

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Curtis G. Shake, Referee

PARTIES TO DISPUTE:

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

**THE DENVER AND RIO GRANDE WESTERN
RAILROAD COMPANY**

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

(a) Carrier violated rules of Clerks' Agreement when the position of Miscellaneous Clerk (a five-day position at Grand Junction Freight Station, rest days Saturday and Sunday) was abolished and a new assignment consisting of four days of work as Miscellaneous Clerk, 8:00 A.M. to 5:00 P.M., meal period 12:00 noon to 1:00 P.M., on Monday, Tuesday, Wednesday and Thursday, and one day of work as Ticket Clerk, 7:15 A.M. to 3:15 P.M., on Sunday, was established effective March 1, 1951, under the pretext that this arrangement constitutes a Relief Clerk assignment.

(b) H. E. Cash, seniority date February 20, 1942, shall be paid one day's pay at rate of his assigned position of Miscellaneous Clerk, \$12.84 per day, for each day beginning March 1, 1951, that he has not been permitted to occupy the position of Miscellaneous Clerk, in addition to each day's pay allowed for service on Yard Office Relief Position No. 3, as a result of the action cited in Claim (a), when junior employe, J. I. Hollandsworth, seniority date August 25, 1950, was permitted to displace Mr. Cash.

EMPLOYEES' STATEMENT OF FACTS: Prior to March 1, 1951, the following regular clerical positions, among others, were established at Grand Junction, Colorado:

Ticket Office—Day Ticket Clerk, rate \$12.31 per day, hours 7:15 A.M. to 3:15 P.M.—7 days per week. Assignee Frank Brodak. Assigned Monday to Friday with Saturday and Sunday as designated rest days. Saturday assignment filled by Relief Clerk. Brodak was, however, regularly called on Sundays of each week for which he was compensated at the overtime rate as the Sunday (rest day assignment of Brodak) was not included in any relief assignment.

Freight Office—Miscellaneous Clerk, rate \$11.84 per day, hours 8 A.M. to 5 P.M.—5-day position. Assignee H. E. Cash. Saturdays and Sundays rest days.

Subsequent to the issuance of Circular No. 60 on October 5, 1950, quoted above, both Mr. Cash and Mr. Hollandsworth, among others, made request to take the Ticket Clerk Training Program. Mr. Hollandsworth was selected and completed the basic training required for the position of Ticket Clerk and he was therefore qualified for and assigned to the position of Miscellaneous Clerk-Ticket Clerk on March 1, 1951, in place of Mr. Cash who was not qualified to perform the duties of Ticket Clerk.

It is the Carrier's position in this case that under the provisions of Rule 31½—Paragraph (E) Carrier had the right to abolish the position of Miscellaneous Clerk and establish an assignment of Miscellaneous Clerk-Ticket Clerk. The position of Miscellaneous Clerk-Ticket Clerk was not a new job in the sense that it had never before existed. It was simply a restoration of a job that had at one time existed without protest from the Organization.

Regarding the claim of Mr. Cash, there is no rule in the current agreement which would support claim for one minimum day's pay on a certain position for service not performed in addition to compensation paid for service actually performed on another position. Subsequent to March 1, 1951, Mr. Cash has been regularly employed — five days per week — as Demurrage Clerk and on Relief Clerk Position No. 3.

In accord with the Agreement of December 7, 1942, which gives Carrier the right of selection, Mr. Cash was not selected for the Ticket Clerks' Training Program. He had no basic training in Ticket Clerk work, therefore, he was not qualified for the position of Miscellaneous Clerk-Ticket Clerk.

The claim has no merit and should be denied.

All data in support of Carrier's position has been submitted to the Organization and made a part of this particular question in dispute. The right to answer any data not previously submitted to Carrier by Organization is reserved by Carrier.

