

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Horace C. Vokoun, Referee

PARTIES TO DISPUTE:

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

**THE CHESAPEAKE AND OHIO RAILWAY COMPANY
(Chesapeake District)**

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

(a) The Carrier violated the Agreement when it nominally abolished position of Clerk, Office of Agent, Pratt, West Virginia, rate \$9.41 per day (now \$11.18 per day), effective December 31, 1948, and

(b) Mrs. Grace Hammar be returned to the position and compensated for all wage loss sustained and other employees displaced from their positions by reason of such nominal abolishment be accorded like treatment.

See Award 8379 for Statement of Facts and Positions of the Parties.

OPINION OF BOARD: In Award 8379 the Division ruled that the Telegraphers' Organization had third-party interest in the instant dispute and was therefore entitled to notice and opportunity to be heard as required by the Federal Courts' interpretation of Section 3, First (j) of the Amended Railway Labor Act.

The Telegraphers' Organization was duly notified on July 2, 1958 of a hearing to be held on July 30, 1958, and on July 9th by letter said Organization advised that neither the Organization nor the employees it represents are involved in the case before us. Said hearing was held as scheduled and the Telegraphers' Organization did not appear. The case is now before the Division on its merits.

The essential facts are not in dispute. For several years prior to December 31, 1948, there had been a Clerk position at Pratt, West Virginia, on the Carrier's east-west main line. The position was occupied by the claimant herein and was covered by the Clerks' Agreement. Effective January 31, 1948, that position was abolished.

On February 3, 1949, the Local Chairman filed a claim with Carrier charging that the abolishment of this position and the performance of the work formerly assigned to the Clerk by the Agent constitutes a violation of Rule 1 of the applicable Clerks' Agreement No. 7 dated "effective January 1, 1945," as amended. The Current Agreement is No. 8, "Effective November 1, 1955."

Claim was handled on the property up to and including Carrier's Assistant Vice President-Labor Relations, who declined this claim as lacking in merit on October 26, 1949.

The claim was subsequently rehandled, and the last correspondence in reference thereto is dated August 11, 1953.

Thereafter, on October 5, 1955, the Employees served notice of intent to file an ex parte submission with this Division.

The duties of the position of Clerk included:

(1) Expensing of inbound carload and less-than-carload freight bills including those destined to Crown Hill, West Virginia, Hansford, West Virginia and non-agency stations located on Paint Creek Sub-Division extending from Pratt, West Virginia, to Kingston, West Virginia, a distance of 22.13 miles and embracing 19 non-agency stations.

(2) Selling tickets, checking baggage and compiling reports incidental thereto.

(3) Station Cashier and compiling Railway Express and Railway cash balances and remittances.

(4) Making collections or refunds on corrected freight bills.

(5) Delivering and receiving less-than-carload and express shipments.

(6) Waybilling carload and less-than-carload and express shipments.

(7) Compiling and maintaining demurrage records, bills and reports.

(8) Meeting Train No. 13 and delivering U.S. Mail to Post Office.

(9) Answering telephone and performing duties incidental to furnishing customers information.

The Agreement contained the following rules:

"Rule 1—Scope Rule

"* * *

"(b) Positions within the scope of this Agreement belong to employees herein covered and nothing in this Agreement shall be

construed to permit the removal of such positions from the application of these rules except as provided in Rule 65.

"* * *

"Rule 65—Date Effective and Changes

"This Agreement shall be effective as of January 1, 1945, and shall continue in effect until it is changed as provided herein or under the provisions of the Railway Labor Act as amended.

"Should either party to this Agreement desire to revise or modify these rules, thirty (30) days' written advance notice, containing the proposed changes, shall be given and conference shall be held immediately on the expiration of said notice unless another date is mutually agreed upon."

In this case we are dealing with and interpreting Rule 1(b) and Rule 65 within the framework of those awards previously adopted by this Board in similar situations. Rule 1(b) as negotiated permits no removal of a position and there is no evidence in the record to show that the Carrier made any effort to conform to Rule 65.

The Carrier in its response to Ex Parte Submission by Employees states:

"* * * the Carrier submits that the issue may be defined as follows:

Did the Carrier, when it abolished the Clerk position on December 31, 1948, returning the work to its one-man status the same as before a clerk was assigned, violate the Clerks' Agreement?"

The record contains a copy of a letter written by the Carrier's Superintendent to the Division Chairman which reads:

"This refers to your letter of January 10, 1949, requesting that you be advised as to the disposition of the duties of the position of Clerk at Pratt, W. Va., abolished effective December 31, 1948.

