# Award No. 8673
# Docket No. CL-8165

## NATIONAL RAILROAD ADJUSTMENT BOARD

## THIRD DIVISION

Horace C. Vokoun, Referee

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## 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 and continues to violate the terms of Clerks Agreement No. 7 when on June 22, 1954, it abolished position of Freight and Ticket Clerk, rate $13.89 per day, hours 7:30 A.M. to 4:30 P.M., and thereafter performed the work by assigning it to others not covered by the Agreement, and

(b) That the senior furloughed employe be paid a pro rata day's pay at the regular rate established for position of Freight and Ticket Clerk here involved for each day the work involved was performed by persons other than employes entitled to perform said work under and within the terms of Clerks Agreement No. 7. The claim contemplates that on any day it should develop that there was no furloughed employe, regularly assigned employes to be designated by the Organization be additionally compensated by one pro rata day's pay. Claim to continue until all corrections are made.

See Award 8378 for Statement of Facts and Positions of the Parties.

**OPINION OF BOARD:** In Award 8378 the Division ruled that the Telegraphers' Organization had third-party interest in the instant dispute and was therefore entitled to notice and opportunity to be heard as required by the Federal Courts' interpretation of Section 3, First (j) of the amended Railway Labor Act.

The Telegraphers' Organization was duly notified on July 2, 1958 of a hearing to be held on July 30, 1958, and on July 9th by letter said Organization advised that neither the Organization nor the employes it represents are involved in the case before us. Said hearing was held as scheduled and the Telegraphers' Organization did not appear. The case is now before the Division on its merits.

The essential facts are not at issue. Since 1901 the Station has been under an agent, covered by the Telegraphers' Agreement. Prior to January 26, 1950, a Station Laborer was assigned at Goshen. On that date the parties to this dispute entered into a special agreement creating the position of Freight and Ticket Clerk at Goshen, Virginia. The position was bulletined and L. D. Rose was awarded the job.

The agreed upon description and duties of the job were:

> "The duties of the position will consist of general clerical work such as is performed by Clerks at comparable stations, including selling tickets, checking baggage, checking yard, maintaining car records, billing freight and preparing freight bills."

The position was abolished on June 22, 1954. Claim was filed on August 6, 1954 and appealed to the Carrier's Assistant Vice President Labor Relations. Conference was held on September 25, 1954 and the Carrier declined the claim. Written notice of Appeal to the Board was dated October 4, 1955 and received by the Board on October 5, 1955.

The Carrier in its response to Ex Parte Submission by Employes submits that the issue may be defined as follows:

> "Did the Carrier, when it abolished the Clerk position on June 22, 1954, returning the work to its one man status the same as before a clerk was assigned, violate the Clerks' Agreement?"

The following Rules, on parts thereof, have been quoted:

> "Rule 1—Scope
>
> (b) Positions within the scope of this Agreement belong to employes 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."
>
> "Rule 65—Date Effective and Changes
>
> "This Agreement shall be effective as of January 1, 1945, and shall continue in effect until it is changed as provided herein or under the provisions of the Railway Labor Act as amended.
>
> "Should either party to this Agreement desire to revise or modify these rules, thirty (30) days' written advance notice, containing the proposed changes, shall be given and conference shall be held immediately on the expiration of said notice unless another date is mutually agreed upon."

In this case we are dealing with and interpreting Rule 1(b) and Rule 65 within the framework of those Awards previously adopted by the Board in similar situations. Rule 1(b) as negotiated permits no removal of a position and there is no evidence in the record to show that the Carrier made any attempt to conform to Rule 65.

It is conceded that certain work performed by the clerk was still required after the position was abolished and performed by the agent.

It is conceded that there was no agreement between the parties about the reassignment of the work which was performed by the Clerk. The record contains no information as to whether or not the Clerk performed any duties which he performed to the exclusion of the Agent.

The Organization asks (a) that the Carrier be held in violation of the agreement and (b) that the senior furloughed employe be paid a pro rata days' pay for each days' alleged violation and if no furloughed employe a regularly assigned employe to be designated by the Organization be additionally compensated by one pro rata days' pay for each day of alleged violation.

There is no doubt that the revenue of the Station decreased and that the volume of work performed at the Station decreased. There further is no doubt that work performed by the clerk was, after the abolition of the Clerical position, performed by the Agent.

There further is no evidence that any work performed by the Clerk was his exclusive assignment.

The Board has recently ruled that where some work which the Clerk had performed exclusively remained and was assigned to the Agent it constituted a violation of the Clerks' Agreement and the Carrier had no right to abolish the clerical position—Award 8500.

In previous Awards (5785, 5790, 7372) interpreting this same rule or similar rules the Board held that work is the essence of positions, and said rule prohibited the Carrier from acting as it did in the instant case. Under these Awards of the Board which are predicated upon others of this Board (Awards 1314; 3563; 5785; 6141; 6444) the interpretation of the language in the Scope Rule quoted above compels the conclusion that the abolition of the Clerical position herein and the assignment of work of that position to the Agent constituted a violation of that rule. See also Awards 6357, 7047, 7048, 7129, 7168, 7382, 8079, 8234, 8236, 8289, 8330, 8382. Award number 8382 was released by this referee. Part of that award reads:

> "The Board has ruled so often that Scope provisions such as the one negotiated herein have abrogated the doctrine of 'Ebb and Flo' that the rulings are apparently absolute. Award 3003 among many others holds that 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. Award 3563 along with many others since that time had for review the same scope provision as in the instant case that 'no position shall be removed from this agreement except by agreement' and the holding of the Board was that a violation of the contract occurred when duties under the agreement were assigned out of the agreement."

This Board held in Award 7168:

> "It is not the function of this Board to order the Carrier to restore the work to any particular position. That is the prerogative of the Carrier. We can only find that there was a violation and direct the payment of penalties as long as the violation continues."

The facts show that the position involved was held by only one employe from its assignment to its abolition. No claim is made by the Organization on behalf of that individual. In the assessment of penaltics the usual penalties

are based on losses to individuals who are caused monetary loss because of a contractual violation, in order to make one "whole". Punitive damages are not ordinarily approved by the Board. Here the claim is made on behalf of the senior furloughed employe, and if none on behalf of a regularly assigned employe designated by the Organization. These specified claimants although designated as a class can be ascertained. Claim (b) therefore is allowed but only to the extent of loss sustained by reason of the violation, with earnings of those to be compensated deducted as a setoff against the penalty payment.

The Carrier shall be liable for and those entitled to receive shall be paid only net losses which can be established.

**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 Employes involved in this dispute are respectively Carrier and Employes 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 14th day of January, 1959.