

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Dozier A. DeVane, Referee

PARTIES TO DISPUTE:

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

NEW ORLEANS PUBLIC BELT RAILROAD.

STATEMENT OF CLAIM: "Claim of Clerk Ellis Magnon, M. C. B. Accounting Dept. for (1) restoration of position held by him, that was abolished as per Bulletin No. 54 dated January 11th, 1937. (2) Claim by the General Chairman, Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees that all employees affected by the abolishment of the position, Clerk M. C. B. Accounting Department, be reinstated to their former positions, and be compensated for wages lost resulting from said abolishment, retroactive to January 11th, 1937."

EMPLOYES' STATEMENT OF FACTS: "Agreement governing hours of service, rates of pay, working conditions, etc., was entered into by and between the above named parties to this dispute dated and made effective March 1, 1936.

"Prior to January 11th, 1937, Mr. Ellis Magnon had been for several years the regular incumbent of the position classified and known as Clerk, M. C. B. Accounting Department.

"Effective January 11th, 1937, the position of Clerk, M. C. B. Accounting Department, held by Clerk Ellis Magnon was abolished without notice to or conference with the duly designated and authorized representatives of the employees.

"March 29th, 1937, after a thorough investigation as to the duties formally performed by Ellis Magnon, the representatives of the employees found that all of the duties assigned to Clerk Ellis Magnon's position were being performed by the Master Car Builder's ACCOUNTANT, a position definitely excepted from the current agreement between the New Orleans Public Belt Railroad and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees.

"Clerk Ellis Magnon, through the representatives on March 29th, 1937, notified the Management of their findings and protested the arbitrary abolishment of the position Clerk M. C. B. Accounting Department under our current agreement and transferring same to position known as an excepted position.

"March 31st, 1937, Mr. V. J. Bedell, General Manager and Chief Engineer, in a communication called to the attention of the Local Chairman, Wm. N. Bassemier, the neglect in handling the case in accordance to the agreement but agreed to waive the formalities in this instance and handle case on its merits."

CARRIER'S STATEMENT OF FACTS: "An agreement governing the hours of service, rates of pay, working conditions, etc., was entered into

mentioned position was abolished on January 11, 1937, the then incumbent Clerk Magnon was in a position to exercise his seniority with regard to other positions. He had the opportunity to exercise his seniority with regard to several positions, two of which are important to this matter. The first position as to which Clerk Magnon could have exercised his seniority was that of Assistant Belt Clerk which was then occupied by Clerk George A. Fanning and the other position was that of Assistant Accountant in the Accounting Department. Realizing that he was not capable of holding the position of Assistant Accountant in the Accounting Department, Clerk Magnon exercised his seniority with regard to the position of Assistant Belt Clerk, thereby displacing Clerk George A. Fanning. Clerk Fanning was then in a position to exercise his seniority with regard to several positions. He made application for the position of Assistant Accountant in the Accounting Department and was advised by the Railroad when his application was received that he was not sufficiently qualified to hold such a position. However, he insisted upon his application being recognized and it was accepted by the Railroad. After his application was accepted and he started to work in the position of Assistant Accountant in the Accounting Department, the Railroad found that he was not qualified to hold such position and in accordance with Section 4, Rule 6, disqualified him within thirty days from the date that he began to work in this new position and placed him on the inactive list. This disqualification was contested by the Brotherhood on behalf of Clerk Fanning and a hearing was granted by the Railroad. At this hearing the disqualification of Clerk Fanning was upheld by the Brotherhood. Clerk Fanning exercised his seniority with regard to the above mentioned position on January 11, 1937 and was disqualified as of February 11, 1937. During all this time Clerk Fanning was President of the local Brotherhood. No protest as to the abolishment of the position of Clerk, Master Car Builder's Accounting Department, was ever made by the incumbent, Clerk Magnon, at the time of the abolishment and no protest was made from the time this position was abolished on January 11, 1937 until March 29, 1937, after Clerk Fanning had been displaced by Clerk Magnon from his position of Assistant Belt Clerk and after Clerk Fanning had been disqualified from the position of Assistant Accountant in the Accounting Department and placed on the inactive list. Only now, after the disqualification of Clerk Fanning, does the Brotherhood protest that the abolishment of the position of Clerk, Master Car Builder's Accounting Department, was in violation of the contract and therefore should be restored and all of the employees affected thereby placed in their original positions as of January 11, 1937, and back pay be allowed them.

