Award Number 302
Docket Number CL–308

NATIONAL RAILROAD ADJUSTMENT BOARD
Third Division

Willard E. Hotchkiss, Referee

PARTIES TO DISPUTE:

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

BOSTON AND MAINE RAILROAD

DISPUTE.—

"Alleged violation of rules in connection with changes in classification, hours of service, and rates of pay of baggage forces at Greenfield, Mass., and claim that because of said violations the classification, hours of service, and rates of pay be restored as of August 24, 1934, as shown in Exhibit #1, and the employes compensated for the difference between what they have received and that they would have received had the changes referred to, Exhibits #1 to #6, inclusive, not been made and in addition thereto time be computed and paid for on a continuous basis at overtime rate for such of the employes who were worked intermittently in violation of Rule 48 of the agreement between the parties effective July 15, 1925, subsequent to August 24, 1934."

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

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

The parties to said dispute were given due notice of hearing thereon.

The dispute being deadlocked, Willard E. Hotchkiss was called in as Referee to sit with this Division as a member thereof.

This action involves an ex parte re-submission and request for interpretation of that portion of Award No. 100, Docket No. CL–156, pertaining to positions Nos. 4, 5, and 6, specified therein. Docket No. CL–156 is, therefore, cited as an exhibit hereof.

This Division, in its findings in Docket No. CL–156, Award No. 100, stated in part:

"* * * *Positions Nos. 4, 5, and 6.*—The evidence is not sufficiently conclusive to determine:

"(a) The proper classification, hours of service, and rates of pay for positions Nos. 4 and 5, shown on Exhibit 4.

"(b) The proper classification and rate of pay for position No. 6, freight handler, shown on Exhibit 5, or that Rule 48—Intermittent Service was properly or improperly applied to this position on and after September 30, 1934,

therefore, claims pertaining to these three positions are remanded to the parties for negotiation, in a further effort to dispose of the questions on the property."

And in Award No. 100, the Division stated:

"* * * Claims pertaining to positions Nos. 4 and 5, and to position No. 6, subsequent to September 30, 1934, are remanded to the parties for negotiation and agreement, in accordance with above findings. If agreement is not reached, the parties, or either of them, may resubmit the same."

There is in evidence an agreement between the parties bearing effective date of July 15, 1925, and part of Rule No. 1, and all of Rules 48, 49, 57, and 66 thereof have been cited, reading:

"RULE 1

"* * * *Exceptions.*—(a) These rules shall not apply to * * * individuals where amounts of less than thirty ($30.00) dollars per month are paid for special services which take only a portion of their time from outside employment or business. * * *

"RULE 48

"*Intermittent Service.*—Where service is intermittent, eight (8) hours' actual time on duty within a spread of twelve (12) hours shall constitute a day's work. Employes filling such positions shall be paid overtime for all time actually on duty or held for duty in excess of eight (8) hours from the time required to report for duty to the time of release within twelve (12) consecutive hours and also for all time in excess of twelve (12) consecutive hours computed continuously from the time first required to report until final release. Time shall be counted as continuous service in all cases where the interval of release from duty does not exceed one (1) hour.

"Exceptions to the foregoing paragraph shall be made for individual positions when agreed to between the management and duly accredited representatives of the employes. For such excepted positions the foregoing paragraph shall not apply.

"This rule shall not be construed as authorizing the working of split tricks where continuous service is required.

"Intermittent service is understood to mean service of a character where during the hours of assignment there is no work to be performed for periods of more than one (1) hour's duration and service of the employes cannot otherwise be utilized.

"Employes covered by this rule will be paid not less than eight (8) hours within a spread of twelve (12) consecutive hours.

"RULE 49

"*Weekly Assignment.*—Employes, except those who are paid on an hourly basis enumerated in Section 4 of Rule 1, who have regular positions and are a part of the regular force and who do not lay off of their own accord will not be paid less than six (6) days per week, excepting that this number may be reduced in a week in which holidays occur by the number of such holidays.

