

Award No. 11489

Docket No. CL-11563

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Levi M. Hall, Referee

PARTIES TO DISPUTE:

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

READING COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that Carrier violated the Agreement and understandings:

1. When on June 20, 1958, Carrier discontinued position of Clerk-Stenographer in the General Offices of the Superintendent, Reading Transportation Company, and unilaterally assigned the duties thereof to a position excepted from certain rules of the Clerical Agreement, i.e., without necessary and required conference, agreed upon procedures and negotiations.

2. That Carrier restore the clerical position, together with seniority rights accruing to and compensate Barbara F. Gerhart for all monetary wage loss sustained by reason of the actions taken by the Carrier and the Carrier also be required to continue the position until such time as the agreed upon rules and understandings are complied with.

EMPLOYES' STATEMENT OF FACTS: Prior to June 20, 1958, there existed a regular established position of Clerk-Stenographer, rate: \$17.188, occupied by Barbara F. Gerhart, located in Room 225 Reading Terminal, Philadelphia, Pa., as evidenced by bulletin posted June 13, 1958, quoted below. (Explanation: The position of Clerk-Stenographer although assigned in the office of the Reading Transportation Company, the clerical employees in this office are within the Scope of the Agreement between the Reading Company and Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees and are included in that Agreement as Seniority District No. 22. We believe this explanation necessary due to reference to Reading Transportation Company and certain officers of that Company throughout this submission.)

"June 13, 1958

BULLETIN

To employees of the
Reading Transportation Co.

The position of Clerk-Stenographer, occupied by Barbara F. Gerhart —

AWARD

Claim sustained in accordance with the Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of **THIRD DIVISION**

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 7th day of June 1963.

**CARRIER MEMBERS' DISSENT TO AWARD 11488,
DOCKET CL-11597**

The National Railroad Adjustment Board's jurisdiction is confined to the powers granted by the Railway Labor Act and, in this dispute, is limited to an interpretation or application of the agreement before it, no provision of which provided for a penalty.

The action of this Board in awarding 3 days' pay where no loss was sustained, regardless of how designated, is illegal.

W. M. Roberts
G. L. Naylor
R. E. Black
R. A. DeRossett
W. F. Euker

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"June 13, 1958

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To employees of the
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The position of Clerk-Stenographer, occupied by Barbara F. Gerhart—

With respect to the above rule, Carrier submits that there is no question here before the Board of change of rate for any position and Rule 33 is not, therefore, pertinent to the instant claim.

Carrier further submits that Rules 53 — Mutual Agreements, and 54 — Effective Date and Changes, are not pertinent or relevant to the instant dispute inasmuch as there was no exception to any rule or rules in the agreement and no desire to change or revise such rules on the part of the Company.

The Memorandum of Agreement of August 19, 1946, also referred to by the Organization in the handling of the claim on the property, is attached hereto and made a part hereof identified as Carrier's Exhibit C-1. The Board will note that the Memorandum of Agreement is applicable only when force is reduced or positions abolished because of a reduction of work items or performances and Carrier maintains, therefore, that the Memorandum of Agreement is not applicable to situations such as here involved where there was no particular diminution or reduction of work items but position was abolished because of economic necessity. Even if the Memorandum of Agreement were applicable, Carrier maintains that inasmuch as remaining duties of position abolished were all assigned to clerical employees under scope of agreement in the same office, a joint check of duties is not necessary under the provisions thereof.

In handling this claim on the property, the Organization also took the position that it was improper to assign a portion of the work of the abolished position to the Assistant Chief Clerk, a Negotiated List No. 2 position, contending that a Negotiated List No. 2 position could not perform work formerly performed by an employee not holding an excepted position and subject therefore to all the rules of the Clerks' agreement. Carrier does not concur or agree with the position or contention of the Organization and submits that the Assistant Chief Clerk is covered by the scope rule of the Clerks' agreement and holds an excepted status only insofar as the application of certain rules of the agreement are concerned, and that, since he is covered by the Scope Rule, the performance of the work in question is properly assignable to him. See Third Division Award 7821 and related awards. As a matter of fact, the majority of the work of the abolished position was transferred to the other scope positions in the Superintendent's office.

