Award No. 1611
Docket No. 1591

NATIONAL RAILROAD ADJUSTMENT BOARD

FOURTH DIVISION

The Fourth Division consisted of the regular members and in addition Referee Walter L. Gray when award was rendered.

PARTIES TO DISPUTE:

THE AMERICAN RAILWAY SUPERVISORS ASSOCIATION

THE NEW YORK CENTRAL RAILROAD COMPANY, WESTERN DISTRICT

STATEMENT OF CLAIM: 1. The Respondent Carrier has violated the agreement between the parties by assigning to a position of Assistant Foreman Shop Inspector at Fearing Street Repair Track, Toledo, Ohio, with a rate of $516.20, the duties and responsibilities of the position of Shop Foreman with a rate of $549.09 which was abolished effective July 31, 1959.

2. In consequence of the aforesaid violative action the Carrier shall be required to reestablish the position of Shop Foreman at Fearing Street, Toledo, Ohio, with rate of $549.09, or pay to Supervisor J. M. Glesser and/or his successors at the rate of $549.09 for the number of hours they have worked or performed duties formerly assigned to the position of Shop Foreman at Fearing Street Repair Track commencing with September 4, 1959.

EMPLOYES' STATEMENT OF FACTS: There is an agreement in effect bearing effective date of February 1, 1948, with revisions to June 1, 1950, with amendments up to date, between The New York Central Railroad Company and The American Railway Supervisors Association, which is controlling in the instant claim.

Prior to July 31, 1959, there was a position of Shop Foreman at Fearing Street, Toledo, Ohio, rate of pay $549.09 per month, held by J. M. Glesser. This position was in charge of the shop and eleven mechanics employed there as follows:

1 Blacksmith
1 Blacksmith Helper
3 Car Repair Men
1 Woodmill Machine Operator
1 Journal Lathe Operator
1 Machinist
2 Painters
1 Janitor

Effective July 31, 1959, the Carrier abolished the position of Shop Foreman and stated that the duties and responsibilities of supervision of the Shop and the eleven mechanics who continued to be employed there, would

be assumed by George Mohr Foreman of the adjacent nearby Fearing Street Repair track. Mr. Mohr's position held rate of $582.59 per month. Mr. J. M. Glesser exercised displacement rights on a position of Assistant Foreman Shop Inspector on the Fearing Street Repair track, rate of pay $516.20, held by Mr. H. E. Lees. Mr. H. E. Lees displaced Assistant Foreman Shop Inspector T. J. Spitulski, who in turn displaced Relief Foreman A. G. Klein. See Association Exhibit Nos. 1, 1-A, 1-B, 1-C and 2.

The Fearing Street Shop and the Fearing Street Repair Track are two separate facilities. The duties of an Assistant Foreman Shop Inspector on the Fearing Street Repair Track consist of inspecting cars for repairs and releasing repaired cars plus supervising the men on the repair track engaged in repairing the car.

Shortly after the change made July 31, 1959, Repair Track Foreman George Mohr began to shift the work of supervising the Shop and the Shop employes to Mr. J. M. Glesser until after thirty days Mr. Glesser was performing all of the supervision of the Shop in exactly the same manner as he did when he was Shop Foreman prior to July 31, 1959. This situation was brought to General Foreman C. A. Guhl's attention by District Chairman T. J. Spitulski in letter dated September 4, 1959 (Association Exhibit No. 3). In letter dated September 14, 1949 (Association Exhibit No. 4) General Foreman C. A. Guhl admitted that Repair Track Foreman Mohr had assigned these duties to Mr. Glesser but stated that Repair Track Foreman Mohr was within his rights in assigned Shop Inspector Assistant Foreman to duties under his jurisdiction which included the Shop referred to, and denied the time claim. This decision was appealed up to and including Carrier highest officer of appeals (Association Exhibit Nos. 5 through No. 16 inclusive) and was denied. The claim was then progressed to the Fourth Division in letter notice dated September 15, 1960.

