

Award No. 8203

Docket No. CL-7960

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Sidney A. Wolff, Referee

PARTIES TO DISPUTE:

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

**THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD
COMPANY**

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that the Carrier violated and continues to violate the Clerks' Agreement:

(1) When, on October 6, 1954, it abolished a position fully covered by the scope and operation of the Clerks' Agreement at Elmira Yard Office, titled Chief Clerk, rate \$379.00 per month, and concurrent therewith, the preponderance of the work attached thereto, was assigned to the position of Trainmaster's Chief Clerk, an "excepted" position in the same office.

(2) The Carrier shall be required to restore said position and work to the scope and operation of the Clerks' Agreement and,

(3) That as a result of the action of the Carrier—in violation of the Agreement terms, Clerk George H. Kelly shall be reimbursed for each day since October 6, 1954, up to the time the violation is corrected, the difference in the amount of what he has been paid for each straight time day and what he would have been paid, had his position of Chief Clerk not been improperly discontinued, and further, that all or any other employees who may have been affected by the violation cited, shall be reimbursed for any and all monetary losses sustained as a result thereof, on October 6, 1954, and subsequent thereto, until the condition is corrected.

EMPLOYES' STATEMENT OF FACTS: The Carrier maintains a facility at Elmira, New York, identified as Elmira Yard, which includes the Yard Office. On the date prior to the improper abolition of the Chief Clerk position involved in the instant dispute, there existed within the confines of the seniority roster district affected, ten (10) positions fully covered by the scope and operation of the Clerks' Agreement, listed as follows:

The Carrier asserts that any of the work which the Employees allege was turned over to the Trainmaster's Chief Clerk was work which was heretofore performed by him or is work which rightly belongs to or may be assigned to the Trainmaster's Chief Clerk position. The practice of Mr. Scrimshaw doing the work under the supervision of the Trainmaster has been in effect more than 15 years. Mr. Kelly may have been assigned certain work simply because Mr. Scrimshaw needed assistance. There is nothing new or unusual about work reverting back to a position where it originated. See Award 1593. That is exactly what happened in the instant case.

When the position held by Mr. Kelly was abolished certain work was abolished. Some work was turned over to the yard checker and janitor, some work to other clerks in the Elmira Yard Office. Other work was not exclusively Clerks' work, such as telephoning in certain instances.

"The Carrier clearly had the right to reduce its forces by abolishing positions provided it did so in accordance with the provisions of the controlling agreement. It is well settled as a general proposition that a carrier may not remove work from the scope of one agreement which belongs to the employees under that agreement. Award 3003. A recognized exception to that rule is that clerical work may be performed by employees without the scope of the Clerks' Agreement where it is incidental to the work of their positions. This rule was stated by this Division in a case similar on its facts to the one before us in the following language:

'It is urged that as the work was once performed by clerks that it cannot be taken from them except by negotiation. This Division has not adopted this view. A review of Awards 931 and 1694, among others, leads to the conclusion that if the clerical work of a foreman becomes too great for him to perform it, it may be assigned only to a clerk, and when the amount of clerical work abates so that the foreman can perform it himself, it can be turned back to him without violating the Clerks' Agreement.' Award 2334."

(Award 3211—Third Division)

That part of the claim dealing with "all or any other employees" is, of course, too vague and formless to be adjudicated even if the specific claim for Mr. Kelly had any merit.

For reasons stated above, there is no merit to the claim and it should be denied.

All data in connection with this case have been handled on the property.

(Exhibits not reproduced.)

OPINION OF BOARD: On October 6, 1954 the Carrier abolished the position of Chief Yard Clerk at the Elmira Yard Office and assigned the preponderance of the duties of that position to the Train Master's Chief Clerk, an excepted position.

The employees claim this to be in violation of the Clerks' Agreement.

In 1939 the position of Chief Clerk to the Train Master was negotiated as an excepted position while that of Chief Clerk to the Yard Master was brought within the coverage of the Agreement. It appears that the position of Train Master's Clerk had been worked by Claimant for some six months back in 1925. He was then moved up to the position of Yard Chief Clerk, stated by Claimant to be a "higher rated and more responsible position" than Train Master's Clerk.

The position of Train Master's Clerk was assigned to Mr. Scrimshaw in 1926 and he has held this assignment ever since.

Claimant asserts, without contradiction, that prior to 1926, the Train Master's Clerk did not supervise the Yard Clerk or any of the Clerks under the Yard Clerk's supervision.

Carrier denies that the Yard Chief Clerk position was a higher rated job than that of Train Master's Chief Clerk. It explained that in 1926 the Yard Chief Clerk received more pay only because he worked seven days a week while the Train Master's Clerk only worked six. This then gave the Yard Clerk \$207.30 for the month and the Train Master's Clerk \$177.30. When the 40-hour week went into effect, the applicable formula brought about an adjustment in rates so that the Chief Yard Clerk received \$378.48 per month and the Train Master Chief Clerk \$380.33.

The Company points out that there was simply not enough work for both positions of Chief Clerk Yard Master and Train Master, and that it retained Mr. Scrimshaw's position "because the position requires both stenographic and typing experience for taking testimony at hearings conducted by the Train Master and Yard Master at Elmira, New York."

We are satisfied that upon the abolishment of the Chief Clerk Yard Master position, the Carrier unilaterally transferred the duties of that position and assigned the major portion of such duties to the excepted position of Chief Clerk Train Master—a position that on this record we find was set up after that of Chief Clerk Yard Master.

The "ebb and flow" doctrine (Award 4559, Wenke) relied upon by the Carrier does not appear applicable here, for we are not satisfied from this record that the work of the Yard Chief Clerk "flowed" from the Train Master's Chief Clerk position at Elmira. If this doctrine were to be adopted there would appear to be a basis for the suggestion advanced by the Employees that the work of the excepted position ought to flow back to the Chief Yard Clerk's position. But in any event, as we said in Award 751 (Swacker):

"Notwithstanding the carrier's contention that some of the work involved had been performed by the chief clerk before the general clerk position was established, the fact remains that when the latter position was established, it and its work automatically became subject to the agreement and, the work subsisting, they could be removed therefrom only by agreement of the parties."

This Board has repeatedly held that the Carrier may not abolish a covered position and assign its duties to an excepted position. Typical of the decisions are Award 1384 (Mitchell); Award 7351 (Coffey; Award 2569 (Coffey); Award 6796 (Robertson).

However, we cannot direct the restoration of the position of Chief Yard Clerk as demanded for we do not have jurisdiction to direct that the position be restored.

In Award 1314 (Wolfe) we said:

"As to disposition: The violation of the agreement lay not in abolishing Position 225 but in giving some of its work to Moore. Hence we cannot decree the restoration of Position No. 225. The Carrier may choose to continue the abolition of the position and make a legal distribution of the work * * *".

See also Award 5785 (Wenke); Award 6967 (Carter); Award 6421 (Ferguson).

The Carrier objects to our consideration of the claim advanced on behalf of "all or any other employees who may have been affected by the violation" on the ground that the particular claimants are not named as

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 to the extent set forth in the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 8th day of January, 1958.