"NOTE.—Nothing herein shall be construed as changing practice of working certain employes about stations part time and paying them for time worked.

"RULE 57

"*Overtime.*—Except as otherwise provided in these rules, time in excess of eight (8) hours, exclusive of meal period on any day, will be considered overtime and paid on the actual minute basis at the rate of time and one-half.

"The provisions of this rule will not apply where employes alternate between shifts for their own convenience or due to seniority changes.

"The provisions of this rule will not apply to spare employees who may cover all or a part of two assignments in a 24-hour period.

"RULE 66

"*Change in Title or Rate.*—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."

The petitioner states that conferences, as contemplated in Award No. 100, were held between the parties, but that no agreement could be reached.

The petitioner contends that the occupants of positions Nos. 4 and 5 were regularly assigned baggagemen prior to August 24, 1934, working eight consecutive hours per day, six days per week, at rate of pay of $4.25 and $4.09 per day, respectively; that effective August 24, 1934, and thereafter, their hours of assignment and rates of pay were progressively reduced, the title of their positions changed from baggagemaster to laborer, until effective September 30, 1934, their hours of assignment had been reduced from eight hours per day to two hours and thirty minutes per day, their rates of pay reduced to 40¢ per hour each, and their titles changed from baggagemaster to laborer; that thereafter they continued to be so rated, classified, and assigned, notwithstanding the fact that they continued to perform the same class of work (handling milk, mail, and baggage) that they performed prior to August 24, 1934, and that Rules 49 and 66 were violated by the Carrier.

With respect to position No. 6, the petitioner submits that there is no dispute between the parties as to the proper classification and rate of pay on and after September 30, 1934. (The carrier agreed in its contention, original joint submission, to classify this position as freight handler, rate 53¢ per hour.) Exhibit No. 6 (Joint Statement of Facts, Docket CL–156) is cited by the petitioner showing that occupant of position No. 6, effective September 30, 1934, was assigned to duty from 7:00 to 11:00 A. M., and from 2:30 to 6:30 P. M., and that during this period he worked a total of two hours and thirty-five minutes as baggageman. The balance of the time assigned, amounting to five hours and twenty-five minutes, he worked in the freight house as a freight handler.

The petitioner contends that when occupant of this position is assigned off duty from 11:00 A. M. to 2:30 P. M., he is essentially a baggageman, because when he goes off duty he concludes work in the baggageroom, and he resumes duty therein at 2:35 P. M.; that being assigned to the duties of baggageman, in view of the finding of the Division in Award No. 100 that "the baggage service at Greenfield is not intermittent * * *", this employee should be compensated under Rule 57, retroactive to September 30, 1934, in accordance with original request in Docket CL–156. Petitioner further contends that service in the freight house is not intermittent, as contemplated in Rule 48, and whether the occupant of position is classified as a baggageman or freight handler, Rule 48 does not apply.

The Carrier states that conferences were held between the parties as directed in Award No. 100, but no agreement was reached on the matters remanded. The Carrier contends that positions Nos. 4 and 5 are not subject to the terms of the agreement between the parties effective July 15, 1925, by reason of the fact that the occupants are paid less than $30.00 per month and come within the exceptions to Rule 1; that the work of these men is that of laborers in and around stations, loading and unloading baggage and mail from truck to train and train to truck, and hauling trucks, loaded or empty, from one part of the station premises to another; that they are not responsible for checking or recording of baggage, mail, etc., the same as baggagemasters; that they work under the supervision and direction of a baggagemaster; that "Laborer" is the proper classification for the kind of work performed, and 40¢ per hour is a reasonable rate.

The Carrier also contends that, if the agreement applies, under the "Note" attached to Rule 49, reading: "Nothing herein shall be construed as changing practice of working certain employees about stations part time and paying them for time worked," it is proper to pay employees occupying positions Nos. 4 and 5 only for actual time worked.

