Award No. 13749
Docket No. CL-14485

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

P. M. Williams, Referee

PARTIES TO DISPUTE:

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

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5453) that:

1. Carrier violated and continues to violate the rules of the Clerks' Agreement when it abolished regularly established and assigned positions, the duties of which remained to be performed, and assigned such duties with regularity to furloughed employes.

2. (a) Carrier shall compensate employe J. J. Casey, occupant of Check Clerk position abolished May 31, 1962, and Employe J. McDevitt, occupant of Caller position abolished May 31, 1962, for a day's pay, eight (8) hours, at the applicable straight time rate of their respective positions for each work day Monday through Friday, plus compensation at the rate of time and one-half for each Saturday and Sunday subsequent to May 31, 1962 that Transload freight forwarding work is performed by furloughed employes.

(b) Carrier shall compensate employe K. Nelson, occupant of Check Clerk position abolished June 12, 1962, and Employes M. J. Galvin and P. J. Lynch, Sr., occupants of Caller positions abolished June 12, 1962, for a day's pay, eight (8) hours, at the applicable straight time rate of their respective positions for each work day Monday through Friday, plus compensation at the time and one-half rate for each Saturday and Sunday subsequent to June 12, 1962 that Transload freight forwarding work is performed by furloughed employes.

3. Carrier shall compensate employe H. Bealke for a day's pay eight (8) hours, at the regular rate of the Foreman position for each day of his regular work week Monday through Friday during the period June 30 to August 28, 1962, plus compensation at the rate of time and one-half for each Saturday and Sunday subsequent to June 30, 1962 that work is performed.

4. Carrier shall return the work transferred to furloughed employes to the regularly established and assigned positions that existed before the abolishments.

EMPLOYES' STATEMENT OF FACTS: In September, 1956 the transloader freight forwarder work formerly located and performed in Minneapolis, Minnesota, was transferred to St. Paul, Minnesota. This transfer was accomplished by Memorandum of Agreement dated September 14, 1956, a copy of which is submitted as Employes' Exhibit A.

Immediately prior to June 1, 1962 the transloader freight force at St. Paul consisted of: 1 Foreman, 2 Check Clerks, and 3 Callers, all of whom were regularly assigned Monday through Friday with Saturday and Sunday rest days.

Effective 4 P. M. on May 31, 1962, Carrier abolished 1 check clerk position, occupied by employe J. J. Casey, and 1 caller position occupied by employe J. McDevitt. On June 1, 1962 the Carrier filled the caller position by calling a furloughed employe and on June 8 and 12 filled both the Check Clerk position and the Caller position with furloughed employes.

Effective 4 P. M. on June 12, 1962, the Carrier abolished the remaining check clerk position occupied by Employe K. Nelson and the 2 caller positions occupied by employes M. J. Galvin and P. J. Lynch, Sr., leaving a force of 1 Foreman with no crew.

As result of the abolishment of his Check Clerk position on June 12, 1962, employe K. Nelson, who was filling the Foreman position during employe Bealke's absence on vacation from June 11 to 29, 1962, inclusive, exercised displacement rights on the Foreman position.

On August 20, 1962 Carrier issued Bulletin No. 55 advertising Foreman Position No. 2035 for bid. Employe H. Bealke was the successful applicant for the position and was again assigned to the Foreman position by Bulletin No. 56 dated August 28, 1962.

That transloader freight business work remains and is being performed since June 12, 1962 with the use of furloughed employes is clearly evident from the following record which covers the period June 13, 1962 through March 31, 1962.

		Employes Used	
Date		Foreman	Furloughed
Wed.	June 13, 1962	1	
Thurs.	June 14, 1962	1	
Fri.	June 15, 1962	1	5
Sat.	June 16, 1962	1	5
Sun.	June 17, 1962	1	5
Mon.	June 18, 1962	1	5
Tues.	June 19, 1962	1	5
Wed.	June 20, 1962	1	5
Thurs.	June 21, 1962	1	
Fri.	June 22, 1962	1	5
Mon.	June 25, 1962	1	5

The Carrier submits that it will be readily and clearly apparent that by the instant claim the employes are attempting to secure through the medium of a Board Award in the instant case something which they do not now have under the rules and in this regard we would point out that it has been conclusively held by the Third Division, as well as by the other three Divisions and the various Special Boards of Adjustment, that your Board is not empowered to write new rules or to write new provisions into existing rules.

It is the Carrier's position that the instant claim is in no way supported by schedule rules or agreement and we respectfully request that the claim be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: At some date prior to September 14, 1956, Carrier determined that its operating requirements were such that transloader freight forwarding work should be transferred from Minneapolis to St. Paul and that the persons who were to do this work would have to begin their shift on the five day positions to be created, at 4:00 A. M., Monday through Friday.

