Award No. 1314
Docket No. CL-1336

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

James H. Wolfe, Referee

PARTIES TO DISPUTE:

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

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY—WESTERN LINES

EMPLOYES' STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that carrier violated the rules of the Clerks' Agreement:

"1—When on May 3, 1938 it nominally abolished Position No. 225, Chief Dispatcher's Clerk, Clovis, New Mexico, rate of pay $6.15 per day and removed the duties of said position from the scope and operations of the Agreement rules by assignment to an employe occupying a position wholly excepted from the rules of said agreement.

"2—When on November 7, 1938 it assigned three hours work formerly attaching to position No. 225 to Position No. 45, File Clerk, rate $5.89 per day.

"That Position No. 225 shall now be reestablished and rated at $6.15 per day, and

"1—Clerk J. T. Lockhart paid the difference between what he has earned on Position No. 45 and what he would have earned on Position No. 225 from May 3, 1938 until Position No. 225 is restored.

"2—Clerk Rex T. Cassidy compensated in full for wage losses sustained as a result of having been displaced from Position No. 45 for the period from May 3, 1938 until Position No. 225 is restored."

There is in evidence an agreement between the parties bearing effective date of December 1, 1929.

EMPLOYES' STATEMENT OF FACTS: "Effective May 3, 1938 Position No. 225, occupied by J. T. Lockhart, was abolished. Mr. Lockhart exercised seniority displacing rights on Position No. 45, File Clerk, rate $5.89 per day, occupied by Mr. Rex T. Cassidy. Mr. Lockhart suffered reduction in rate of pay of 26 cents per day; Mr. Cassidy went to the furloughed list.

"The duties which composed Position No. 225 were:

	Daily
Stenographic work—Taking dictation and transcribing same	7'00"
Compiling Talley Sheet	30"
Filing	30"
	8'00"

of abolishing a position; it is only when that act is combined with another, i. e., the creation of a new position covering relatively the same class of work, that the rule comes into play, and not even then unless the combined action of abolishing one position and creating another is for the purpose of reducing the rate of pay or evading the application of the rules. No new position was created when the position of Chief Dispatcher's Clerk was discontinued at Clovis, there was no reduction in a rate of pay, and there was no intent of evading the application of any of the rules in the agreement.

Article XIII, Section 15.

"This rule reads:

'Date Effective and Changes.

'Section 15. This agreement shall be effective as of December 1, 1929, and shall continue in effect for two years and thereafter until thirty (30) days' written notice of a desire to change is served by either party on the other.'

"As to this rule the employes contend:

'Article XIII, Section 15 is the rule which provides the method for revising the Agreement. Committee contends carrier was obligated to conform with the provisions of this rule if it was desirous of removing positions or work out from under the scope and operations of the agreement rules. Committee contends this rule was violated when by unilateral action, the Railway Company did remove work out from under the Agreement rules without conference or agreement with the duly accredited representatives.'

"The fact that no conferences were held with representatives of the employes prior to abolishment of the position of Chief Disptcher's Clerk at Clovis can not in any way be construed as a violation of this rule. There is nothing in that rule, nor in any other rule in the agreement with clerical employes on this property, that requires or contemplates prior consultation with representatives of the Employes before positions are abolished. The purpose of the Employes in referring to lack of prior conferences is not apparent, unless it be for the purpose of creating the impression that the agreement contains a rule requiring prior conferences in connection with abolishment of positions, or that it has been the established practice to hold such conferences, neither of which is a fact. There was nothing connected with the abolishment of the position in controversy that could have any effect upon or be affected by the provisions of Section 15 of Article XIII.

"The excerpts from the 'Findings,' 'Conclusions of the Third Division,' 'Opinion of the Referee' and 'Opinion of Board' in the several awards cited in 'Position of Employes' have to do with cases involving different conditions and different circumstances than those pertaining to the instant case, and in some of the cases cited the awards do not even pertain to clerical workers, so these opinions and awards would not be controlling in the instant case."

OPINION OF BOARD: This case is not important from a monetary standpoint. The conceptions which it involves are important. Attempt will be made to clarify these concepts.