Carrier submits, with respect to position No. 6, there is no dispute between the parties as to the proper classification and rate of pay; that the classification of freight handler and rate of 53¢ per hour are proper and cites in support of this statement that part of Rule 2 (c), reading:

> "(c) *Station Employes and Laborers.*—In determining the classification of employes enumerated in Sections 3 and 4 of Rule 1 consideration will be given to character of the work and the time necessary for its performance. If over 50 per cent of the employe's duty is regularly and exclusively in any one class, he shall receive at least the minimum pay of that class."

Carrier further contends:

That freight handling (trucking) in freight houses is intermittent and it is proper to assign this employee under the provisions of Rule 48.

The record including Exhibits carried over from Award 100, CL–156, shows that carrier issued successive orders between August 21, 1934, and September 30, 1934, materially changing the assignments of seven employees, all of whom in their respective positions were under the agreement between the parties. Exhibits 1 to 6, original submission, set forth the effects of these orders on the employees concerned. Exhibit 7 is a notice from the agent to the effect that beginning Sept. 28th, there are various times when there will be no baggage master on duty and that ticket agents will be obliged to check any baggage offered. Exhibit 8 is a notice that baggage room is closed from 8:45 A. M. to 10:00 A. M., and from 11:00 A. M. to 12:10 P. M. Exhibit 9 shows train schedules in force April 29th to September 29th, 1934, and September 30, 1934, to April 27, 1935.

Information is rather meager concerning the occasion for the action out of which these claims arose. The case appears to have been argued chiefly on technical grounds; and yet, such of the circumstances as are revealed by the record, especially in regard to positions 4 and 5, must be accorded considerable bearing on the merits of these claims under the agreement.

In the absence of adequate information, it is permissible to speculate as to reasons which might normally give rise to such a re-scheduling of positions as resulted from the several orders of this carrier between August 21st and September 30, 1934. It is also permissible, in the judgment of the Referee, to test out some of the normal and customary reasons for seeking such results in the light of such facts as the record reveals.

Following are possible impelling reasons which occur to the Referee as normal objectives of the kind of action which the carrier took in this case.

(1) Reduction in the amount of work to be done.

(2) Change in the character of work or in its distribution over the working day.

(3) Drive for increased efficiency occasioned either by (a) developments within the company, or (b) in response to external pressure.

(4) Desire to test out the agreement on issues involved.

The first of the reasons suggested, reduction of the amount of work to be done, would offer the most natural explanation for a general re-organization of assignments like the one under review. At the bottom of page 9, original submission, carrier says: "We assert there is no work to be performed by these employees and their services cannot otherwise be utilized." In looking for evidence to support this assertion we find that the carrier ordered the baggage room closed at certain hours. We may infer from this that it was considered practicable to accomplish the work to be done without having any employees on duty in the baggage room at those hours.

It would appear that the most convincing evidence of the amount of work to be done would be the number of trains to be serviced, the kind of trains, and the traffic from them to be handled by the employees involved. Only on the first of these points, the number of trains to be serviced, is the record especially helpful. Exhibit 9, original submission, as above quoted, shows the train schedules before and after September 30, 1934. The Referee is aware that this alone is not a sufficient basis on which to pass any final judgment on the work of the employees involved in this case. However, taking Exhibit 9 for what it is worth, the showing is about as follows:

	Before Sept. 30th, 1934	After Sept. 30th, 1934		Before Sept. 30th, 1934	After Sept. 30th, 1934
Daily trains	8	7	Total trains to service Sundays	20	20
Week-day trains	18	21			
Sunday trains	12	13			
Total trains to service week-days	26	28			

If we divide the day into four-hour periods, starting at midnight, and assume that trains for which no interval of time was shown in Exhibit 9 were in the station on an average of five minutes, the total amounts of time that trains were in the station during these four-hour periods, after September 30th, were as follows:

	Week-days	Sundays
12 Midnight to 4:00 A. M	30 Mins	15 Mins.
4 A. M. to 8 A. M	63 Mins	33 Mins.
8 A. M. to 12 Noon	175 Mins [1]	23 Mins.
12 Noon to 4 P. M	53 Mins	25 Mins.
4 P. M. to 8 P. M	55 Mins	37 Mins.
8 P. M. to Midnight	50 Mins	35 Mins.

