

Award No. 8330
Docket No. CL-7851

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 CHESAPEAKE AND OHIO RAILWAY COMPANY
(Chesapeake District)**

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

(a) That the Carrier violated the terms of Clerks' Agreement and memoranda in connection therewith, when, effective September 22, 1951, it unilaterally discontinued the position of Cashier No. A-15 (3) at Delaware, Ohio, as the work of the position was not abolished in fact, but remained to be performed, and

(b) That the Carrier further violated the terms of Clerks' Agreement and memoranda in connection therewith, when, commencing September 22, 1951, it required or permitted an employee not under the Clerks' Agreement to perform the work of position No. A-15 (3), and

(c) That the work shall be restored to the Clerks' Agreement and D. C. Waxler, who was the regularly assigned incumbent and who was improperly removed from position No. A-15 (3) at the time it was improperly discontinued on September 22, 1951, shall be restored to this position and paid for all loss in wages, plus travel and waiting time and other loss and necessary expenses incurred, and

(d) That all other employees who may have been adversely affected as a result of this improper action on the part of the Carrier, shall be restored to former positions and paid any loss in wages they may have sustained, plus travel and waiting time and other loss and necessary expenses incurred as a result of the discontinuance of position No. A-15 (3), Cashier, Delaware, Ohio.

EMPLOYES' STATEMENT OF FACTS: Prior to September 22, 1951 there were the following employees at the Carrier's Delaware, Ohio freight and passenger station:

Cashier (Clerk)	Hours 7:30 A. M.—4:30 P. M.	rate \$13.81 per day
Night Clerk	Hours 8:45 P. M.—5:15 A. M.	rate 12.49 per day
Agent	Hours 8:00 A. M.—5:00 P. M.	(unknown)

form necessary station work just as such work is being performed by the Agent-Operator at Delaware, Ohio, under present conditions, and that there has been no violation of the Clerks' Agreement in any respect. The Board should, therefore, deny the claim in the instant case in its entirety.

(Exhibits not reproduced.)

OPINION OF BOARD: Heretofore this dispute was before us, but as a preliminary issue, the Carrier questioned our jurisdiction in view of the failure to give the Telegraphers' Organization notice and the opportunity to be heard. It was our determination (Award 8200) that the Telegraphers' Organization was an interested third party and therefore entitled to notice, as required in Section 3, First (j) of the Railway Labor Act.

The required notice was duly given to the Telegraphers' Organization, which however, failed to appear, although it did inform the Secretary of this Division that it was "not involved" in the dispute.

Regardless of the position taken by the Telegraphers and since it appears that due notice has been given "to all parties involved in the proceeding", as directed by the Railway Labor Act, the matter is now properly at issue and our determination will be binding upon the parties involved.

Recently a similar issue as the one presented in this case was before us, Award 8079 (Lynch) involving the same parties and the same agreement and in particular, Scope Rule 1 (b).

There the Carrier had abolished a ticket-clerk position and turned the work over to the Telegraphers. A claim was then filed that such unilateral abolishment was a violation of Rule 1 (b).

We sustained the claim on the finding that "Carrier (1) concedes it abolished Claimant's position and (2) distributed the work of his position between two persons not covered by the applicable Agreement".

In Award 7372 (Carter) we sustained the claim that this Carrier violated the Agreement when it unilaterally abolished a ticket-clerk position at Staunton, Virginia and re-assigned a part of the remaining work to an employee under the Telegraphers' agreement.

In language applicable to the present case, we there said:

"It is the contention of the Carrier that the original rule demanded by the Organization was made applicable to 'positions or work' and that the words 'or work' were removed so that the rule would apply only to 'positions' in accordance with the existing understanding on the subject. The Organization disputes this fact and says that Carrier understood the purpose to be the elimination of the ebb and flow theory and that, after extensions of time and further consideration, it was accepted on that basis. In any event, this Division has passed upon the meaning of language similar to Rule 1(b).

"Several awards of this Division have held that rules similar to Rule 1(b) require that the work of a position may not be removed from the application of the agreement except by agreement or mediation. The reasoning of these decisions is expressed in Award 5790 as follows:

'In determining the meaning of the foregoing provision quoted from Rule 1 Carrier asks us to consider the rule proposed by the Organization during negotiations preceding its adoption. If a rule is clear then the history of the negotiations leading up to its adoption should not be

considered in determining its meaning for we are then limited to a consideration of the intention made manifest thereby as we do not have authority to rewrite or amend the rules or provisions of the Agreement itself. See Awards 2467, 4181, 4506, 5133, and 5430 of this Division. Of course, if the rule or provision agreed to can be said to be ambiguous the opposite would be true.

"The word positions, when used in connection with an agreement, has been defined by this Division as "positions" which are subject to the agreement are protected to the craft by the agreement, and since "work" is of the essence of a position such work which is the manifestation of the position and the identity of it is likewise protected to the craft." Award 1314 of this Division.

"Similar awards of this Division to the same effect are: Awards 3563, 5785, 6141, 6444. We think, therefore, that the Carrier violated the Agreement when it assigned ticket selling work to one under the Telegraphers' Agreement after January 1, 1949, which had been performed immediately prior thereto by clerks. * * *"

See also Award 7047 (Wyckoff), Award 5790 (Wenke), Award 8234 (Lynch).