On and prior to May 3rd, 1938 the Chief Dispatcher at Clovis, New Mexico had a clerk—a position bulletined as Chief Dispatcher's Clerk No. 225. On that date this position was abolished. Some of the duties were taken over by the Chief Dispatcher—others—i. e. the stenographic work was given to the stenographer of the Trainmaster—Position No. 180. The Chief Dispatcher belonged to another craft. The Trainmaster's stenographer was an excepted position. The remainder of the duties were given to File Clerk—Position No. 45, which rated $5.89 per day as against $6.15 for the Chief Dispatcher's Clerk. J. T. Lockhart who formerly filled the position of Chief Dispatcher's Clerk displaced Rex T. Cassidy as Filing Clerk in Position 45.

The latter was furloughed. Thus the situation remained until November 7th, 1938 when the file clerk either "assisted" the Trainmaster's stenographer in some of his duties, or took them over. It is not clear from the record whether the stenographic work which went from Position 225 to Position 180 came back to Position 45, or whether Position 45 simply assisted Position 180 in doing the work of the latter. Resolving of this fact would make a difference because if the work which went from Position 225 to 180 (excepted position) on May 3rd was returned to Position 45 (an unexcepted position) on November 7th, the alleged violation of giving work properly belonging under the agreement to one not thereunder on that day ceased. In that case only the question of whether work belonging to a higher rated was given to a lower rated position would remain after November 7th.

On the other hand, if the work which went from 225 to 180 remained in 180 after November 7th, and Position 45, occupied then by Lockhart, assisted in doing some of the work normally belonging to Position 180, we would still have an alleged continued violation of the agreement. In passing it should be said that the carrier contends that nothing in the rules prevents this. We shall later return to that contention. In the meantime we shall attempt the difficult matter of endeavoring to discern from a record in conflict whether functions belonging to Position 225 came back under the agreement on November 7th or whether they remained out after that date. This is purely a factual question.

This is a joint submission. The Employes state the work of Position 225 consisted of 7 hours of stenographic work—30 minutes each of compiling Tally Sheets and filing, and two hours a week used in the preparation of three statements. This totals more than 8 hours work a day, but we must presume that the times are only rough estimates, as by the very nature of the work they must be, and that the two hours per week making out reports was worked into the 8 hour periods. The Employes further state that G. L. Moore, the excepted Trainmaster's stenographer, on May 3rd took over the making of the three weekly reports and some of the stenographic work, amounting in all to from 2 to 3 hours daily; that the Chief Dispatcher took over the Tally Sheets and handled such correspondence as was not given to Moore. He also did filing with the help of the Night Chief Dispatcher. Nothing is said as to where the remainder of the seven hours stenographic work was lodged. Perhaps this was part of the correspondence the Chief Dispatcher took care of. Lockhart, who was regularly assigned to Position 45, was, according to the Employes on November 7th detailed to **"assist"** Mr. Moore three hours daily on work **which formerly constituted the assignment of abolished Position 225.** If in "assisting" Mr. Moore, Lockhart really performed after November 7th from 2 to 3 hours work which he formerly did while occupying Position 225, then certainly the work which it is alleged went out from under the Agreement came back to Lockhart who remained under the agreement.

The Carrier in the Joint Statement sets out that the work of Position 225 was distributed on May 3rd, as follows: The stenographic work—one half of filing and three weekly reports, to Position 180. The other half of the filing went to Position 45, and compiling Tally Sheets to Position 115, the Maintenance Clerk. The Chief Dispatcher took on some of the routine duties his clerk had formerly been doing. That on November 7th the Filing Clerk, Position No. 45, took on additional work of the Chief Dispatcher's office. There is, therefore, a marked conflict in the statement of the parties. The Carrier states that the additional work which came to the File Clerk on November 7th, 1938 came from the Chief Dispatcher, evidently part of the work which he took over from his clerk on May 3rd. The Employes state that the work which came to the File Clerk on November 7th was work that Moore had, but do not say whether it was work Moore took over from Position 225. At the hearing the Employes took yet a different position. They combined the statement of the Carrier that on November 7th the File Clerk took over the Chief Dispatcher's work with a statement in a letter of T. A. Gregg writ-

ten on August 15th, **1939,** which states: "I now take it that the only dispute involved is the work **now performed** by the stenographer to the Trainmaster (an excepted position) in taking a portion of the chief dispatcher's dictation daily." (Emphasis added.) From this they urge that it was shown that Moore (Position 180) was still on August 15th, 1939 doing the stenographic work of the Chief Dispatcher, and that the other work which came to Position 45 on November 7th came from the Chief Dispatcher, whereas they previously stated it was work in which Lockhart "assisted" Moore. It is quite likely that the Carrier has correctly stated the situation, i. e., after November 7th the stenographic work formerly done by Position 225 (several hours per day), which went to Moore (Position 180) on May 3rd still remained there, and work which went from Position 225 to the Chief Dispatcher came on November 7th to the File Clerk, and the Tally Sheets remaining with Position 115.