[1] One train laid over an abnormally long time during this period.

If Exhibit 9 and the Referee's calculations are correct, the change in train schedules that became effective September 30 did not involve any substantial change in the amount of work to be done. With the exception of the period from 8 A. M. to 12 Noon on weekdays there does not appear to have been any considerable bunching of work at particular hours.

Coming to hypothetical question No. 2, possible change in the character of work or in its distribution over the working days, the Referee does not find in the record indication that the work as a whole was materially different after September 30 from what it was prior to August 21.

The Referee has suggested, hypothetical question No. 3, that the orders may have been occasioned by a drive for increased efficiency, either internally or in response to external pressure. It is easy to imagine such a drive. The general situation of American railways and of this railway, at the time the case arose, would justify any proper effort to reduce expense. The demand for economy in railway administration at that time as voiced by the coordinator of railways is a matter of common knowledge. However, if this circumstance had been an impelling cause of the orders in question, the record would naturally show evidence of it.

By suggesting that these orders may have reflected a purpose to test the agreement, hypothetical question No. 4, it is not intended to impugn the motives of the carrier. There are usually points in agreements of this kind, the complete meaning of which is only revealed by interpretation; that is the reason for the existence of this Board. Nevertheless, when a case of this kind is argued primarily on the basis of technical rights, it must usually be decided on similar grounds.

If for any of the reasons here suggested, or for any other reason, the carrier found it necessary to make important changes in the organization of work of such a nature as to affect adversely the employees involved, the agreement and the Amended Railway Labor Act are fairly specific as to the procedure to follow.

The preamble of the agreement contains sixteen numbered paragraphs, some of which, by any obvious interpretation of the language employed, place mandatory obligations on one or both of the parties, while others use language which is declaratory of principles and objectives.

Paragraph No. 7 is one of the mandatory paragraphs, and it says that "the right of employees to be consulted prior to a decision of management adversely affecting their wages or working conditions shall be agreed to by management." The record does not give evidence of such consultation.

Article 4 of the agreement prescribes the method of handling grievances. The amended Railway Labor Act, in Section Two under "General Duties," and in Section Three (i), prescribes how issues of this kind should be handled before reaching this Board. Presumably conferences were held after the representatives of the employees complained of the orders in question, if not before. If the record contained a fuller account of what transpired in conference before the case reached the Board, it would be easier than it is on the record as it stands to apply the specific provisions of the agreement to the issues involved.

The issues now before the Board have to do with positions 4, 5, and 6. Reviewing the items of the original submission that apply to these three positions, we find that Exhibit 3 is an order from the superintendent to the agent, dated August 25, 1934, directing agent to restore position 3 from laborer back to Baggagemaster, to abolish positions 4 and 5, and to assign position 6 as Assistant Baggagemaster instead of laborer. The order concluded, "you are authorized to use two laborers at 40 cents per hour rate, called when and as you need them from time to time, to assist with trains when transfer may be heavy." Exhibit 4, original submission, is an order by the agent, effective

September 28, 1934, assigning new hours to the original six men by name in positions 1 to 6, respectively, without designating titles or rates of pay. Exhibit 5, original submission, is a further order effective September 30, 1934, listing the six men by name, as in the order effective two days earlier, and assigning still different hours.