"We submit that if the protest should be made by the Brotherhood, it should be on the complaint of Clerk Magnon whose position was abolished by Bulletin No. 54, issued January 5, 1937, and not of any one else. Clerk Magnon is at the present time satisfied and in his new position as Assistant Belt Clerk is earning more money than he was in the position of Clerk, Master Car Builder's Accounting Department. We further submit that the Railroad has acted in accordance with every provision of the contract and that it has the right to abolish any position under the contract when the circumstances warrant the abolishment, and that this complaint should be dismissed on the grounds that it is not founded on a violation of the contract."

OPINION OF BOARD: Carrier contends that this case is improperly before the Board for the reason it was not progressed to final submission as required by the agreement between the parties.

The applicable rule is as follows:

SECTION VI. DISCIPLINE AND GRIEVANCES

"Rule 1. (a) Should any employe subject to this agreement desire to make a complaint on grounds of unjust treatment or of violation

of any of the provisions of this agreement, the employe must make such complaint to the head of his department within twenty-four (24) hours after the occurrence complained of.

"(b) In the event the matter complained of is not satisfactorily adjusted and the employe desires to appeal to the Superintendent of Transportation or the Chief Clerk to the General Manager, the employe must do so within twenty-four (24) hours following the decision of the head of the department.

"(c) Appeals should be made to the Superintendent of Transportation where employes in the Transportation Department may be involved and to the Chief Clerk to the General Manager where employes other than employes in the Transportation Department are involved.

"(d) All matters submitted to the Superintendent of Transportation or the Chief Clerk to the General Manager must be in writing and decisions will be rendered in writing not later than ten (10) days after completion of investigation.

"(e) If decisions of these officials be not satisfactory, the employe may appeal to the Protective Committee. The Protective Committee may then, in its judgment, present the matter to the General Manager, provided such presentation is made in writing within seven (7) days from the date of the decision of either the Superintendent of Transportation or the Chief Clerk to the General Manager.

"(f) The Chairman of the Protective Committee, acting for the Committee, may submit matters for adjustment without the formality of a hearing to the Superintendent of Transportation or the Chief Clerk to the General Manager; but such matters must be submitted in writing and decisions rendered in writing."

When the position of Clerk, Master Car Builder's Accounting Department, was abolished, effective January 11, 1937, the employe holding this position filed no protest as provided in Rule 1 (a) above. In fact the employe immediately moved into another position carrying a better salary, and as far as the record shows, never at any time filed a protest to the action of the carrier in abolishing the position.

When the position was abolished, Magnon (the employe affected) exercised his seniority rights with regard to the position of Assistant Belt Clerk. George A. Fanning, the employe displaced by Magnon, exercised his seniority rights to the position of Assistant Accountant, Accounting Department, from which position, after 30 days' trial as provided by Rule 6, Section IV, he was disqualified. Subsequently, on March 29, 1937, a protest was made by the Brotherhood against the abolishment of the position of Clerk, Master Car Builder's Accounting Department, in which the Brotherhood made a formal request that said position be restored and all employes affected by the abolishment of this position be restored to their former positions and compensated for wage losses resulting from the abolishment of said position.

Rule 1 of Section VI provides for two distinct methods for handling complaints. Paragraphs (a) to (e), inclusive, specify the successive steps where the complaint originates with the employe. As the complaint in this case was not originated by the employe, these paragraphs of the rule are not applicable.

