.

That the decrease in car loadings justified the changes and that the re-established position of Assistant Car Distributor had been abolished approximately half a month previous to its re-creation and the abolishment of one Car Distributor position are facts which nowhere are disputed in the record and consequently those facts should have been accepted as true.

3. That, while Claimant, who was the incumbent of the former Car Distributor position covering the territory Cheney to Yakima, was assigned to the new Assistant Car Distributor position covering that territory, he no longer assumed responsibility or performed at least ten duties for which he previously had been responsible and had performed as Car Distributor.

4. That Claimant's duties as Assistant Car Distributor covering the territory Cheney to Yakima are identical to those of the Assistant Car Distributor Paradise to Cheney and the same rate is paid both positions.

5. That the changes effective January 19, 1949, placed the Idaho Division on the same basis as Carrier's six other Divisions, viz., one Car Distributor and Assistants as required.

For the foregoing reasons the Award of the majority is in error and we dissent thereto.

/s/ W. H. Castle

/s/ E. T. Horsley

/s/ R. M. Butler

/s/ C. P. Dugan

/s/ J. E. Kemp