Award No. 11341
Docket No. CL-13284

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Arthur Stark, Referee

PARTIES TO DISPUTE:

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

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5167) that:

(a) The Carrier violated and continues to violate the Clerks' Agreement, when on May 4, 1961 it nominally abolished position of Merchandise Clerk, Central Service Bureau, Superintendent's Office, Denison, Texas, a position having a full eight hour complement of work, and rearranged the assignment with the result that the regular incumbent of the position, Mr. P. S. Sanders, a senior employe, was reduced to a furloughed status and junior employe(s) retained in regularly assigned status.

(b) Mr. P. S. Sanders, who occupied the position at the time it was nominally abolished, and/or any other employe or employes affected, be paid a day's pay at the pro rata rate of the Merchandise Clerk position for May 11, 1961 and each succeeding work day thereafter until the violation is corrected.

EMPLOYES' STATEMENT OF FACTS: On February 27, 1957, Memorandum of Agreement No. DP-329 was entered into between the Carrier and the Organization transferring certain positions from the Office of General Superintendent of Transportation to the Assistant Auditor's Office, both at Denison, Texas, Employes' Exhibit A. On March 11, 1957, a Central Service Bureau was established in the Assistant Auditor's Office. The establishment of this Bureau is covered by Memorandum of Agreement No. DP-334, Employes' Exhibit B. On August 16, 1957, Mr. A. F. Winkel, Assistant General Manager, addressed a letter to former General Chairman Pickett advising him that the Central Service Bureau was being transferred from the office of Assistant Auditor at Denison to the jurisdiction of the General Superintendent of Transportation and on January 1, 1959 this Bureau was placed under the jurisdiction of the Superintendent at Denison (now Office of General Superintendent) due to the abolishment of the office of General Superintendent of Transportation. Thus, on May 4, 1961, the Central Service Bureau was under the jurisdiction of the Superintendent at Denison and there remained only three positions under the Agreement in this Central Service Bureau. The positions, duties and occupants were as follows:

that in the event of a sustaining Award, it should be given credit for the amount of time which Claimant Sanders has worked during the period May 4, 1961 through December 31, 1961, which is clearly set out in the record in this case (Carrier's Exhibit "A", Sheet 28) and amounts to 71 days — all of which was at a higher rate of pay than the position which he had formerly occupied and which was abolished.

The above is without prejudice to the position of the Carrier that the agreement was not violated, and that no payment whatever is due to claimant P. S. Sanders, and is not to be construed as an admission that there is any merit to this alleged claim. Clearly this alleged claim is wholly without merit and should be denied in its entirety.

This is a most unusual case. Here the Organization asks the Third Division to interpret a rule which they, themselves, have agreed no longer exists. Their request is not therefore a request that the Division settle a dispute between the parties as to the interpretation of a rule (which, as Carrier understands the Railway Labor Act, is the purpose for which the National Railroad Adjustment Board was created) — yet they still desire to collect, on behalf of the brother of their Division Chairman, several hundred dollars for which he has performed no work and to which he is clearly not entitled. The issues herein are moot, as a result of action of the parties to the agreement; all that remains is a demand for payment of a penalty clearly not contemplated by a rule which is no longer in existence.

All that remains for the Division to decide in this case is whether the Carrier shall be required to make this unwarranted payment to claimant Sanders.

Carrier has clearly shown that no agreement rule requires the payment of this penalty, and therefore respectfully requests the Third Division to deny this alleged claim in its entirety.

All data submitted in support of the Carrier's position have heretofore been submitted to the Employes or their duly accredited representatives, or originated with the Employes or their duly accredited representatives and they are fully conversant with same.

Carrier requests ample time and opportunity to reply to any and all allegations contained in the Employes' and Organization's submission and pleadings.

Except as herein expressly admitted, the Missouri-Kansas-Texas Railroad Company denies each and every, all and singular, the allegations of the Organization in alleged unadjusted dispute, claim or grievance.

For each and all of the foregoing reasons the Missouri-Kansas-Texas Railroad Company respectfully requests the Third Division, National Railroad Adjustment Board, to dismiss or deny said claim and grant said Railroad Company such other relief to which it may be entitled.

(Exhibits not reproduced.)

