Award No. 14075
Docket No. CL-14707

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Arthur M. Stark, Referee

PARTIES TO DISPUTE:

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

SOUTHERN RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5470) that:

(a) Carrier violated the Agreement at St. Charles, Virginia, when Mr. E. K. Giesler, former Weighmaster, was notified, verbally, that his job was abolished upon termination of assignment on June 22, 1962.

(b) Carrier further violated the Agreement when it assigned duties that have for over fifty years been performed by employes covered under the Scope rule of our Agreement, to employes not covered by the Agreement.

(c) The work advertised in Southern Railway Company Bulletin No. 65, St. Charles, Virginia, on June 14, 1947, Employes' Exhibit B, still exists.

(d) Mr. Giesler be properly compensated for the period beginning June 25, 1962, and continuing until such time as this work is properly returned to Group 1 Employes.

(e) Carrier restore this work, removed from the Agreement in violation thereof.

EMPLOYES' STATEMENT OF FACTS: This dispute is between the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes as the representative of the class or craft of employes in which the Claimant in this case held position and the Southern Railway Company.

Mr. E. K. Giesler worked for the Southern Railway Company at St. Charles, Virginia, in the capacity of Weighmaster. The last time his position was bulletined was on July 14, 1947, Employes' Exhibit B. He worked this position continually from that date through June 22, 1962.

sively by employes of any single class or craft on this property. The Clerks' representatives have heretofore recognized that such work does not belong to clerks exclusively, as they are fully aware of the past practice on this property.

The Adjustment Board has held in numerous decisions that the conduct of the parties under an agreement over a period of time is evidentiary of their intent — in other words, the Board has considered past practice as a practical means of determining the intent of the parties in such cases. Therefore, even if Rule 3 was not contained in the Clerks' Agreement, there would be no basis for the instant claim under the established past practice and interpretation of the agreement rules.

In addition, carrier's right to continue long standing past practices is preserved by Article VIII of the August 21, 1954 Agreement, which reads as follows:

"ARTICLE VIII.

CARRIER'S PROPOSAL No. 24

Establish a rule or amend existing rules to recognize the Carrier's rights to assign clerical duties to telegraph service employes and to assign communication duties to clerical employes.

This proposal is disposed of with the understanding that present rules and practices are undisturbed."

In Award 11453, also involving Southern Railway, the Board held that the fueling of Diesel locomotives was not reserved exclusively to Stores Department employes under Rules 1 and 2 of the Clerks' Agreement, although they had performed such work prior to March 1958, and denied the "continuing" claim. This decision was based on the fact that such work had not been performed exclusively by clerical employes.

The evidence of record does not support petitioner's contention that the agreement was violated, nor does it support the claim for pay. For the reasons set forth herein, the claim should be denied in its entirety, and carrier respectfully requests that the Board so decide.

(Exhibits not reproduced.)

OPINION OF BOARD: Claimant Giesler worked as Weighmaster at St. Charles, Virginia from 1947 to 1962. According to the 1947 Bulletin which advertised the Weighmaster vacancy, the preponderating duties of the position were to "weigh and bill coal, prepare reports in connection with same, apply rates on shipments, and any other work relating to this position." Although a six-day position in 1947, the job was subsequently changed to five days, Monday through Friday.

In June 1962 Carrier decided to abolish the Weighmaster position. On June 18 Giesler was verbally notified that the job would be eliminated effec-

tive June 22. He was offered — but rejected — the opportunity to displace a junior employe elsewhere in the district (Rule 21 (a): "When forces are reduced, employes affected will be given all reasonable notice practicable in no case less than thirty-six (36) hours) and will be eligible to any position on their respective seniority district to which their seniority and qualfications entitle them under this schedule"). At the time Giesler's position was abolished a monthly-rated Agent-Telegrapher (covered by the Telegraphers' Agreement) was also employed at St. Charles on a six-day, Monday through Saturday schedule. After June 22 St. Charles became a one-man station with only the Agent-Telegrapher assigned.

Petitioner's claim that Carrier violated the Agreement with respect to issuing bulletins is supported by the evidence. Rule 23 provides in relevant part that "Bulletins will be issued and posted covering positions furloughed or abolished" and a specimen abolishment bulletin is included in the contract. But no bulletin was posted when the Weighmaster position at St. Charles was abolished.