Award 100 modified the action of the carrier, as reflected in the several orders cited and disposed of the case as applied to positions 1, 2, and 3. It appears that conference has been held as directed by Award 100, and the parties are still in disagreement as to positions 4 and 5, and partially so as to position 6. Positions 4, 5, and 6 appear to have been held continuously during the period covered by this dispute by Slachetka, Sullivan, and Oleoski, respectively. The changes in rating and assignment for these positions have been as follows:

POSITION 4—SLACHETKA

Dates	Title	Basic Rate	Assignments	
			Week days	Sundays
Prior 8-24-34	Baggagemaster	$4.25	8 hrs., 3:40 to 11:40 A. M.	None.
Order 8-21, Effective 8-24	Laborer	.51	7 hrs., 9:20 to 11:00 A. M., 1:45 to 4:45 P. M., 7:00 to 9:20 P. M.	1 hr., 8:15 to 9:15 P. M.
Superintendent's Order 8-25.	"	.40	No record of changed assignment.	
Order 9-28-34	"	.40	2 hrs., 7:20 to 9:20 P. M.	1 hr., 8:15 to 9:15 P. M.
Order 9-30-34	"	.40	2½ hrs., 7:45 to 10:15 P. M.	None.

POSITION 5—SULLIVAN

Prior 8-24-34	Baggagemaster	$4.09	8 hrs., 1:00 to 9:00 P. M.	2 hrs., 7:30 to 9:30 P. M.
Order 8-21, Effective 8-24	Laborer	.51	2 hrs., 7:20 to 9:20 P. M.	3 hrs., 5:00 to 8:00 A. M.
Superintendent's Order 8-25.	"	.40	No record of changed assignment.	
Order 9-28-34	"	.40	2 hrs., 7:20 to 9:20 P. M.	3 hrs., 5:00 to 8:00 A. M.
Order 9-30-34	"	.40	2½ hrs., 7:45 to 10:15 P. M.	None.

POSITION 6—OLEOSKI

Prior 8-24-34	Baggagemaster	$4.09	8 hrs., 3:40 to 11:40 A. M.	4 hrs., 5:00 to 9:00 A. M.
Order 8-21, Effective 8-24	Laborer	.51	8 hrs., 6:00 to 10:00 A. M., 1:30 to 5:30 P. M.	None.
Superintendent's Order 8-25.	Asst. Baggagemaster	.51	8 hrs., 6:00 to 10:00 A. M., 1:30 to 5:30 P. M.	"
Order 9-28-34	Laborer	.51	8 hrs., 6:00 to 10:00 A. M., 1:30 to 5:30 P. M.	"
Order 9-30-34	Frt. Handler	.51	8 hrs., 7:00 to 11:00 A. M., 2:30 to 6:30 P. M.	"

Position 6.—The parties appear to be in agreement that position 6 is to be rated as a Freight Handler at 53¢ per hour or $4.24 a day. Apparently the only question remaining at issue regarding position 6 has to do with working a split trick. A new item in the record on this point as compared with the original submission is a report of an inquiry made by the Superintendent on January 15, 1935, of the Receiving and Delivery Clerk, Mr. Bowe, as to whether he (Bowe) performed Freight Handlers' work as a part of his duty between 11:00 a. m. and 12:00 noon and 1:00 p. m. and 2:30 p. m. The report of these conversations as interpreted by the carrier are to the effect "That on the few occasions

that he has handled freight he simply did it as an accommodation to a shipper or consignee, not because he had ever been instructed to do so by his superiors." The Referee is of the opinion that this is a fair inference to be drawn from these questions and answers as they appear in the carrier's report of the conversation.

The Referee's attention was also called to Mr. Bowe's statement, dated December 27, 1935, as presented by employes, indicating that about 2% of the time Bowe has to perform this class of work. This, it was urged, is proof that Freight Handlers' work is not regularly assigned duty of Mr. Bowe.

The Referee cannot feel that either the technical arguments for denying the right of the carrier to work position 6 a split trick or the arguments of the carrier asserting that right, are particularly convincing. Assuming the normal conditions which prevail in a fairly important junction point like Greenfield, there appears to be nothing in the record to indicate any change of conditions that would justify removing the position from the restrictions in reference to working split trick at the time the carrier made this change. If the conditions surrounding the work of position 6, whether classified as a Baggage Master or as a Freight Handler, were, as appears, substantially the same before and after the line of reasoning followed in Award No. 100 applies. The Referee so finds.