Paragraph (f) vests in the Chairman of the Protective Committee authority to initiate and submit matters to the carrier for adjustment. The protest in this case was originated in that manner. The wisdom of this provision is well illustrated by this case.

The protest of March 29, 1937, was addressed to the General Manager and Chief Engineer of the carrier, and not to the Superintendent of Trans-

portation or Chief Clerk to the General Manager, as provided in paragraph (f) of the rule. However, this constituted a mere procedural informality which could have been readily corrected had the General Manager insisted upon it. Instead of so doing, the General Manager, while calling the Chairman's attention to the rule, waived the formalities in this case and agreed to consider the case on its merits. The irregularity could not have been fatal in this case, as paragraph (f) of the rule places no time limit upon the filing of protests by the Chairman of the Protective Committee. The Board, therefore, finds and holds that this case is properly before it.

The question presented on the merits of this case requires a succinct analyses of the facts in the case. The agreement under which the parties are operating became effective March 1, 1936. For some years prior to the effective date of the agreement, the Master Car Builder's Department consisted of:

- (1) Master Car Builder, in charge,
- (2) Three (3) Clerks at Car Shops,
- (3) Master Car Builder's Accountant,
- (4) One (1) Clerk (the claimant), and
- (5) One (1) Typist.

On August 1, 1932, the Master Car Builder's Accountant was granted a leave of absence for seventeen (17) months. During his absence his duties were performed by Clerk Magnon. Upon the return of the Master Car Builder's Accountant on January 1, 1934, the management assigned him to supervision of physical inspection of cars, as well as supervision of the accounts. According to the evidence of the Brotherhood, which is not disputed by the carrier, he spent approximately six (6) hours each day on inspection work, and two (2) hours in the office. It is agreed by the parties that the accounting work performed by the Master Car Builder's Accountant falls within the scope rule (Section I, Rule 1) of the agreement, but that the inspection work does not.

About September 1, 1936, the Master Car Builder's Accountant was taken off the inspection work and took over the accounting work in the office. At the same time, Magnon was assigned to do some special accounting work in the general office of the carrier, and when this work was completed about January 9, 1937, his position was abolished. The record further shows that the accounting work in the office is still being performed by the accountant and typist—Magnon having been advanced to the position January 16, 1938. It thus appears that since August 1932 the work falling under three positions (Master Car Builder's Accountant, Clerk, and Typist) has in fact been done by two persons, with the exception of what accounting work, if any, the Master Car Builder's Accountant may have performed between January 1, 1934, and September 1, 1936.

The agreement between the parties **excepts** certain employes from the provisions set forth therein, among them being the Master Car Builder's Accountant.

Carrier contends that a distinction must be drawn between those employes and positions **excluded** from the agreement and those **excepted** from the application of its terms. The fallacy in this contention lies in the fact that at the time the agreement was executed the principal duties of this employe, **excepted** from the agreement, consisted of duties admittedly outside the scope rule of the agreement.

This Board has repeatedly held that the carrier is within its rights in abolishing positions when the work has disappeared or substantially reduced in volume. The Board has also repeatedly held that the carrier cannot discontinue or abolish positions and assign the duties thereof to employes not covered by the agreement.

The latter line of decisions are controlling in this case. There is no claim that the work in the office had reduced following the execution of the agreement. There had not been sufficient work for the Clerk and the Accountant for more than three years prior to the execution of the agreement, and as shown by the record, there is not sufficient work for both today. The duties performed are covered by the agreement, and it is the opinion of the Board that the position of Master Car Builder's Accountant was **excepted** from the terms of the agreement because the employe was at the time chiefly engaged in work entirely outside the scope of the agreement and not to save a position for an employe when the carrier desired to reassign him to the duties of an Accountant, which work is admittedly covered by the agreement.

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 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 carrier violated the current agreement, as indicated in the opinion.

AWARD

Claims sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 10th day of October, 1938.