There is no dispute as to the right of the Carrier to abolish a clerical position which is subject to the agreement and distribute that work among other clerks subject to the agreement, at least in so far as such distribution does not make a new position out of any of the positions to which it is given, a matter which in this case does not arise. Nor is there any dispute as to the right of the Carrier to abolish a position **and** entirely abolish the work connected therewith.

The question arises: Can the Carrier abolish a position subject to the agreement and assign the work it entails to an excepted position? On May 3rd the Chief Dispatcher and an excepted position received the **majority** of the work of the Chief Dispatcher's clerk. On November 7th, as we view the facts, some of the work which on May 3rd went to the Chief Dispatcher came back under the agreement to the File Clerk, but much of it, the stenographic work, was still left in the hands of an excepted employe.

At this time we shall discuss the problem as if all of the work of an included employe had been given to an excepted employe, thus facing the question squarely, and for the moment avoiding the troublesome questions which arise when the work of an abolished position is divided among excepted and included employes.

The Carrier strikes at the very heart of the problem by asserting that nothing in the rules prohibits the abolition of a position and the distribution of the work to any one. It rests this contention primarily on the proposition that the Scope Rule, Article 1, Section 1, governs only the hours of service and working conditions of the classes of employes named and does not mention "work."

There are numerous awards dealing with the transfer of work from a position coming under one craft agreement to an existing position belonging to another craft or to a new position created and belonging to another craft. Many of these awards interpreted different rules. Our job is to interpret and apply the rules governing each particular case and not transmute such interpretation into a general principle applicable to other agreements unless it is applicable to those agreements.

In Award 139 it was held through Referee Spencer that a rule exactly the same as Article XII, Section 6 of this agreement prohibited the abolition of night clerk coming under the Clerk's agreement and giving part of it to the "record clerk" and part of it to the "night assistant yardmaster." And again by the same Referee in Award 180 that work under the Clerk's agreement could not be transferred to an outside agency. And again by Referee Corwin in Award 323 where clerks of the Kansas City Southern Railroad took over part of the duties formerly performed by certain clerks of the Chicago Great Western Railway Company, holding it "exactly the same in principle as that under consideration by this Division in Award 180." And in Award 360 Referee Sharfman cited these three Awards and Award 331 which seems to deal with a different, but perhaps relevant, situation with approval. In

Award 385 where the same rule as Article XII, Section 6 was involved, Referee Sharfman says "It is well established under collective agreements of the character here involved that while the carrier is free to abolish positions, such work as remains in connection with these positions must be performed by the class of employes to which the agreement applies."

In Award 236 Referee Garrison considers a number of possible situations involving redistribution of work and concludes by reason of the principle involved in Award 147 that under a rule similar to Article XII, Section 6, the work of one clerk which had not been reduced under fifty percent of the normal load could not be divided among lower rated clerks. It is not necessary for us in this case to affirm or deny the correctness of that decision. The point here involved is a narrower one. This is not the situation of dividing work of one clerk among others **also subject to the same agreement.** This is a situation more similar to those in Awards 139, 180, 323 and 385. There would not seem to be any difference in principle between farming work out to employes in another railroad (Award 323) or to an outside Bureau (Award 180) or to another craft (Award 385) and that of giving it to an excepted employe. All are bottomed on the principle that work which belongs to a certain position covered by an agreement or performed by an employe who belongs to a craft which is covered by the agreement, must, at least as long as that work exists in substantial volume, remain as the work of that craft. This principle is so important that we deem a reexamination of the philosophy and reasons given to support it advisable, especially in view of the strong dissents in Award 458 and to the recent Award 1254. But before doing so we shall take this opportunity to further collate many of the awards bearing on this subject so they may be assembled and briefly compared.