In our opinion when the Carrier abolished the Cashier's position and assigned the duties of that position to the Agent, it violated the agreement.

This does not mean that a Carrier may not abolish a position. The Carrier has this right "when the work no longer exists" for as we said in Award 601 (Swacker):

"The claim of the employees is, in the main, an assertion that since there were 10 employees in the class involved at one time, the positions of which were enumerated in the then existing agreement, that the only way these positions could be abolished would be by negotiation. In effect it is stated that having been negotiated into the agreement they would have to be negotiated out. This contention, however, is not sound. It is well settled by a long line of decisions that a carrier is free to abolish a position when the work no longer exists;"

but in the present case, the work of the abolished position still exists and is subject to the Clerks' agreement.

In making our determination we are not unmindful of the other awards wherein we "recognized that almost every employe and official of a carrier is called on to perform some clerical work. So long as that work is merely incidental to the performance of his regular duties, there is no violation of the agreement". Award 2138 (Thaxter); but in this case we find that the work in question does not come within the description of "incidental".

Accordingly, we sustain claims (a) and (b).

By notice dated September 17, 1951, effective September 21, 1951, the Carrier abolished the Cashier's position which carried the rate of \$13.81 per day. Prior thereto, and on August 3, 1951, claimant Waxler, who had held the Cashier's position some 22 years, bid for another position that of Assistant Chief Clerk, which carried the rate of \$17.10 per day.

On September 19, 1951, before the Cashier's position was abolished, Mr. Waxler was awarded the new job. In these circumstances claimant Waxler has no standing to maintain claim (c) and is should be denied.

Likewise claim (d) is to be denied. The claimants are unnamed and unlike the situation in Award 8203 (Wolff), they do not on this record even appear identifiable. Award 8124 (Coffey).

In addition it is to be pointed out that the record here shows an unwarranted and unexplained delay of some 33 months after the claim was first declined and 25 months after the declination was reiterated before an appeal was taken. Such a delay has been frowned upon by this Board and has resulted in adverse action. See Award 6656 (Wyckoff) where although the claim was sustained on the merits, yet a delay of 32 months was held unreasonable so as to bar a monetary award.

Also see: Award 5190 (8 year delay); Award 6229 (2 year delay); Award 7074 (28 months delay); Award 8162 (26 months delay); Award 8209 2½ year delay).

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 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 30th day of April, 1958.

DISSENT TO AWARD NO. 8330, DOCKET CL-7851

With respect to the claim disposed of in this Award, which was premised on Carrier's alleged violation of Scope Rule 1 (b) providing.

"Positions within the scope of this Agreement belong to employees herein covered and nothing in this Agreement shall be construed to permit the removal of such positions from the application of these rules except as provided in Rule 65."

when effective September 22, 1951 it abolished an entirely unneeded Cashier (first trick) position at its Delaware, Ohio Agency and reassigned such of its duties that remained to the Agent and/or Agent-Operator (first trick); and included demands—

(1) that the former incumbent be restored to the Cashier position and paid "for all loss in wages, plus travel and waiting time and other loss and necessary expenses incurred"; and

(2) that all other employees adversely affected by Carrier's disputed action be restored to their former positions and, likewise, paid for all loss in wages suffered, plus travel and waiting time and other loss and necessary expenses incurred.

We fully concur in the conclusion of the majority wherein it is held that this Award is binding upon the Telegraphers, as well as the Carrier and its Clerks, despite failure of the former to appear at a hearing held pursuant to notice to them of the proceedings as ordered by the Division as result of prior Award 8200 which determined the Telegraphers were involved; and that the monetary claims are denied because—

(a) the named Claimant D. C. Waxler, former incumbent of the abolished Cashier position, has no right under the Agreement for restoration thereto by reason of his having bid off that position and being assigned to another prior to its abolishment;

(b) the portion of the claim with respect to unnamed claimants is invalid, since they are not identifiable from the record; and,

(c) the continuing claim was not progressed to this Division with reasonable dispatch to the Carrier's prejudice.

However, we are not in accord with and have dissented to those prior Awards wherein this and other Carriers have been held by this Division to be in violation of the same or similar Scope Rule when, as here, they have abolished entirely unneeded clerical positions and reassigned such of their station duties as remain to be performed to station employees of the Telegrapher Craft as incidental to the duties of their regular assignments or to fill out their 8-hour assignments; therefore, we must and do dissent to the conclusion of the majority in its Opinion here that—

“when the Carrier abolished the Cashier's position and assigned the duties of that position to the Agent, it violated the agreement.”

for the reason that the majority has, by following those erroneous Awards, incorrectly interpreted Scope Rule 1 (b), because that rule only concerns itself with the removal of positions having the exclusive right, by agreement, to the performance of certain work. To require Carriers to maintain unnecessary positions gives such rules an absurd rather than a sensible meaning, and a meaning certainly not intended by the parties in negotiating such rules. See Carrier Member Dissents to Awards 8234, 8079, 7372, and 6937.

/s/ C. P. Dugan
/s/ J. F. Mullen
/s/ R. M. Butler
/s/ W. H. Castle
/s/ J. E. Kemp