Under all the facts and circumstances set forth hereinbefore, Carrier submits that no rules of the Clerks' agreement were violated when position of clerk in the Superintendent of Reading Transportation Company's office was abolished and, therefore, claim is without merit or support under the rules and should be denied in its entirety.

This claim and all material contained herein has been discussed in conference and handled by correspondence with representatives of the Organization.

(Exhibits not reproduced.)

OPINION OF BOARD: The joint statement of agreed upon facts is, as follows:

"The Superintendent of Reading Transportation Company notified the Division Chairman on June 13, 1958, that due to recession in business, and as an economic necessity, not necessarily as a result of discontinuance of work items, the position listed below would be abol-

ished effective with close of business at 5:00 P.M. Friday, June 20, 1958.

Clerk — Office of Superintendent

Basic rate \$16.228

(Rate does not include cost of living adj.)

The Division Chairman notified the Superintendent of his disagreement with the re-assignment of work items before the effective date of the abolishment and requested joint checks be made. The Superintendent stated that he did not think joint check was essential, nor required, but that he was willing to discuss the re-assignment of work items. Re-assignment of work items was discussed between Division Chairman and Superintendent prior to abolishment of position, but no agreement was reached.

"Position was abolished on June 20, 1958 and Superintendent of Reading Transportation Company assigned remaining duties to two Clerks and Assistant Chief Clerk."

Rule 13 of the Agreement provides:

* * *

"(b) Positions or work within the scope of this agreement belong to the employees covered thereby and nothing in this agreement shall be construed to permit the removal of positions or work from the application of these rules except through negotiations."

* * *

"(e) When there is a sufficient change in the regular assigned duties and responsibilities of a position or in the character of the service required, the compensation for that position will be subject to adjustment by mutual agreement between the Management and the General Chairman, but established positions will not be discontinued and new ones created under the same or different titles covering relatively the same class or grade of work, which will have the effect of reducing the rate of pay or evading the application of these rules.

"(f) When positions are abolished any remaining duties will be re-assigned through conference in conformity with paragraph (e) of this rule."

A Memorandum of Agreement between the Carrier and the Petitioner, dated August 12, 1946, is, in part, as follows:

"IT IS AGREED:

When it becomes necessary through the reduction of work items or performance to reduce force or abolish positions, the following will apply:

* * *

"If the employing officer or supervising official is notified by the Local or Division Chairman before the effective date of the abolish-

ment of the position of any disagreement concerning the re-assignment of the remaining work items, an immediate report will be made to the head of the department and prompt arrangements made for a joint check between a representative of the Management and the Organization. In such instances, the position will be continued until the joint check is completed and the Organization representative notified of the decision of the Management."

The Record discloses there was neither a conference nor a joint check of the duties of the position as requested by the Petitioner and as contemplated by Rule 13 of the Agreement and the Memorandum Agreement, dated August 12, 1946. The action of the Carrier was largely a unilateral one in disregard of the provisions of the Agreement. Carrier's discontinuance of Claimant Gerhart's position and the assignment of her duties to others without a necessary and required conference and without agreed upon procedures and negotiations constitutes a violation of the Agreement. See Awards 6348 and 11137 between the same Petitioner and the same Carrier.

These Awards 6348 and 11137, however, purport to restore to the Claimants the positions which were discontinued in those Awards. In that portion of the Award that reaches that conclusion and subsequent direction, we cannot concur, fully realizing, that when a precedent is established on a certain Railroad property in the interpretation of Agreements involved in a controversy between the Organization and the Carrier, it has been the rule of this Board that such a precedent should be followed unless found to be palpably erroneous. In that respect these aforesaid Awards go farther than an interpretation of the Rules in that there is an attempt by the Board to assume a prerogative which it is extremely doubtful that the Board possesses.