(Exhibits not reproduced)

OPINION OF BOARD: Prior to September 1, 1949, there were three 7-day positions of Ticket Clerk at Grand Junction. With the advent of the 40-Hour Week the Carrier reduced these assignments to five days per week, resulting in an aggregate of six rest days for the occupants. A new position of Relief Ticket Clerk was created to absorb five of these relief days, leaving one unfilled.

As of November 22, 1950 the Claimant Cash had been assigned to a 5-day position as Miscellaneous Clerk at Grand Junction. Effective March 1, 1951, this position was abolished and a new position of Ticket Clerk-Miscellaneous created with four day's work (Monday through Thursday) as Miscellaneous Clerk, Friday and Saturday as rest days, and Sunday as Ticket Agent to fill the remaining relief day that resulted from the reduction of the three Ticket Clerk's positions to five days per week. Claimant was unable to bid in the position of Ticket Clerk-Miscellaneous because he was not qualified as a Ticket Clerk.

On August 7, 1951, the Ticket Clerk-Miscellaneous position was abolished and the position of Miscellaneous Clerk, with five days per week as such and with no duties as Ticket Clerk attached, was restored and bid in by the Claimant. He now seeks compensation as a Miscellaneous Clerk from March 1 to August 7, 1951, in addition to what he earned on another position during that period.

The Carrier says that there was no need for the position of Miscellaneous Clerk from March 1 to August 7, 1951, because of a seasonal ebb in traffic

demands and that its action violated no contractual obligation. The Organization contends that the position of Miscellaneous Clerk was not, in fact, abolished on March 1, 1951; that four of its five days functions remained; and that the change made was merely to require the occupant to absorb the duties of a Ticket Agent on his fifth day, as is evidenced by the fact that said position of Miscellaneous Clerk was restored five months after the Carrier's alleged abolishment of it. A violation of Rules 3 (Seniority); 16 (Starting Time of Regular Assignments); 31½ (40-Hour Week); 39a (Absorbing Overtime); and 60 (Discontinuing Old Positions and Creating New Ones to Evade the Application of the Rules) is charged.

The Organization has admitted that "this position has been reestablished and again discontinued at various times when business has increased or decreased," and the history of the position corroborates this statement. Under these circumstances the Carrier's action would appear to be justified, unless it was in contravention of Rule 31½. This Rule provides:

"All possible regular relief assignments with five days of work and two consecutive rest days will be established to do the work necessary on rest days of assignments in six or seven-day service or combinations thereof, or to perform relief work on certain days and such types of other work on other days as may be assigned under individual agreements."

Here the Carrier did establish a Relief Ticket Clerk to work five of the six relief days that resulted when the 40-Hour Week went into effect. This left one rest days unassigned and if, as the Carrier contends and as the Organization appears to have conceded, the position of Miscellaneous Clerk was one that was only seasonally required, there was no impediment to its abolishment. This would remove the case from the application of Rules 3, 16, 39a, and 60 and bring it within the application of the latter portion of that part of Rule 31½ quoted above. That is to say, that if a new position with four days of miscellaneous clerical duties was sufficient to meet the Carrier's seasonal needs, it would appear to have been proper to assign the occupant to the duties of a ticket agent on his fifth day, as was done in this case.

Of course this hypothesis presupposes that the Carrier's action was in good faith, was justified by the facts, and was not prompted by an intent to by-pass the other Rules of the Agreement. In the light of the Carrier's unchallenged assertions and the Organization's admissions, we do not find in the record any basis for concluding that the Carrier's actions were not justified. In reaching this conclusion we are not unmindful of the fact that Award 5330 lends some support to the Organization's contentions. On the other hand, it should be noted that in Award 5330 this Board had before it a situation where the occupant of an existing regular position was required to perform relief work on one of his regularly assigned days. When this distinguishing fact is coupled with specific consideration of that part of Rule 31½ which we deem to be controlling, conflict in the precedents would appear to be avoided.

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 Employee 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 the facts do not support the claim.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 6th day of August, 1953.