

NATIONAL RAILROAD ADJUSTMENT BOARD
Third Division

John P. Devaney, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT
HANDLERS, EXPRESS AND STATION EMPLOYEES
CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD
COMPANY**

STATEMENT OF CLAIM.—

"Claim of employees M. J. Whelan and William Haseltine for restoration to their yard clerk positions, Ottumwa, Iowa, and payment for all wage loss suffered retroactive to January 30, 1933."

STATEMENT OF FACTS.—The parties jointly certify to the following statement of facts:

"Ottumwa, Iowa, would be an established division terminal where two yard clerks were employed with assigned hours 5 A. M. to 1 P. M. and 4 P. M. to 12 midnight, respectively, located in the yardmasters' office. Three telegraphers were assigned 7:30 A. M. to 3:30 P. M., 3:30 P. M. to 11:30 P. M., and 11:30 P. M. to 7:30 A. M., and two yardmasters 6:30 A. M. to 6:30 P. M. and 6:30 P. M. to 6:30 A. M.

"Effective January 30, 1933, the two yard clerk positions were abolished which resulted in a controversy as between the representative of the clerical employees' organization and the Management.

"For the purpose of identifying and clarifying the volume and character of work performed by each of the yard clerks, whose positions were abolished, arrangements were made for an investigation on the part of the Division Superintendent and the clerks' organization representative, which was conducted Monday, February 5, 1934, and the result thereof is outlined in Exhibit 'A' hereto attached."

An agreement between the parties bearing effective date of November 1, 1929, was placed in evidence.

POSITION OF EMPLOYEES.—Effective Tuesday, August 30, 1932, and every Tuesday thereafter Yard Clerks Whelan and Haseltine were given the day off and on such days off the two yardmasters employed at Ottumwa performed the yard clerks' work.

Effective January 30, 1933, the two yard clerks' positions were discontinued. The action of the carrier was in violation of rules:

"RULE 1 (a)

"These rules shall govern the hours of service and working conditions of the following employees, subject to the exceptions noted below:

"(a) Clerks, Clerical Workers, Stenographers, Typists, Comptometer Operators, Hollerith Machine and Key Punch Operators."

"RULE 2

"Employees who regularly devote not less than four hours per day to the writing and calculating incident to keeping records and accounts, writing and transcribing letters, bills, reports, statements, and similar work, and to the operation of office mechanical equipment or devices in connection

with such duties and work shall be designated as clerks. The above definition shall not be construed to apply to:

"1. Employees engaged in assorting tickets, waybills, etc., nor to employees operating appliances or machines for perforating and addressing envelopes, numbering claims or other papers, adjusting dictaphone cylinders and work of a similar nature; nor to employees gathering or delivering mail or other similar work not requiring clerical ability.

"2. Office boys, messengers, and chore boys; or to other employees doing similar work.

"3. Employees performing manual work not requiring clerical ability."

"RULE 42

"RATES DISCONTINUED

"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."

"RULE 44

"AGREEMENT DURATION

"This agreement shall be effective as of November 1st, 1929, and shall supersede and be substituted for all rules or existing agreements, practices, and working conditions, and shall remain in full force and effect until after thirty (30) days' notice has been given in writing by either party to the other."

Also that rules 3 to 12, inclusive, establish seniority rights of employees covered by the agreement to perform work specified in rule 1 and that the agreement, when negotiated, embraced the positions and duties of the position here involved.

When the carrier abolished the two yard clerk-caller positions it did not eliminate the work, but required the yard masters to take over the duties formerly performed by the yard clerks-callers and thereby violated the intent and purpose of the agreement and the seniority rights of the employees concerned.

Work was removed from the scope of the agreement without notice and transferred to persons who held no seniority rights to perform such work. The record of investigation held February 5, 1934, Exhibit "A," is evidence that work formerly performed by claimants still exists and is performed largely by yardmasters.

POSITION OF CARRIER—The carrier contends there is no dispute as to right of employees to perform work in accord with seniority, but the dispute is confined to right of carrier to abolish positions. Also that established positions were not discontinued and new ones created under a different title. The abolishment of the two yard clerks' positions resulted from business depression.

The employment of clerical force is dependent on volume of work and at a majority of stations agents and telegraph operators perform all of the clerical work. At Ottumwa the duties of yardmasters include calling crews, answering telephones, and other work incidental to train and yard movements.

There is no rule, agreement, custom, or practice which requires employees being continued in service when the volume of work does not require their service, and Carrier's responsibility for economical operation should not be prejudiced by any action requiring employment of unnecessary or excess forces.