POSITION OF EMPLOYES: Prior to July 31, 1959, at Fearing Street, Toledo, Ohio, the Respondent Carrier maintained two separate facilities, a Shop in charge of a Shop Foreman, rate of pay $549.09 per month, held by J. M. Glesser with eleven mechanics under his supervision, operating a Wood Mill, Machine Shop, and formerly a Blacksmith Shop since eliminated. The Machine Shop turned axles and small machine shop work. The Wood Mill cut and finished lumber used on the Repair Track and for Caboose repair which is done along side of the Wood Mill and was under the jurisdiction of the Shop Foreman, Lot Order Work such as lumber and mill work ordered from outside points, highway crossing signs, tool boxes for Maintenance of Way Department, etc. The other facility was a Repair Track under the supervision of Foreman George Mohr, rate of pay $582.59 per month, and two positions of Assistant Foreman Shop Inspector working on the Repair Track with rate of pay of $516.20 per month. The Repair track repaired all bad order cars carded in the train yard.

Effective July 31, 1959 the Carrier abolished the position of Shop Foreman and stated that the duties and responsibilities formerly exercised by the Shop Foreman were transferred to the position of Repair Track Foreman.

Mr. J. M. Glesser exercised displacement rights on one of the positions of Assistant Foreman Shop Inspector on the Repair track. As shown by the record, shortly after the change Repair Track Foreman Mohr shifted the duties and responsibilities of supervision of the Shop and the employes therein to Mr. J. M. Glesser. As of September 1, 1959, Repair Track Foreman Mohr was performing the same duties as he had prior to July 31, 1959 with the

exception that he now had nominal or token charge of the Shop. Mr. Glesser found himself in actual charge of the Shop performing exactly the same duties he performed prior to July 31, 1959, but at the lesser rate of $516.20 (or $32.89 per month less), and with the title of Assistant Foreman Shop Inspector. It is the position of the employes that the Carrier's actions constituted a reclassification of the position of Shop Foreman which established a less favorable rate of pay or condition of employment in violation of Rule 7 of the agreement.

According to Rule 12 of the agreement, it is a management prerogative to decide whether Supervisors' positions should be established or maintained at any point or in any shop. Accordingly this Association raised no objection when Carrier abolished the position of Shop Foreman at Fearing Street, Toledo, Ohio. On the other hand, this Association does have an interest in the disposition of the work of the abolished position. The parties to the contract have agreed in Rule 1 Scope that certain work is covered by the agreement and is reserved to those holding seniority under the agreement. In numerous awards of the Adjustment Board, the Board has recognized this principle. In third Division Award No. 231 it was said:

> "Whenever a particular position is negotiated into an agreement and specifically placed there by the parties, it means only one thing, and that is that so long as the work is to be done it will be done by an employe filling the position under the agreement at the rate of pay fixed in the agreement. The position can be abolished if the work is not there but it cannot be handed over to an employe not covered by the agreement."

And in Third Division Award No. 255:

> "Nor is there any question of the right of the carrier to abolish positions. The Carrier asserts in its printed brief that the theory of the employes 'would prohibit the Carrier from absolutely abandoning a station or discharging an employe that was was named in the agreement'. But this statement is quite unfounded. The Carrier has an absolute right to abandon a station. It has an absolute right to discharge employes, subject to the procedure laid down in the Agreement (no employes are 'named' in the agreement but only positions). The Carrier has also an absolute right to abolish any position in the agreement provided the duties of the position are in fact abolished. What the Carrier does not have the right to do is, under the guise of abolishing a position, to transfer its duty to someone not covered by the agreement, or, as in the present case, again under the guise of abolishing positions, to pay employes performing agency work at stations included in the agreement on any other than an hourly basis."

And in Third Division Award No. 1314:

> "From what has been said it is apparent that the two outstanding purposes of agreements are to insure to a craft those positions which fall within the craft, and to insure to the members of that craft the work concommitant to those positions in order of their length of service, for work is to the position what seniority is to the employe. Those two principles are the top stone and keystone of the arch. Work is attached to and is an attribute of a position; seniority attaches to and is an attribute of the person.

> In consequence of what has been said it follows that 'positions' which are subject to the agreement are protected to the craft by the agreement, and since 'work' is of the essence of a position such work which is the manifestation of the position and the identity of it is likewise protected to the craft."

The parties have also agreed upon certain rates of pay to be applied to certain positions based on the duties and responsibilities of the positions. In order to preserve these rates the parties included a Rule 7 Preservation Of Rates in the Agreement reading as follows:

> "(a) Positions coming within the scope of this agreement will not be reclassified for the purpose of establishing a less favorable rate of pay or condition of employment. When positions are reclassified due to substantial change in duties and responsibilities, the adjusted rates shall conform with rates of existing positions of comparable character in the same seniority district. When a new position is created, the rate of pay will be established in conformity with rates of positions of similar character and responsibility in the same seniority district.
>
> Excepting changes provided for in the first paragraph of this section, no change in rates shall be made unless agreed to by the parties to this agreement.
>
> (b) If it is found that this rule does not produce adequate compensation for supervisors affected the rates may be taken up for adjustment. The committee has the right, and management has an equal right, at any time to request an adjustment in the rate of pay of any position subject to this agreement."

