

Award No. 13835
Docket No. CL-14134

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Benjamin H. Wolf, Referee

PARTIES TO DISPUTE:

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

BROOKLYN EASTERN DISTRICT TERMINAL

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5386) that:

1. The Carrier violated the established practice, understanding and provisions of the Clerks' Agreement particularly Rules 32, 33, 34 and 50 among others, when it abolished the position of Assistant Cashier on June 25, 1962, at the rate of \$104.35 per week and concurrently therewith created position titled General Clerk (Relief) at rate of \$99.16 per week, and bulletined same on June 26th, 1962 to perform substantially the same work as that normally attached to the Assistant Cashier's position.

2. The Carrier be required to restore the Agreement rate of pay of \$104.35 per week to this position effective June 26th, 1962, and compensate claimant Mary Tihanitch, and all other employes who may be involved or affected by this violation of the Agreement for all wage losses sustained, starting June 26, 1962, and each day thereafter until such time as the violation is corrected.

EMPLOYES' STATEMENT OF FACTS: There is in effect a Rules Agreement effective April 1, 1938, and revisions of September 1, 1949 and July 7, 1955, and the National Agreements signed at Chicago Ill. on August 21, 1954, August 19, 1960 and June 5, 1962, covering clerks, chauffeurs, watchmen, freight handlers, etc., between this Carrier and this Brotherhood. The Rules Agreement will be considered a part of this statement of facts. Various Rules and memorandums may be referred to from time to time without quoting in full.

This dispute involves the question of whether or not the Carrier can arbitrarily abolish a regular established position at the rate of \$104.35 per

"The claim in this case should be restricted to the employees specifically named therein, since the correspondence shows that they were the only ones discussed in conference".

The First Division of this Board, in Award 11642, said:

"... we do not propose to require the Carrier to search the records to develop claims for unidentified trainmen on unspecified dates ...".

Also, see Third Division Awards 4305, 411 and 1566, as well as First Division Awards 12345 and 11293.

The Carrier is of the opinion that a careful and complete examination of the record will disclose no unfair discrimination or any other manifest injustice, caprice or arbitrary action, has been imposed on the Organization.

The Organization has not demonstrated as they have claimed that the claimant was and is required "to perform substantially the work as that normally attached to the Cashier's position, etc.". The Organization has simply failed to prove that which it had the burden of proving to support the alleged violations.

The Carrier denies that it has violated rules 32, 33, 34 and 50 among others, as listed in Mr. Griffith's letter of July 13, 1962 (Exhibit No. 1) and as claimed in Employees' Ex Parte Submission. Furthermore, while the employees did not include in their Ex Parte Claim to the Third Division; the Carrier further denies that it has violated Rule 9 of the Agreement as claimed in Mr. Griffith's letter of August 20, 1962 (Exhibit 4) and the Carrier further denies that it has violated Section 2 "First" of the Railway Labor Act or the Scope of the Clerks' Agreement or Rules 48 and 50 as claimed by Mr. Hewson in his letter of November 23, 1962 (Exhibit 9).

Therefore, this claim is without merit and should be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: On June 25, 1962, Carrier abolished the position of Assistant Cashier, with rate of pay \$104.35 weekly, at the same time it re-established a position of General Clerk-Relief, rate of pay \$99.16 weekly. Claim, in essence, is that Carrier thereby discontinued an established position and created a new one under a different title, covering relatively the same class of work, for the purpose of reducing the rate of pay in violation of Rule 34 which expressly prohibits such practice.

The record contains allegations and evidence purporting to support the charge that Carrier did not act in good faith in making the change and that it was a subterfuge to reduce the rate of an established position. While the evidence raises some questions with regard to the intentions of the Carrier, the real question is whether the new position covers relatively the same class of work or not. If it does, then Rule 34 prohibits it. If not, Carrier's purpose becomes irrelevant.

The difference between the two positions, aside from their titles, is that the new position does not require that the occupant "must be familiar with cashier's duties such as delivering order-notifying consignments, making daily balance and preparing deposits" which were the principal purposes of

the old. The Organization argued that these duties took no more than 30 minutes a day and hence were a minor part of the job. While this was true at the time the position was abolished, the Organization disregards the fact that when the position was constituted they were the major part of the work. It was principally because these duties were no longer required that the Carrier decided to abolish the position.

In making a comparison between the two positions, we must look to the position as it was constituted not as it became when it deteriorated to the point at which it was abolished.

Moreover, as the work ebbed and flowed, the old position could properly be expected to handle cashier's work up to its previous level. As constituted, the new position cannot be called upon to do any cashier's work except in relief and at the cashier's rate and it must, therefore, be recognized as an essentially different one.

The new position is in no sense an assistant cashier's position and it cannot, therefore, be said to cover relatively the same class of work.

Most persuasive in this case was the undenied fact that the amount of business done at this terminal had fallen off sharply. This led Carrier to re-examine the amount and distribution of work remaining, and refutes the allegation that the new position was re-established merely to get the old work done at a lower rate.

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 Carrier did not violate 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 17th day of September 1965.

**LABOR MEMBER'S DISSENT TO AWARD 13835,
DOCKET CL-14134**

The purpose behind Carrier's actions in this case was quite obvious and well documented. Such evidence, as well as that in support of the charge

that other rules listed in the Statement of Claim were violated, should not have been so easily dismissed and left unanswered.

In view of this decision, and absent agreement under Rule 33 as to the rate for the new "Relief" position, the conclusion must be that any time spent by the occupant of the position in the performance of duties rated higher than \$19.83 per day should be paid for, under Rule 32, at the higher rate.

In addition, it is not at all clear as to how the occupant of this new "Relief" position might be called upon to perform "Cashier's" duties when the Referee has found that the position no longer required that the occupant "must be familiar with cashier's duties * * *."

At any rate, the total effect of Carrier's action however is that Carrier has, thus far, procured the performance of higher rated work for a lesser rate. Carrier thereby violated the agreement as charged by the Employees and the Referee should have so found.

Award 13835 is in error and I dissent thereto.

D. E. WATKINS

D. E. Watkins, Labor Member

10-11-65