Positions 4 and 5.—Considering first such facts concerning the work of these positions as can be gleaned from the record, it has already been shown that the trains served at the Greenfield station, during the period covered by the orders complained of and prior and subsequent thereto, did not change materially. As to the distribution of trains there appears to be no considerable bunching except during the period from 8 a. m. to 12 noon on weekdays. After the last of the series of orders complained of became effective on September 30, 1934, Slachetka and Sullivan were employed only from 7:45 to 10:15 p. m. on weekdays. It appears from Exhibit 9 that the aggregate time which trains were in the station during this period was somewhat less than one hour, which does not indicate any substantial bunching of trains at that time.

Even though, as the meager evidence at hand seems to indicate, the amount, kind, and distribution throughout the day, or work previously performed by the seven employees covered in the original submission has remained substantially constant, the carrier is still entitled under the agreement to reduce his force if he finds that a smaller force is adequate. In doing this, however, he is obliged to discharge his responsibilities as well as to exercise his rights under the agreement.

As above set forth, Paragraph 7 of the preamble requires the carrier to consult employees prior to a decision of management adversely affecting their wages or working conditions. The carrier maintains that positions 4 and 5 were withdrawn from the operation of the agreement by abolition and that the persons subsequently employed as laborers (in fact, the same employees as before) were not covered by the terms of the agreement. There can be no question that these employes were covered by the agreement prior to the alleged abolition of their positions. There can be no question that the action of the carrier affected their wages and working conditions adversely, and so the obligation to consult is clear. The record gives no evidence of such consultation, and if there was no such consultation the agreement was violated in this regard.

If we assume for the sake of argument that the action of the carrier, in respect to positions 4 and 5, was taken after consultation, or if, failing consultation, we assume that the obligation to consult was merely a formal requirement which did not affect the status of the action taken, one way or the other, we then have to examine those terms of the agreement under which the action of the carrier, in regard to positions 4 and 5, must stand or fall.

The carrier invokes the following rights and principles under the agreement in support of its action:

1. The right to reduce force.
2. The right to employ persons outside the scope of the agreement at less than $30 per month for special services that require the individuals in question to take only a portion of their time from other employment.
3. The right to work certain employees about stations part time, paying them for the time actually worked.
4. Principle 12, that for eight hours' pay eight hours' work should be performed.

Over and against the carrier's rights under the agreement must be set his obligations. Rule 49, "Weekly assignments," provides that employees of the

kind that the holders of positions 4 and 5 were before the positions were allegedly abolished will not be paid less than six days per week (less holidays, if any), if they do not lay off of their own accord. Rule 66 prohibits the carrier from discontinuing established positions and creating new ones 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 rules.

The petitioner's case in the first instance rests upon the guarantee contained in Rule 49. The carrier's primary claim appears to be that the right to reduce force fortified by Exception (a) to Rule 1 cancels out this guarantee as applied to the claim now before the board, and that in addition the note attached to Rule 49 justifies the carrier in employing the claimants part time and paying them for time worked. This position the carrier maintains is reinforced by Principle 12.

Analyzing the carrier's contentions under the right to reduce force and Exception (a) to Rule 1, we find the superintendent revising the action of the agent by which the agent had reclassified and re-rated these two weekly positions and instructing the agent to abolish the positions. In the same order the superintendent authorizes the agent to employ two laborers at 40 cents an hour when needed to handle the service.

The carrier properly assumes the right to reduce force. Having done this by abolishing positions 4 and 5, Slachetka and Sullivan, who had occupied these positions, became unemployed. In these circumstances, the carrier maintains there is nothing in the agreement to prevent the carrier from employing these two men as laborers and paying them for time actually worked.