It is true, as Carrier points out, that Rule 23 does not state specifically that the abolishment notice must be posted prior to the date of abolishment. However, in this case no notice was ever posted, before or after June 22, insofar as the record shows. Award 10315, cited by Carrier, is not relevant here for two principal reasons: (1) the posting rule was different (it was a general rule providing merely that "suitable provisions will be made for posting notices of interest to the employes"); (2) a bulletin was ultimately posted. Award 13580, too, involved a different rule, one which required giving notice to the Local and Division Chairman that positions were to be abolished. The Board, in holding that failure to submit such notice in that case did not constitute an agreement violation, placed great weight on the fact that the claimant was also the Local Chairman. But that is not true in the case at hand.

What, then, should be the remedy for Carrier's failure to follow Rule 23? Insofar as Claimant is concerned, there was no discernible damage since he was given "all reasonable notice practicable" and a full opportunity to exercise his Rule 21 (a) displacement rights. No other employes were damaged either, since no job openings were created as a result of the St. Charles action. Significantly, Carrier's failure to issue a bulletin appears to have stemmed from and impression that such action was not required at certain points. Thus, Superintendent T. O'Brien, in a September 18, 1962 letter to Division Chairman V. M. Saylor, stated in part: "It is immaterial that no abolishment bulletin was issued, as such had not been the practice at outlying points on this division, without objection or protest on your part, to my knowledge." Under all these circumstances, and particularly in light of the fact that no employe happened to have been damaged as a result of Carrier's failure to issue a bulletin, it is our conclusion that the appropriate remedy is for Carrier to promptly inform all appropriate Management personnel that Rule 23 must be strictly observed whenever a position is abolished and regardless of location.

A different remedy might be in order were the record more clear with respect to the purpose and function of Rule 23. But the wording of this clause does not reveal whether the issuing of a bulletin is required as a condition precedent or as a concomitant to the abolishment action. Or, to put it another way, the record is unclear on whether the Rule is designed to protect the rights of the incumbent employe or, rather, to protect other workers potentially affected by the action. Nor does the record show, in fact, whether abolishment bulletins have customarily been issued before or after the effective date of the

action. (Rule 16, by contrast, provides specifically that a vacancy bulletin be issued within two days.)

Petitioner also claims that Carrier's action violated Rules 1 and 2 of the Agreement. Rule 1 (Scope) lists the five groups of employes covered by the contract. Rule 2 (Definition of Each Group of Employes as Covered by Respective Sections of Scope Rules) lists the types of work handled by employes in various classifications. Carrier denies any rule violation since, it states, the work in question does not belong exclusively to the Clerks.

Petitioner's claims with respect to this aspect of the case cannot be sustained. True, a Weighmaster has performed weighing an billing functions at St. Charles for fifty years. But the basic question here is whether he has been the only person to perform such functions. While the record does not reveal the number of years an Agent-Telegrapher has been assigned to St. Charles, it does indicate that he has billed cars as a regular part of his duties for many years, both before and after June 22, 1962. Additionally, the Agent-Telegrapher at St. Charles, at least for thirteen years prior to 1962, has regularly performed weighing work on Saturdays. (No Weighmaster is assigned that day.)

There is no evidence, moreover, of a practice or custom on this Carrier or on this district of limiting billing and weighing assignments to employes covered by the Clerks' contract. Thus, denial Award 12485 involved a dispute between Carrier and ORT in which that Organization protested several weighing assignments to conductors at Lake City, alleging that its Scope Rule reserved such work exclusively to the incumbent Agent-Telegrapher. (Carrier, in other cases — has also had occasion to receive — and deny — complaints from conductors, brakemen, and yard foremen concerning weighing assignments to employes of other crafts.)

The Board has held in many cases that where the Scope Rule of an Agreement is general in character, the party asserting a claim to certain work must show by a preponderance of the evidence that tradition, custom and practice on the property establish its exclusive right to perform that work (Awards 12462, 13400 and others). In the present case the evidence does not establish a right to exclusivity. Therefore, the assignment of the work in question to an Agent-Telegrapher (and to Conductors to some extent), after St. Charles was converted into a one-man station, cannot be deemed a violation of the Clerks' Agreement.

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 violated Rule 23 of the Agreement by failing to issue a bulletin covering an abolished position at St. Charles, Virginia.

That the Carrier did not violate Rules 1 or 2 of the Agreement by assigning certain billing and weighing duties at St. Charles to employes not covered by the Agreement.