It must be conceded, in the absence of an Agreement, that Carrier, in its discretion, would have a right to discontinue any position. It is conceded that, in the instant matter, there had been a fall off in business. Petitioner has stated that the right of the Carrier to discontinue the position might not have been contested had the Carrier proceeded in compliance with the Agreement. We do not now know what the present situation on the Carrier may be. Conditions do change and it is entirely possible there is no need for the position now. The establishment or re-establishment of a position has always been treated as a managerial function and we are not inclined to usurp that right. There are a multiplicity of Awards supporting this position—commencing with Awards 1125 and 1126 and continuing down through recent Awards 10743, 10867. So much of this claim as asks that the Carrier be required to restore the clerical position of the Claimant Gerhart will be disallowed.

As to that portion of the claim which asks that Claimant be compensated for all monetary wage loss sustained by reason of the action taken by the Carrier, restitution should be made to her for her net financial losses resulting from the violation of the Agreement. See Award 10743.

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 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 Agreement has been violated.

AWARD

Claim (a) sustained.

Claim (b) sustained except that part which asks that Carrier be directed to re-establish the abolished position which is in accordance with the Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 7th day of June 1963.

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Interpretation No. 1 to Award No. 11489

Docket No. CL-11563

Name of Organization:

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

Name of Carrier:

READING COMPANY

Upon application of the representatives of the employee involved in the above Award that this Division interpret the same in the light of the dispute between the parties as to its meaning and application, as provided for in Section 3, First (m) of the Railway Labor Act, as approved June 21, 1934, the following interpretation is made.

The submissions presented to the Board by the parties indicate that disagreement exists with respect to the following provision in the Award:

"As to that portion of the claim which asks that Claimant be compensated for all monetary wage loss sustained by reason of the action taken by the Carrier, restitution should be made to her for her net financial losses resulting from the violation of the Agreement."

It appears from the Award that Claimant's position of Clerk-Stenographer was wrongfully discontinued on June 20, 1958. The position was restored November 23, 1962, though this was not called to the attention of the Board prior to the adoption of the Award. During the period of the violation, June 20, 1958, and up to November 23, 1962, Claimant was employed by the Carrier in various positions with her rate eventually exceeding that of her former position on March 21, 1959. It is contended by the Carrier that had Claimant remained in her former position during the period of the violation, her total earnings would have been \$21,471.21, but that her actual earnings were \$21,093.33, a net loss to Claimant of \$377.88.

It is Claimant's contention that her net loss should be determined as of the date March 21, 1959, as that corresponds with dates during which she was employed at a rate lower than her former position; that after March 21, 1959, she was employed at higher rated positions.

Carrier, to the contrary, contends that what is meant by net financial loss is Claimant's actual loss from the date of the violation of the Agreement,

June 20, 1958, until it was corrected on November 23, 1962; that Carrier is entitled to deduct what her total earnings were during that time from what she might have earned had she continued in her former position.

Claimant contends that her earnings accruing after March 21, 1959, are irrelevant in calculating compensatory damages or net financial loss. (There was no suggestion of having an arbitrary date set prior to the time of the adoption of the Award.) Petitioner's theory is that the higher earnings resulted from Claimant's ability to assume these new positions and not from Carrier's abolition of the former position. The position of the Petitioner is conjectural and illogical.

Claimant is entitled to compensatory damages only. She is entitled to be made whole for any monetary loss she has sustained. The compensation which will make Claimant "whole" under the present circumstances has been universally recognized as the wages the employe would have earned had the position not been abolished less the total sum she has earned since then and up to the time the position was restored. If, prior to time of the adoption of the Award, it had been called to the attention of the Board that Claimant's former position had been restored, the Opinion would have been amended to read — "up to the time her former position was restored."

See Award No. 10748 and Award No. 10878 with Interpretation No. 1, Serial No. 203.

Referee Levi M. Hall, who sat with the Division as a neutral member when Award No. 11489 was adopted, also participated with the Division in making this interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 21st day of July 1965.