Applying the rule of reason, the correctness or incorrectness of any such position would depend entirely upon the circumstances of the individual case. Assuming, as we must, that these employees enjoyed the guarantees of the agreement prior to the alleged abolition of their positions, the carrier's line of reasoning and the procedures which, if sustained, would deprive them of those guarantees appear superficially somewhat strained. There is obviously no mutuality of interest in the result which would justify a waiver of the guarantees which these employees had previously enjoyed. The contentions of the carrier cannot be supported on the mere assertion of a technical right without giving consideration to the corresponding obligation.

The language of the exception is as follows:

> "These rules shall not apply to freight handlers, (including loaders, stowers, and coopers) on Boston docks, or to individuals where amounts of less than thirty ($30.00) dollars per month are paid for special services which take only a portion of their time from outside employment or business."

While the reference to loaders, stowers, and coopers on the Boston docks does not definitely prove that the part of the paragraph following the word "or" contemplates essentially the same type of service as that performed by these casual laborers on the Boston docks, it does suggest strongly that this type of service was in the minds of the negotiators when the exception was agreed to.

The natural meaning of the language of Exception (a) to Rule 1 is that the services in question shall be in fact special services, and not regular services of the kind regular employees had been accustomed to perform under the agreement.

The Referee holds that the carrier was wrong as to the application of Rule 1, Exception (a) to this case.

The carrier has cited the note attached to Rule 49 as supplementing his contention under Rule 1, Exception (a). The wording of this note as set forth on page three above is the same as appears in the Booklet containing the complete agreement governing clerical and station employees effective July 15, 1925. In the smaller pamphlet, containing the "Memorandum of Changes of Rules of Agreement, of July 15, 1925," the note attached to Rule 49 reads as follows:

> "NOTE.—Nothing herein shall be construed as changing practice of working certain employees about stations part time and paying them for time worked or preventing the excepting of certain employees that may be mutually agreed upon between the management and the duly accredited representatives of the employees."

There is nothing in the language of this note to prove that it bars the carrier from employing persons on part time in positions in which they would normally be working on weekly assignments. Moreover, the fact that the note is attached to Rule 49, which covers weekly assignments, instead of being attached to the agreement in general, is fairly clear evidence that in some way or other it was intended to modify the effect of Rule 49. It has been argued that there was no past practice to justify the employment of persons in the Greenfield station part time under the authority of this note. The Referee is of the opinion that this particular circumstance is not controlling. The agreement under which the case arises applies to the whole B. & M. System, and there appears to be nothing in it to prevent the carrier from working certain employees in a particular station part time at certain periods and not working any employees part time at other periods. The Referee can find nothing in the Rule to prevent inaugurating this practice at the Greenfield station, provided the carrier has a legitimate reason for so doing, and provided also that he acts in full compliance with other provisions of the agreement.

However, the act by which the carrier asserted the right to employ persons part time at the Greenfield station affected adversely employees covered by the agreement at the time the act occurred. The carrier's obligation to consult was clear. After the event, the employer cannot claim the right to benefit from his wrongful act or omission under one clause of an agreement by invoking another clause of the same agreement.

The carrier, in addition to Exception (a) of Rule 1, and the note to Rule 49, cites Principle 12, contained in the preamble to the agreement, and particularly the phrase "for eight hours' pay eight hours' work should be performed." Declaratory principles, like those set forth in the preamble to this agreement, should be given force and effect to the fullest extent possible in any legal instrument in which they occur. However, it is clear that an abstract principle, however correct, (and this one is correct) must either be reconciled with specific mandatory stipulations contained in the same instrument or be subordinated to those specific mandatory stipulations. If this were not so it would be extremely difficult to incorporate such principles in a trade agreement without greatly impairing the workability of the agreement. The Referee holds, therefore, that Principle 12 cannot be invoked to set aside a specific obligation of the agreement such as the weekly guarantee contained in Rule 49. Moreover, the same line of reasoning applies as was just applied in reference to the note attached to Rule 49.

