Award No. 5540
Docket No. CL-5553

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

KENTUCKY AND INDIANA TERMINAL RAILROAD COMPANY

STATEMENT OF CLAIM: 1. Claim of the Terminal Committee of the Brotherhood that Carrier violated the rules of the current agreement when it required all regularly assigned employes covered by the agreement working in the office of the Secretary and Auditor to suspend work on their regular positions on August 22, 23, 24, and 25, 1950; claiming that the positions were abolished, in spite of the fact that substantially all of the duties of each position remained intact.

2. That Carrier shall now reimburse the following employes for four (4) days' pay each at the rate of their respective positions, with interest at the rate of one-half of one percent per month until adjusted.

Employe	Title of Position	Daily Rate
L. L. Henry	Head Bookkeeper	$14.22
L. P. Heazlitt	Valuation Accountant	14.89
F. R. Reynolds	Fuel Clerk	13.22
H. R. Wade	Chief Time Keeper	15.08
I. Y. King	Voucher & Bill Clerk	12.96
J. E. Kipp	Timekeeper No. 1	12.00
James E. Ward	Payroll Clerk	12.93
Oneda Carlton	Miscellaneous Clerk	12.36
Walter H. Roegge	Labor Clerk	12.06
Betty J. Turley	Material Clerk	12.18
Grayson M. Hoke	Timekeeper No. 2	12.00
J. E. Lazouskas	Stenographer & Clerk	11.86

EMPLOYES' STATEMENT OF FACTS: On August 16, 1950, Kentucky & Indiana Terminal President and General Manager C. W. Ashby issued a bulletin (Exhibit No. 1) announcing that as a result of a strike called for 6:00 A.M., August 21, 1950, by the Brotherhood of Railroad Trainmen on the K. & I. Terminal, all operations would cease and that all positions cov-

"Nothing herein shall be construed to permit the reduction of days for regularly assigned employes included in Group 1 and 2 of this agreement below five (5) per week, except that this number may be reduced in a week in which holidays specified in Rule 21(b) occur within the five days constituting the work week by the number of such holidays."

was violated? Authority for the declination of the application of the "guarantee rule" in this case is adequately treated in Award 5074, the Board there holding:

"The latest pronouncements of this Board on the subject of applying 'guarantee' rules to strike situations are found in Awards 4099 and 5042, wherein it is held in effect that 'guarantee' rules are not enforceable during strikes.

"The last cited awards adhere more to the basic philosophy of labor agreements. Traditionally, it has come to be accepted in railroad employment practices that when a position has been abolished for legitimate reasons, the rules of the agreement no longer apply to it because the position has ceased to exist. Collective bargaining agreements are not contracts of employment for a term in any true sense. One reason why they cannot be said to fix the term of employment is that the employe is free to withdraw from the service of one employer and enter the service of another at any time he sees fit and the employer has no remedy either for damages or specific performance. Accordingly, there is a total absence of mutuality of obligation, if it can be said on the one hand the employer is compelled to retain the employe for a definite term, but the employe is not compelled to remain in the Carrier's service. Even though a monthly rate of pay should be held to indicate a hiring for the month, the right given the Carrier by Rule 3 of the subject agreement to reduce forces for legitimate reasons, subject to seniority rights, dispels any idea of permanency, or the hiring for a term, in any given position.

"We think it better to look upon these agreements for what they really are—rules governing wages, hours of service, and working conditions of employes as long as they remain in the service of the employer, and leave to the Courts questions of general contract law. Therefore, when an employe is taken out of service for legitimate reasons and in accordance with mutually agreed upon procedures, his rights under the agreement for compensation, hours of service, and other conditions of employment are restricted to the extent provided for in the agreement."

(Exhibits not reproduced.)

OPINION OF BOARD: On August 15, 1950, Carrier was informed that on Monday, August 21, 1950, at 6:00 A.M., its yardmen would go on strike. On August 16, 1950, Carrier posted bulletins abolishing all positions under the Clerks' Agreement, effective August 22, 1950. Claimants occupied positions which were abolished pursuant to this bulletin. The strike ended Saturday, August 26, 1950, at 6:00 A.M. Pursuant to a special agreement between the Carrier and the Employes, the latter were returned to work on their former positions following the end of the strike. Claimants contend that their positions were improperly abolished.

The record shows that there were no train or engine movements on any portion of the Carrier's property during the period of the strike. No work was performed on any of the positions occupied by these claimants. The Carrier asserts that because of the cessation of car handling, no material

was used, no accounting work was performed in connection with time slips, payrolls, labor and material distribution, or in handling car reports. The duration of the strike could not be determined by the Carrier. It was the function of management to protect itself from loss. The abolishment of positions not needed because of this strike is clearly within the prerogative of management. Awards 5042, 5074.

It is urged here, however, that there was work to be performed on the positions occupied by these claimants. In this respect the record shows that these claimants occupied positions in which there was a lag of two or three days between train and engine movements and the work they performed. They assert that the fact that there was certain work that could be done during the period of the strike that the Carrier was required to maintain the positions. We think otherwise. Where the source of the work has been nullified by a strike, the fact that backlog work remains which could be performed is not an absolute bar to the abolishment of the position. It is clear from the record that it was not necessary to be performed. The fact that none of it was performed during the period of the strike appears to conclusively sustain this conclusion. In addition, the special agreement, hereinbefore referred to, provided that all employes whose positions had been abolished would return to work simultaneously immediately following the termination of the strike. This did not contemplate that all backlog work would be performed during the strike and then have these employes return to their positions with no work to do during the lag period. We think that no necessary work remained to be performed that would bar the abolishment of these positions during the period of the strike.

It is asserted that the special agreement provided that employes would be retained as long as work remained to be performed. The pertinent portion of that agreement provides:

> "As information, our membership and the employes we represent will be advised to continue to perform their usual, customary and regular work, no more and no less, so long as work belonging to our craft or class is available to them. They will be advised not to refuse to cross picket lines unless there would be personal danger involved in doing so."

Assuming that this paragraph is contractual, it simply means that employes would be advised to stay at work so long as work is available. This agreement was made three days before the strike was called. It applied to the period after its execution and before the abolishment of positions after the strike was actually placed in effect. It does not purport to bind the Carrier to retain employes after the bulletin abolishing the positions became effective.

The Guarantee Rule does not apply to the occupants of positions which have been abolished. This we have previously decided. Awards 5074, 5042.

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 not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 2nd day of November, 1951.