OPINION OF BOARD: On May 4, 1961 Carrier abolished the position of Merchandise Clerk at the Central Service Bureau, Superintendent's Office, Denison, Texas. This was one of three positions which had been maintained in the Bureau for several years:

Position	Incumbent	Seniority	Rate
#3712 Demurrage Inspector	A. Hughes	1922	$522.04 mo.
#3714 Chief KFF Clerk	G. S. Sanders	1913	487.23 mo.
#3719 Merchandise Clerk	P. S. Sanders	1917	21.61 day

On May 4 Merchandise Clerk P. S. Sanders sought to exercise his seniority by displacing Demurrage Inspector Hughes, although the Inspector position was excepted from bulletin, promotion and displacement rules of the Agreement. (Section II, Paragraph (c) provides in relevant part that employes in certain specified positions "may not be displaced therefrom due to changes in forces, or for other reasons, by senior employe." Rule 23 provides in part that "employes whose positions are abolished may exercise their seniority rights over junior employes . . .") The Carrier denied Sanders' request.

Also, on May 4, in a separate communication, Sanders advised Management that he did not believe the abolishment of his position had been handled in accordance with the Agreement. On the same day Chief KFF Clerk G. S. Sanders, the Organization's Division Chairman, wrote Management to protest its action and serve notice that claims would be filed "when any part or parcel of our schedule clerical work is transferred to or performed by any excepted positions or by any so-called officials."

On May 11 Division Chairman G. S. Sanders renewed his protest concerning abolishment of Merchandise Clerk which, he asserted, "still remains a full eight hour assignment of schedule clerical work." Sanders also charged that Management had (1) improperly removed him from Chief KFF Clerk and required him to spend full time in the Merchandise Clerk job, (2) improperly removed Hughes from Demurrage Inspector work and assigned him to the Chief KFF Clerk job, (3) improperly assigned Demurrage Inspector work to two other persons.

On May 22, Carrier denied the claim, noting also that it had received no protest from Hughes. Subsequent appeals were denied and, on May 3, 1962 the Organization submitted a claim to this Board.

While a host of contentions has been advanced in this lengthy docket (it runs to more than 230 pages), the parties' principal arguments may be summarized as follows.

The Organization maintains:

1. Abolishment of the Merchandise Clerk position was only "nominal"; i.e., the work remained and, in fact, was so heavy that the Demurrage Clerk assisted the Merchandise Clerk for seven hours on each Monday. In effect, the Organization contends that the Carrier eliminated an employe, not a position.

2. When the Merchandise Clerk P. S. Sanders was furloughed from his position, his work was given to other persons and their work reshuffled, part being assigned to persons outside the seniority district.

3. By these actions the Carrier, in actuality, created new positions, under the same titles, covering relatively the same class of work, thus evading the application of Rule 62 which provides in relevant part:

> "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."

While no new position was actually designated, the result of Carrier's action had the same effect since the existing positions lost their original identity.

4. To arbitrarily detach an employe from his position, acquired through the exercise of seniority rights, under the guise of "abolishment", while the work remains, threatens the very foundation of the Agreement, particularly the host of seniority rights contained therein.

The Carrier argues in substance:

1. The claim presented to this Board is not the same as the claim processed on the property. The issue hitherto discussed between the parties was, basicIly, whether the Carrier could abolish a position without the Organization's consent. Now the allegation is that the position was never abolished at all or, in the words of the Statement of Claim, only "nominally abolished." Consequently, the case should be dismissed without consideration of the merits.

2. As to the earlier charge (if the case is not dismissed), there is nothing in the Agreement which prohibits the Carrier from abolishing a position or which requires it to negotiate an abolishment. The mere fact that a position may be listed in a wage schedule (Addendum No. 5) does not preclude the Carrier from abolishing it. Moreover, a special Memorandum of Agreement (DP-329) recognizes Carrier's right to adjust the number of Service Bureau positions. It states in Paragraph 10:

> "It is agreed that nothing in this Agreement shall be construed as definitely fixing the number of positions to be maintained in the Service Bureau."

3. Rule 62 was not violated since no new positions were created.

4. The Carrier acted in the interests of economy and efficiency in abolishing the Merchandise Clerk position and rearranging the remaining work among higher rated men. Nothing in the Agreement bars assignment of some work to Demurrage Inspector just because that position is partially excepted. It is a position fully covered by the Scope Rule except for purposes specified in II (c).

5. The seniority rights of P. S. Sanders were not violated since, under II (c), he had no right to displace Demurrage Inspector Hughes.

6. A full day's work did not remain in the Merchandise Clerk position in May 1961, as the Union asserts. Contrariwise, due to the loss of most of the handling of LCL merchandise from rail to commercially operated truck lines, the work which this job had originally been established to perform had virtually disappeared. The work of the two other positions had also declined substantially.