The petitioners, as above noted, rest their contention primarily on Rule 49. They do not deny the right of the carrier to make bona fide reductions in force by abolishing positions, but they contend that positions 4 and 5 were not properly abolished. The petitioners also cite Rule 48 in reference to working split tricks, and Rule 57 in reference to overtime.

As applied to positions 4 and 5, Rule 48 would have no significance after September 30, 1934, since such limited service as has been performed has been continuous since that date. The application of Rule 57 is limited in the same way as Rule 48, since under any interpretation of Rule 48 no overtime has been worked since September 30, 1934.

The only other Rule of the agreement which appears crucial in respect to positions 4 and 5 is Rule 66, which provides that—

> "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."

The action of the superintendent in changing the instructions of the agent, in respect to positions 4 and 5, appears practically tantamount to an admission that the occupants first had to be removed from the protection of the agreement by abolishing their positions in order for the carrier to escape the obligations which the agreement imposed on it in respect to these positions. Having upheld the contention of the petitioners that the carrier was wrong in applying Exception (a), Rule 1, to these positions, the Referee must conclude that the occupants of positions 4 and 5 are still under the protection of Rule 66.

The fact that the established positions were discontinued cannot be denied; no more can it be denied on the face of the record that new positions were created under a different title covering relatively the same class of work. The

Referee obviously cannot be expected to read the minds of carrier and to pronounce judgment upon his motives. However, another Referee, under somewhat similar circumstances, has held that actions of this sort must be judged by their natural effects. Upon that basis the Referee holds that Rule 66 was violated in respect to positions 4 and 5.

In conclusion, the carrier would have been fully within its rights in making a bona fide reduction of force by abolishing one or more positions under the provisions of Rule 22. The carrier was not within its rights in abolishing positions covered by a weekly guarantee, thus setting aside the guarantee, and then employing laborers to do relatively the same class of work. This ruling would hold whomever the persons so employed as laborers.

The carrier would also have been within its rights, and would still be within its rights, in trying to negotiate an agreement for working certain employees part time. Inasmuch as this procedure was not followed, the question whether, if it had been followed without reaching an agreement, the carrier could then have invoked the note to Rule 49 is not before the Board at this time, and therefore need not be decided.

The Referee holds that positions 4 and 5 were improperly abolished. Since the positions were not properly abolished, he must also hold that the employees entitled to these positions have been continuously the rightful holders of them, and as such they have continued under the weekly guarantee embodied in Rule 49. However, the fact that subsequent to September 30, 1934, the occupants of these positions have had all of their time free except from 7:45 P. M. to 10:15 P. M. creates a reasonable presumption that they may have been able to supplement the wages paid them by the carrier by other earnings.

In awarding back pay the Referee therefore considers it proper to ask these employees to make affidavit concerning any earnings from other sources during the period covered by the claim, and to deduct the amount of such earnings in addition to the wages paid them by the carrier from the amount which they would have received at their respective weekly rates of compensation during the period covered by the claim.

AWARD

Position 6.—(a) The carrier is not permitted under the agreement to work this position a split trick under the conditions revealed by the original submission, as supplemented by the record of the instant case.

(b) The occupant of position 6 is entitled to compensation at the rate of 53 cents an hour on continuous assignment from August 24, 1934. He is also entitled to any overtime which may have accrued as a result of spreading his employment over an excess of hours as a result of working him a split trick. He shall be paid the difference between the amount he has actually received and the amount to which he is entitled under this ruling.

Positions 4 and 5.—(a) *Rating.*—Occupants shall be restored to their previous rating as of August 24, 1934, and be compensated at their respective rates of $4.25 and $4.09 per day.

(b) Claimants shall make affidavit as to their earnings from other employment during the period covered by this claim, and such earnings, if any, shall be added to the pay which they have actually received from the carrier. They shall then be paid the difference between this sum and the earnings which they would have received as Baggagemasters at their respective rates on eight-hour assignments six days per week.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: H. A. JOHNSON
Secretary

Dated at Chicago, Illinois, this 18th day of September, 1936.