Award No. 5163
Docket No. CL-5031

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Edward F. Carter, Referee

PARTIES TO DISPUTE:

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

THE CHESAPEAKE AND OHIO RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(a) The Carrier violated and has continued to violate the Clerical Agreement when it failed and refused to properly rate the position of Yard Clerk at Marion, Ohio,—as advertised by Bulletin No. 154, April 19, 1948,—at $9.24 per day, and

(b) That it shall now be required to advertise the position at a rate of $9.74 per day (plus general wage increase effective October 1, 1948, agreement of March 19, 1949) and assign same in accordance with the rules of the Clerical Agreement and that each and every employe adversely affected as a result of the violation be compensated for such loss, retroactive to April 19, 1948.

EMPLOYES' STATEMENT OF FACTS: On April 19, 1948, the Carrier issued Bulletin No. 154—copy attached as Employes Exhibit "A"—advertising permanent position of Yard Clerk No. 26 at Marion, Ohio, rate $9.24 per day, hours 11:30 P.M. to 7:30 A.M.

The position was located in the Transportation Department covered by Transportation Department seniority roster known as "East of Walbridge to and including Ackerman."

On the date that the position was established, there were two other Yard Clerks' positions covered by the same roster located at the same place, Marion, Ohio,—and in the same seniority district—and rated at $9.74 per day.

The Marion, Ohio Yard is a three-trick interchange Yard operation, the first trick position working from 7:30 A.M. to 3:30 P.M., the second trick position from 3:30 P.M. to 11:30 P.M. and the third trick position from 11:30 P.M. to 7:30 A.M. All three positions are similar, their duties being as follows:

First Trick position—checks track, makes list for Train 94 due at 10:30 A.M., occasionally makes list for Local Train 63 if the third trick Yard Clerk does not have time to do so, assembles information and prepares Form CF-443, answers telephone and handles other ordinary Yard Clerk duties.

Second Trick position—checks track and makes lists for Train 92 due at 6:30 P.M. Train 99 due at 2:15 P.M. and Local "pick-up" due around 4:00 P.M.,

not complied with the agreement, and the rate now being paid to the present claimant should be held to be just as binding as if specifically incorporated in the written agreement.

The claim should be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: On April 19, 1948, Carrier bulletined the position of Yard Clerk No. 26 at Marion, Ohio, at the rate of $9.24 per day. The position is covered by the Transportation Department seniority roster. It is a third trick position in an "around the clock" operation. On March 26, 1948, because of a reduction of work due to a closing down of mine operations, the Carrier abolished Position No. 26 effective March 30, 1948. It is the contention of the Organization that when the position was re-established on April 19, 1948, the rules required that it be rated at $9.74 per day instead of $9.24 per day.

The controlling rules are Rule 46 (a) and (b) which provide:

> "(a) The rates of pay for new positions or positions abolished and later re-established shall be in conformity with the rates of pay for positions of similar kind, or class, in the seniority district where created.
>
> "(b) When new positions are established and there are no positions of similar kind or class in the seniority district where created, the rates will be subject to negotiation and agreement between the supervising officer and General Chairman."

The Carrier urges that Position No. 26 was not abolished but was merely discontinued temporarily. We do not think there is merit in the contention. We have consistently held that a position must be abolished in order to terminate the guarantee rules of the Agreement. See Awards 3838, 4001, 5074. We conclude that a Carrier who abolishes a position because of a reduction of work to be performed, abolishes the position for all purposes.

Rule 46 (a) applies to positions abolished and later re-established as well as new positions. It therefore applies to the position here involved. The proper rate of the position upon its re-establishment is that which is in "conformity with the rates of pay for positions of similar kind, or class, in the seniority district where created."

The record shows that the three positions working around-the-clock perform the same kind of work. The occupants of the first and second tricks were rated at $9.74 per day while the third trick position, occupied by claimant, was rated at $9.24 per day. We fail to see how these positions could be re-established at different rates of pay if Rule 46 was correctly applied. It is the duty of the Carrier to apply the contract in the first instance and fix the rates of these positions when they are re-established. It fixed the rate of the first and second trick positions at $9.74 per day. The Organization does not contend that the Carrier misapplied the Agreement in so doing. We agree with the Organization that the third trick position should be assigned the same rate in view of the fact that it is of similar kind or class. Under such circumstances, a variance in rates cannot be justified by the Carrier under Rule 46. We concur with the view that the assigned rates of positions existing at the time positions are abolished, which fall within the scope of Rule 46, are not controlling in determining the rate to be applied to new positions or positions abolished and later reestablished. We simply hold in this case that the Carrier having fixed a rate on two of the positions to which the Organization is in accord, it is obligated to so rate the third position. The claim is meritorious.

The Carrier asserts that the practice has been to rate such positions when re-established at the rate the position carried at the time of its abolishment. The contract (Rule 46) is plain and unambiguous. The practice, assuming

its existence, may have the effect of defeating reparations for past violations. It does not defeat the prospective enforcement of the Agreement as made by the parties.

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 Agreement was violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 18th day of December, 1950.