Has a new claim been presented here? We think not. True, the emphasis has changed. Originally, for example, the Organization contended that "no conference or discussions have been held with our organization as to the necessity of abolishing this position" and that Rule 76 (the reopening clause) should have been invoked by the Carrier (letters of May 4, 1961). But in its April 13, 1962 letter the Organization's General Chairman commented: "We are not here contending that Addendum No. 5 or Rule 62 prohibits the Carrier from abolishing a position when the work disappears or if only a fraction of the work of a position remains . . ."

Nevertheless, throughout the communications which preceded submission of the case to this Board, the Organization alleged and argued that the full work complement of Merchandise Clerk had not been abolished but merely reassigned (letters of May 11, 1961, July 6, 1961 and others). This, as we understand it, is precisely the claim now before us; "nominally abolished" means abolished in name but not in fact. Under the circumstances the Carrier's objection to further consideration of the case cannot be sustained.

Since it is recognized that Management may abolish a position (absent rules to the contrary) when a substantial portion of the duties disappear or are no longer required, the issue here boils down to a question of fact. What, in reality, was the situation in May 1961? The record is in conflict.

The Organization relies in large part on a table it prepared showing time consumed in various job duties. According to this table, for example, Merchandise Clerk job duties are divided into three groups. In an eight hour day the Clerk spends three hours assembling the Broadcast report, addressing and stuffing envelopes, and delivering them to the Post Office. He devotes two hours to running off the 6:00 A. M. report, consist, and other reports from three yards on a ditto machine. He spends the remaining three hours on various duties including (1) cutting up long sheets from the teletype machine to separate consist 74 report of trains, delivery of cars to connecting lines and passing reports from three yards, (2) assembling and gluing these sheets on ditto paper in order that consists deliveries to connections and passing reports would appear separately on the Broadcast report; (3) preparing the ditto machine for use and assembling ditto paper.

The Demurrage Inspector, according to the Organization's listing, spends seven hours every Monday in assisting the Merchandise Clerk in preparing the Daily Broadcast report "due to accumulation of work . . . over the week-end," in addition to his other duties, all of which total eight hours of work per day.

According to the Organization (as already noted) the full battery of these Merchandise Clerk duties (eight hours a day) were re-assigned to other employes in 1961.

Management, however, has a different story. In May 1961, it says, not one of the three Central Service Bureau positions had a full complement of work (i.e. 40 hours a week). As direct evidence of this the Carrier points to the overtime record of Demurrage Inspector and Chief KFF Clerk in the eleven months following abolishment of Merchandise Clerk. Neither man has worked a single hour of overtime during this period, despite which all the work has been performed satisfactorily.

All the reasons for the decline in Bureau work, as set forth by the Carrier, will not be detailed here. With respect to Merchandise Clerk, however, they include these factors: (1) Changes in the method of supplying information for the Broadcast Report; (2) elimination of information to be included in the Broadcast Report; (3) elimination of the 6:00 A. M. Report from the Broadcast Report; (4) discontinuance of 7-days per week issuance of the report (i.e. reduction to 5 days a week); (5) reduction in the mailing list for the Broadcast Report; (6) loss of most of the handling of LCL Merchandise from rail to truck lines.

The work load of Demurrage Inspector had also declined drastically, Managements states, due to (1) reduction in the number of cars handled by the Carrier; (2) discontinuance of certain checking work which was a duplication

of work performed by Traveling Auditors. Similarly, the Chief KFF Clerk's load had decreased because of (1) decline in the number of cars handled; (2) virtual disappearance of the work of handling reassignments and diversions; (3) complete elimination of the task of copying information from Bureau files for the Accounting and Freight Claim Departments (due to acquisition of photocopying equipment).

To further illustrate what has happened over the past few years the Carrier points to the substantial decline in clerical employment since 1957 resulting, principally, from a combination of declining traffic (and revenue) and introduction of technological improvements. Thus, in April 1961 there were only 333 clericals of all types as compared with 1,185 in January 1957.

It is unfortunate that this conflict over the facts was not resolved before reaching the Board. True, in November 1961, when faced with Management's firm denial of its allegations, the Organization requested that a "joint check" be made. The Carrier's rejection of this suggestion, the Organization contends, was unjustified and certainly leaves the inference that that Employes' position is correct.

Be that as it may, this case cannot sensibly be decided on the basis of inference. We have held in prior decisions that while a Carrier's refusal to make a joint check "may be important in solving conflicts in evidence, it is not sufficient to overcome a lack of proof" (Award 4939). In the matter at hand we have conflicting assertions from both parties — but little probative evidence. Certainly, there is no more reason to accept the Organization's listing of hours spent at various tasks than the Carrier's contention regarding the decline in work load. Therefore, since the record fails to establish the validity of the Employes' claim, we have no choice but to deny it.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

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 evidence fails to establish Carrier has violated the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 26th day of April 1963.