The odd starting time of the shift created a situation for negotiating a special rule and the parties completed and signed a Memorandum of Agreement on September 14, 1956. This memorandum provided for the creation of the positions (Section 1); these being "five day" positions, Monday through Friday (Section 1 & 2); that the employes required to perform transloader business on Saturdays, Sundays or holidays would be called, in accordance with seniority and title classification, from the regularly assigned employes handling transloader business or the shift beginning at 4:00 A. M. (Section 4); and these same employes could be used intermittently to perform freight handler work in St. Paul, except at the Prior Avenue station and for mail (Section 5).

On March 27, 1961, the work of transloading LCL freight at St. Paul was transferred to Minneapolis. As a part of their presentation Claimants' assert that this operational transfer of work reduced the amount of work available to them, however, since no claim is made herein for that work and finding that the instant claim can be resolved without reference to that transfer, we shall make no further comment concerning it but rather shall leave discussion of the matter to the Board in this Division's Docket No. CL-13589.

The claims which are presented to us for decision herein are essentially situations arising from a difference of opinion as to the meaning of the language of Rule 19 of the applicable Agreement, which provides:

> "Established positions shall not be discontinued and new ones created under a different title covering relatively the same class of work which will have the effect of . . . evading the application of these rules."

and in the provisions of the Memorandum of Agreement of September 14, 1956, paraphrased above.

The Petitioner alleges that two of the Claimants were adversely affected, economically, when the Carrier abolished a Check Clerk and a Caller position on May 31 and thereafter on June 12, 1962, three other Claimants were

similarly affected when the Carrier abolished the jobs to which they were permanently assigned, i.e., a Check Clerk and two Caller positions. It is not disputed that as a result of Carrier's action only the foreman's position remained as a permanent assignment.

From within its submission Petitioner charges that the Claimants mentioned above were deprived of their permanent positions in violation of the provisions of Rule 19 and to support its charge that the work of the positions remained to be performed, it has submitted to us a detailed list of the work performed from June 12, 1962 through March 30, 1963. The Carrier's substituted corrective figures to this latter list were used by Petitioner's representative on this Division and those figures have been used by us in arriving at our findings.

From this record there is evidence to support a finding that there was a preponderance of hours, as well as days, in all of the workweeks from June 12, 1962 through March 30, 1963, where the services of full time employes were required and could be utilized, albeit in each week five employes were not required — and, to the extent that less were used on a majority of work days in a given week, this award should be tempered to reflect the reduced requirements. We believe that Award No. 439 of this Division, which award was followed in the situations presented in Award Nos. 3884 and 11753, correctly and succinctly interpreted a rule containing language almost identical to Rule 19 quoted above, when, in that award it was stated: "In the opinion of the Board a carrier is justified in abolishing a regular full time position or positions and of substituting extra employes to carry on intermittent work of the same class, when and only when the duties of the position fall off to such an extent as to leave nothing for the employe to do during the majority of hours or days of his employment and for a reasonably sustained period. In the application of this opinion the fact should be understood that, where there is a preponderance of hours or days where the service of a full time employe is required and can be utilized, the carriers would not be justified in abolishing the established position and replacing it with extra service. . . ."

The instant record reveals that from June 11 until the workweek beginning December 3, 1962, there were but three workweeks when less than five employes, excluding the foreman, performed work in the positions under discussion. Subsequent to December 3, 1962, the number of workers required in the positions was, except for the last days of that month, reduced to such an extent that by March 30, 1963, only two employes were filling the positions. From these facts we are lead to the conclusion, and such is our finding, that a significant portion of the work of the positions remained to be performed and that the Carrier erred when it abolished those permanent positions on the dates mentioned.

This record also contains undisputed evidence that extra furloughed employes were used to perform the work of the positions on a few Saturdays and Sundays from June 11, 1962 to March 30, 1963, and Petitioner alludes to the practice continuing to date. We find such practice to be violative of the terms of the Memorandum of Agreement of September 14, 1956. Carrier, to the extent of the workers required in each classification and in accordance with seniority, should have called the Claimants, for the overtime work. Since some, or all in certain instances, of the non-foreman Claimants were not called for the overtime work they are to be compensated for any difference which existed in their earnings for the weeks where overtime was involved as

well as in any other weeks where their other earnings were less than the earnings which they would have received had they remained in the abolished positions. Claimant Bealke's request for the overtime rate for each Saturday and Sunday subsequent to June 30, 1962, when work was performed by the foreman cannot be sustained for neither the applicable agreement nor the Memorandum of September 14, 1956, provided for the incumbent foreman to perform this work, however, his request for pay for the period June 30 to August 28, 1962, the time during which he should have remained in the foreman's position, should be allowed to the extent of any difference in earnings between the foreman's regular earnings and the earnings he received in his new position.

There is no authority given to this Board which would empower us to direct that Carrier return the work transferred to furloughed employes to the regularly established and assigned positions so we cannot grant the request contained in Paragraph No. 4 of the claim.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

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 violated the Agreement.

AWARD

Claim (1) sustained.

Claim (2) (A) and (B) and (3) sustained in part and denied in part in accordance with above Opinion.

Claim (4) denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 23rd day of July 1965.