Award 565 deals not with the employment of those outside a craft for work alleged to belong to a craft, but with injecting into the craft a lower classification not provided for in the agreement. Award 609 in part covers a situation where employment belonging to the clerks was assigned partly to telegraph operators. Held a violation of Rule 69, equivalent to Article XII, Section 6 herein. Award 630 was one of a series following Award 607 and involved a similar situation as 609 with the same railroad under the same rules and joint interpretation. Award 631 deals not with the redistribution of the work of an abolished position, but with calling in an excepted employe to the detriment of employes holding seniority rights under the agreement. Award 637 appears to deal with a situation quite similar to the instant case. A position was abolished and a substantial amount of the work was given to the Assistant Agent—an excepted employe. Held a violation of the agreement. Award 731 held that a position **covered** by an agreement cannot be abolished "and the work transferred to another employe **not under the agreement.**" (Emphasis ours.)

Award 751 deals with a situation quite comparable in which portions of work went to two excepted employes and three hours to a lower rated employe. Rules similar in import to those involved in this case were in that case construed. See also Awards 94, 752, 736, 386, 1122, 1125, and 1126. In Awards 1209 and 1210 it was held that established positions could not be abolished and "substantial and preponderating duties" assigned to excepted positions. Award 1119 is not exactly comparable. There was in that case a definite rule, prohibiting the "removal of positions or work from the application of these rules * * *." Award 18 appears to be contra to the general line of decisions in that the Findings state that the Complainant "does not dispute the right of the carrier to have assigned the clerical work from the position of Engine Dispatcher-Roundhouse Clerk to the Roundhouse Foreman [an excepted position]." The protest was confined to the transfer of clerical work from an employe under the agreement to an "excepted employe" in **another seniority district** without negotiation.

As to the philosophy and reasons lying behind these Awards: Certainly in many of the agreements which have come before us and in this one there is

no express prohibition against abolishing a position and dividing the work wherever the carrier desires. Article XII, Section 6, appears to prohibit the discontinuance of a position and the **creation** of **a new one** for the purpose of reducing pay or evading the application of these rules. It does not prohibit the discontinuance of a position because of reduction of force or of work, or in order to divide the work. And indeed it has been held many times that this may be done if the work is not taken from the craft entitled to it.

The agreement by its express terms governs "hours of service and working conditions." It does not specify "work." Where then does the principle ennunciated in the Awards arise? We think it flows logically from the agreement when all its parts are construed together. The agreement recognizes "positions." The exceptions mentioned in Article I as well as Article III, Sections 2, 3, 4, 5, 6, 7, 8 (a), 8 (b), 8 (c), 9, 10 (b), 11, 12 (a), 12 (b), 15, 15 (c), 16, 17, 19 (a), 19 (b), 19 (c), 19 (d), 19 (e), Article VII, Sections 3 (a), 3 (b), 6 (b), 7, Article XII, Sections 2 (a), 2 (b), 2 (c), 3 (a), 3 (b), 4, 5, 6, 7 (d), and other sections, embody the conception of a "position" as something in the abstract apart from the incumbent who may fill it. Like the position of governor of a state, it exists in the abstract. But until filled it is as an empty vessel lacking content. The manifestations of a position are the functions which attend it. The biblical adage that "by their works ye shall know them" applies to "positions" as well as persons. Until it is filled by an incumbent who performs recognized functions it is an abstraction merely. One position becomes delineated from another by virtue of the functions which attend it. It is thus classified and given identity, and a position is not "filled" until an incumbent is inducted into it for the purpose of performing those functions. Hence work is the very life and content of a position. And the title is only a name for the positions usually derived from the functions and duties which go with it. A mere change of title with substantially the same work leaves the position the same. And occupation and position are not identical, although the work embraced in an occupation may be what determines the position. Thus, clerks, stenographers and machinists are generic names of which the various defined positions—defined by more particularized functions—are the species and subspecies. Thus in the hierarchy we have clerks divided into clerical workers and machine operators. And these again are divided into sub-species depending on the functions which they exercise, such as the Chief Dispatcher's Clerk. A position becomes manifest by the functions which attend it, and those functions may attach either by direct expression, such as a new position with bulletined work, or by tradition, custom, or practice, or by functions which are endogenous to it (a train dispatcher for instance deals with work involving the very functions inherent in dispatching trains) or by the accumulation of functions gradually deposited with the position. The work becomes as "recognized." The sum total of this work then obtains a certain identity known as a position. It is not rigid but somewhat flexible. There may be given to it or taken away functions which do not change its identity, just as a finger or an ear taken from a human being does not change his identity. Functions which are normal and incident to it may be added or taken away without changing the nature or type of position. As long as the functions are "in character" the position is not changed—volume of work itself being only a secondary criterion, although there may be cases where a difference in amount or degree may mean a difference in kind.