The carrier contends that they have a right to abolish positions in question because less than four hours per day is devoted by the employee in each position to clerical work within the meaning of Rule 2 of the Agreement. Rule 2 reads in part as follows:

"Employees who regularly devote not less than four hours per day to the writing and calculating incident to keeping records and accounts, writing and transcribing letters, bills, reports, statements, and similar work, and to the operation of office mechanical equipment or devices in connection with such duties and work shall be designated as clerks."

OPINION OF BOARD.—It appears that prior to January 29, 1933, Yard Clerk Whelan occupied position No. 12, classified as Yard Clerk, and he worked from 5 A. M. to 1 P. M. with no time off duty for meal period. His rate of

pay as shown in the Wage Agreement was \$4.66 per day. Yard Clerk Haseltine occupied position No. 3, classified as Yard Clerk, hours 4 P. M. to midnight, with no meal period, and his rate of pay as shown in the Wage Agreement was \$4.51 per day.

In our opinion, Rule 1 placed the positions in question within the scope and operation of the Agreement. The carrier is not allowed to remove the positions or work from the Agreement except in the manner provided for therein. These positions were not properly removed unless the carrier was authorized to remove them under the provisions of Rule 2, hereinbefore quoted.

We are of the opinion Rule 2 does not authorize the carrier to abolish the position in question and transfer the duties thereof to other employees not covered by the Agreement and who hold no seniority rights under the same.

As to whether or not there was four hours' work or more in each of these yard clerk positions, the record is somewhat at conflict. The statements of the Yardmasters are contradictory. The Yardmasters at first stated in effect that practically their whole time was devoted to duties of the yard clerk. Later, at the time of a more formal investigation, they changed their statements, so that accepting the latter statements as true, it can be said only with certainty that there are at least two hours' work of the yard clerk nature performed by each yardmaster per day. The statements of these two important witnesses have not been reconciled or explained. We are inclined on the record taken as a whole to give more credence to the original statement made by the Yardmasters.

From the entire record, giving full consideration to all relevant facts, we conclude that there was at least four hours' work of a yard clerk nature in each position.

The carrier was not justified in abolishing these positions and transferring the duties thereof to other employees not within the scope of the Agreement.

We conclude that the positions in question should be restored to the employees Whelan and Haseltine but that the question of compensation for the loss of work for this time should be returned to the parties for adjustment. See Awards of Third Division No. 385 and 386.

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 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 violated rules of the agreement as indicated in the opinion herein, and the claim of employees Whelan and Haseltine should be sustained.

AWARD

Claims sustained to the extent indicated in Opinion of Board; question of compensation remanded.

NATIONAL RAILROAD ADJUSTMENT BOARD.
By Order of Third Division.

Attest: H. A. JOHNSON
Secretary

Dated at Chicago, Illinois, this 7th day of May, 1937.

DISSENT ON DOCKET CL-399

We dissent from the award in this case, as it is not justified under the evidence of record. In the "Opinion of Board," the Referee states:

"We are of the opinion Rule 2 does not authorize the carrier to abolish the position in question and transfer the duties thereof to other employees not covered by the agreement, and who hold no seniority rights under the same."

Rule 2 in the agreement is designated "Definition of Clerk," and, as its clear title and language show, it is nothing more than a rule of definition and is not susceptible to an attempt to distort it into a rule constituting a guarantee

for maintenance of a position if four hours or more work remains. Its sole and only purpose is to give employees of the classifications specifically enumerated in Rule 1 the designation of clerk when such an employee regularly devotes not less than four hours per day to the writing and calculating incident to keeping records and accounts.

To attempt to construe it as a guarantee rule ignores the historical background of the rule, its clear intent and purpose, and the application given it over a long period of years.

The Referee has predicated his award upon the premise that there was at least four hours' work of a yard clerk nature in each position. The record is in conflict as to whether there was four hours of actual clerical work in each position, but in the face of this conflict and the lack of a clear showing of fact the Referee concluded that there was at least four hours' work of a yard clerk nature in each position. He also entirely disregarded the long established and admitted practice of agents, telegraphers, etc. (employees covered by other agreements), performing clerical work, and found that Rule 2, which is merely a rule of definition, and which neither authorizes nor prohibits the abolishment of positions or transfer of duties to employees not covered by the clerks' agreement, did not authorize the Company to abolish positions which it considered unnecessary.

The conclusion of the Referee that the positions in question should be restored to employees Whelan and Hazeltine and the award which calls for this result are beyond the jurisdictional powers of this Board. While the Board has authority to interpret agreements between carriers and employees, it has no managerial powers and is without authority to dictate the number of yard clerks a carrier shall employ at any station, yard, or terminal.

R. H. ALLISON.
A. H. JONES.
J. G. TORIAN.
GEO. H. DUGAN.
C. C. COOK.