

Award No. 1651
Docket No. CL-1615

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Bruce Blake, Referee

PARTIES TO DISPUTE:

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

MISSOURI PACIFIC RAILROAD COMPANY

(Guy A. Thompson, Trustee)

STATEMENT OF CLAIM: "Claim of the System Board of Adjustment of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees of the Missouri Pacific Railroad Company, that the Carrier violated the agreement of the parties:

1. When effective at the close of business on March 30th, 1940, as result of its notice dated March 28th, 1940, addressed to Clerk W. Manning, copy attached and designated as Exhibit 'A'—it abolished the established and regular position of check clerk, rated at \$5.29 per day, assigned to hours of 10:00 A. M. to 1:30 P. M.—2:00 P. M. to 6:30 P. M., six (6) days per week at its Biddle Street, St. Louis Freight Platform, as a full time position and thereafter worked it upon a part-time basis, less than six (6) days per week;

2. That Clerk, Mr. W. Manning be compensated for wage loss suffered less amounts earned in other employment, retroactive to March 30th, 1940, except Sundays and holidays, until the condition complained of is corrected and the provisions of the Clerks' Agreement complied with; and

3. That Clerk W. L. Penrod be compensated for wage loss suffered on Saturday, April 27th, 1940 (in the amount of difference in \$5.29 per day, check clerk's rate and trucker's rate of 51¼¢ per hour), account Mr. Penrod would have worked as a check clerk on this day because of two (2) other regular assigned check clerks, namely Kenneth Hobbs and Harry Maitland having laid off.

NOTE: The improper abolishment of the position here involved prevented Clerk, Mr. Penrod from working as a clerk on April 27th, 1940."

EMPLOYEES' STATEMENT OF FACTS: "On January 23, 1940, there was regularly assigned at Biddle Street Freight Station, ten (10) receiving clerk positions as follows:

were that it was not proper or permissible to lay off an individual for less than one full week or six days, whereas the Carrier's position was that rule 61 applied only to assignments and that there was nothing in the Clerks' Agreement that guaranteed six days per week to individual employes, and that the situation resulting in the abrupt force reduction was due to an Act of Providence over which the railroad had no control account floods.

"No rule other than No. 61 has been cited by the Employes to support their contention. Carrier feels that this rule has no bearing upon the question at issue and hence the Employes' claim should be denied.

"Accompanying this submission are the following exhibits:

"(a) Statement of payroll earnings of Walter Manning, April 1 to October 31, 1940.

"(b) Statement of number of gangs worked and tonnage handled at Biddle St. Station, period January to December 1940.

"(c) Copy of Mediation Agreement dated October 30, 1929."

OPINION OF BOARD: The Organization's position is primarily predicated on a violation of Rule 61 as supplemented by agreement of October 30, 1929. The pertinent portion of the rule reads as follows:

"It is agreed that in future no reduction in number of days below six (6) per week as provided in Rule 61 (excepting holidays as provided therein) shall be made except by agreement between the Management and General Chairman, or when reducing forces in accordance with Rule 19 and/or abolishing positions in accordance with Rule 25."

The Carrier contends, however, that the position was abolished pursuant to a long established practice under the provisions of Rules 19 and 25. Briefly, the practice has been to regulate the number of gangs working at the Biddle Street platform by the requirements of the tonnage handled. When a gang is worked three days or less it is laid off and put upon a part time basis, the check clerk being assigned to a laborer's position the days the gang is not working.

The Organization invokes the principle that violation of the agreement by the Carrier does not bar its right of claim even though it has acquiesced in the violation over a long period of time. Here, however, we find something more than mere acquiescence. We find a well established practice expressly recognized and, by implication, at least, approved by the Organization's representative.

In a letter to the Carrier's agent dated March 7th, 1939 the Local Chairman wrote:

"As you probably know business is on the up-grade at our platform, and there is a tenth check-clerk working practically every day of the week, which position, we think should be bulletined.

"We should therefore thank you to arrange to bulletin this position in accordance with the rules of our agreement."

And again on February 1, 1940:

"At the present time at this station you are using twelve gangs the majority of the days of the week and you have only ten assigned Check-Clerks.

"Will you bulletin these two extra positions and make them assigned jobs as heretofore?"

Then again on November 11, 1940:

"You recently bulletined and assigned a twelfth check-clerk at the Biddle Street station because the Foreman claimed he intended to use this gang four or five days of the week.

"You are no doubt aware of the fact that a thirteenth check-clerk has been working at least three days a week practically all of this year in violation of Rule 61, current agreement. In fact this check-clerk worked fifteen days last month as the thirteenth check-clerk out of a twenty-seven work-day month." (Emphasis added.)

We think under the facts in this record the parties mutually agreed upon a practical interpretation as to the application of Rules 19 and 25 at the Biddle Street platform. In view of this there was no violation of Rules 19, 25, and 61.

The Organization points out that the week after the position was abolished Manning worked four days as check clerk. However, in view of the fact that, during the period between the time the position was abolished and the time it was reestablished there were seventeen weeks in which he worked as check clerk only three days; eight weeks, two days; and three weeks, not at all. That the Carrier, in the light of the practice and the interpretation of Rules 19 and 25 mutually adopted by the parties, acted in good faith in abolishing the position at the close of business on March 30, 1940, is not to be doubted. That there was a technical violation of the agreement, in that Manning worked four days the following week is, in the opinion of the Board, insufficient to sustain the claim made.

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 did not violate the agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 9th day of December, 1941.