"The duties of that position consisted of general office work, including expensing, correspondence, keeping cash book, selling tickets and making ticket reports.

"The remaining portion of the above duties is now being performed by the Agent within his hours of assignment, 8:30 A.M. to 5:30 P.M.—being the same hours of assignment as those of the abolished position."

Certain work performed by the clerk was still required after the position was abolished, was performed by the Agent subsequently, and there was no agreement between the parties about the reassignment of the work which was performed by the Clerk. The record contains no information as to whether or not the Clerk performed any duties which he performed to the exclusion of the Agent.

The Organization asks (a) that the Carrier be held in violation of the Agreement, and (b) that Claimant be returned to the position, compensated

for all wage loss sustained and that other employes displaced from their positions because of this abolishment be accorded like treatment.

There is no doubt that the revenue of the Station decreased and that the volume of work performed at the Station decreased. There further is no doubt that work performed by the clerk was, after the abolition of the clerical position, performed by the Agent.

There further is no evidence that any work performed by the Clerk was his exclusive assignment.

The Board has recently ruled that where some work which the Clerk had performed exclusively remained and was assigned to the Agent it constituted a violation of the Clerks' Agreement and the Carrier had no right to abolish the clerical position—Award 8500.

In previous Awards (5785, 5790, 7372) interpreting this same rule or similar rules the Board held that work is the essence of positions, and said rule prohibited the Carrier from acting as it did in the instant case. Under these awards of the Board which are predicated upon others of this Board (Awards 1314; 3563; 5785; 6141; 6444) the interpretation of the language in the Scope Rule quoted above compels the conclusion that the abolition of the clerical position herein and the assignment of work of that position to the Agent constituted a violation of that rule. See also Awards 6357, 7047, 7048, 7129, 7168, 7382, 8079, 8234, 8236, 8289, 8330, 8382. Award number 8382 was released by this referee. Part of that award reads:

"The Board has ruled so often that Scope provisions such as the one negotiated herein have abrogated the doctrine of 'Ebb and Flow' that the rulings are apparently absolute. Award 3003 among many others holds that the Carrier clearly had the right to reduce its forces by abolishing positions provided it did so in accordance with the provisions of the controlling agreement. Award 3563 along with many others since that time had for review the same scope provision as in the instant case that 'no position shall be removed from this agreement except by agreement' and the holding of the Board was that a violation of the contract occurred when duties under the agreement were assigned out of the agreement."

* * * * *

This Board held in Award 7168—

"It is not the function of this Board to order the Carrier to restore the work to any particular position. That is the prerogative of the Carrier. We can only find that there was a violation and direct the payment of penalties as long as the violation continues."

The Railway Labor Act provides for "the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions." No time limit is stated by the Act nor is there any in the contract before us.

The record of the case actually displays an unusual and unwarranted delay (filed February 4, 1949, declined by Carrier's highest authority October 26, 1949, and not appealed to the Board until October 5, 1955).

The Board in numerous cases has refused payment of back pay where the delay in presenting the matter to the Board is unreasonable, significant, unconscionable, or where the doctrine of laches is invoked. In some manner, however, almost universally, that delay was noted and advanced as a defense by the Carrier either on the property or in the presentation of the question to the Board. In this instance the record discloses no mention whatsoever of the defense or claim that any monetary penalty, if a violation be found, should be refused because of the failure to expeditiously prosecute the claim. This was submitted to the Board for the first time by the Carrier representative on the Board in his presentation to the Board. The Board must, under the rules established by the Board in numerous awards, therefore disregard this as a defense and not consider it herein.

As to the claim for compensation for Mrs. Grace Hammar, the occupant of the clerical position when it was abolished, the Board rules as it has on innumerable occasions, that an employee adversely affected by the violation of a rule must be made whole for whatever monetary loss was suffered because of such violation. Punitive damages are not ordinarily approved by the Board. Accordingly, the Board rules that Mrs. Grace Hammar is entitled to compensation for only those specific net losses which she is able to establish.

That part of the claim relative to "other employees displaced" is herewith denied because they are "unnamed" and do not in this record appear identifiable. (Awards 8203, 8124 and 8330)

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 Employee involved in this dispute are respectively Carrier and Employee 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 contract was violated.

AWARD

Claim sustained to the extent set forth in this Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 14th day of January, 1959.