From what has been said it follows that clerical work itself is not a position. It may, like thinking, attend many positions even not classed as clerical. See Article I, Paragraph 1, Class 1, and Article II, Section 1-a. Awards 809 and 931. Many non-clerk positions require reports, etc., entailing clerical work.

The development of new positions may arise by reason of work of an entirely different nature or by the growth of the same kind of work requiring greater personnel. The expansion and contraction of the latter by increase

or reduction of force permits work to be distributed within the limits of the craft.

From what has been said it is apparent that the two outstanding purposes of agreements are to insure to a craft those positions which fall within the craft, and to insure to the members of that craft the work concomitant to those positions in order of their length of service, for work is to the position what seniority is to the employe. These two principles are the top stone and keystone of the arch. Work is attached to and is an attribute of a position; seniority attaches to and is an attribute of the person.

In consequence of what has been said it follows that "positions" which are subject to the agreement are protected to the craft by the agreement, and since "work" is of the essence of a position such work which is the manifestation of the position and the identity of it is likewise protected to the craft.

With these principles in mind we return to their practical application to the facts of this case. The carrier urges that many of the duties of the Chief Dispatcher's clerk were the ordinary duties of the Chief Dispatcher; that they were interchangeable and that the clerk's position was due to an overflow of the Chief Dispatcher's duties in busy times. If so, and we have no reason to doubt that fact, such duties as the Dispatcher retained which were incident and reasonably appropriate to his position after the abolition of his clerk's position would seem to come under the ruling of Award 931. Where the duties incidental and normal to a position not under the craft flow out directly to an assistant included in the agreement and taken on where work increased to a point where such assistance was necessary, it would seem that by the same token they could ebb back directly to the original position when the necessity for the assistance no longer existed, provided the duties so involved in the ebb and flow were such as were indigenous to that position—normal and incident to it. But they cannot be given to an excepted position.

It transpires, therefore, that the work which was in this case given to Moore who occupied position 180 was in violation of the agreement, but such as the Chief Dispatcher retained, if normal and incidental to his position, were rightfully returned to him on May 3rd.

The claim as first presented was changed during the course upward from the Superintendent to the Assistant Vice President and as presented to the Board contains additional items. This certainly was not in accord with Section 3, First (i) of the Railway Labor Act, and if the claim had been presented ex parte would have to be remanded to be processed through channels. But the presentation is joint, although the carrier protests and calls attention to the changes. But it is inconsistent to join in a claim as presented to the Board and at the same time maintain that it is not properly before the Board. When the carrier joins in a claim as presented, it agrees that such is the claim which is before the Board. Otherwise it should refuse to join. The requirement of Section 3, First (i) of the Railway Labor Act is not a condition of jurisdiction of this Board.

As to disposition: The violation of the agreement lay not in abolishing Position 225 but in giving some of its work to Moore. Hence we cannot decree the restoration of Position No. 225. The carrier may choose to continue the abolition of the position and make a legal distribution of the work in which case Cassidy has no claim thereafter.

Although the carrier may abolish the position, when he wrongly distributes the work to employes not under the agreement, we can not speculate as to what it might have done if the distribution of work had not been taken out from under the agreement nor as to the consequences of such probable or possible action to the claimants. What is certain and not in the realm of speculation is that the work was wrongly taken out from under the agreement. Perhaps if this had not been done it would not have been possible to

have abolished Position 225, or if the work could have been distributed among qualified included employes perhaps such employe might have taken a rating of $6.15 per day and perhaps Lockhart might have been senior to such employe and could have displaced him, and that employe displaced another and Cassidy still been furloughed. We cannot enter into all possible speculations as to what might have happened if the work had been properly distributed. If so the carrier might by saying it would have done a certain thing evade any consequences of its wrong action. We must treat the situation for the purposes of determining reparations as if Position 225 still existed.

From this it follows that:

The claim of Cassidy is allowed from May 3rd at the rate of $5.89 per day, less such amount as he may have been making if and when he returned to the service. Lockhart is allowed the difference between $6.15 and whatever he received from May 3rd, 1938, as long as what he received is less than $6.15 per day.

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 there was a violation of the agreement in giving work which belongs to Position No. 225 to Position No. 180.

AWARD

The claim is sustained to the extent specified in the Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 8th day of January, 1941.