This rule was placed on the agreement for the express purpose of prohibiting the juggling of positions and work resulting in less favorable rates of pay or conditions of employment. As we have already seen, the final result of the Carrier's actions is that Mr. Glesser now performs the exact same work of supervision of the Shop and the eleven mechanics as he did before Carrier made the changes on July 31, 1959. But, Mr. Glesser is now performing this work at the rate of $516.20 instead of his former rate of $549.09 and the result is that Carrier is securing the performance of the exact same work for $32.89 less than they paid before July 31, 1959. The Carrier states that they have merely abolished a position which was no longer necessary and rearranged their forces as a part of a general force reduction. Aside from the fact that the number of employes etc. at the Shop was the same before and after the change we point out that whatever Carrier may have intended, their actions can only be judged by the results. In Third Division Award No. 5931, the Adjustment Board said:

> "In that situation all we can do is disregard the unsupported statements, accept the cold hard facts of record and apply the rule frequently adhered to under similar conditions. The rule is that in the absence of other evidence the intent and purpose of action must be determined by its natural consequences and results."

Applying the rule to this claim, inescapably leads to the conclusion that the result of Carrier's action was to reclassify the position of Shop Foreman and the establishment of a new and less favorable ($32.89 per month less) rate of pay for the duties and responsibilities of supervision of the Shop

and its employes. The parties to the agreement had established and agreed upon a rate of $549.09 per month to be applied to this position of Shop Foreman and the work of this position and the Carrier has no right to unilaterally change established and agreed upon rates. Such changes can only be made by negotiation between the parties resulting in an agreement.

We have not yet touched upon the fact that Mr. Glesser, after being disturbed from his position of Shop Foreman by Carrier's action in abolishing that position, exercised his seniority rights under the agreement on a position of Assistant Foreman, Shop Inspector on the Fearing Street Repair Track. Mr. Glesser chose this position which carried a certain rate of pay, hours of service and days of rest, and which encompassed certain assigned duties of inspecting cars for repairs, releasing cars and supervising men on the repair track. Mr. Glesser displaced on this position in an exercise of his seniority and he had a right to perform the work of the position as it was when he took it. Under Rule 7 if the Carrier wished to reclassify the position of Assistant Foreman Shop Inspector held by Mr. Glesser, they are required to adjust the rates to conform with rates of existing positions of comparable character in the same seniority district. In this case, this would have necessitated an increase in the rate of Mr. Glesser's Assistant Foreman Shop Inspector rate of $516.20, because the work being placed on the job was the higher rated work of the abolished position of Shop Foreman. Of course, the Carrier will contend that they had no intention of changing or reclassifying Mr. Glesser's position of Assistant Foreman Shop Inspector, and certainly no intention of raising the rate. All the Carrier wanted was for Mr. Glesser to perform the work of his abolished position at the lower rate. It is a fact that prior to this change, none of the work of supervising was ever performed by either of the positions of Assistant Foreman Shop Inspector.

There are many Awards of the Adjustment Board which support our position. In Third Division Award No. 751 it was said:

> "OPINION OF BOARD: There is no substantial difference between the parties concerning the facts; i.e., that a position subject to the agreement and having full eight hours of work, was abolished and the work parceled out, four hours of it going to two excepted employes, the chief clerk, the agent (excepted under the Telegraphers' schedule) and three hours of it to a lower-rated employe; this without conference or attempt at agreement with the organization.
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> This Board has repeatedly held that a carrier may not arbitrarily take work from under the scope of an agreement. Such a prerogative would be destructive of the agreement. See Awards 631, 637, and 736.
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> Notwithstanding the carrier's contention that some of the work involved had been performed by the chief clerk before the general clerk position was established, the fact remains that when the latter position was established, it and its work automatically became subject to the agreement and, the work subsisting, they could be removed therefrom only by agreement of the parties.
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> The assignment of the three hours' work to a lower-rated employe was a violation of the intent of Rules 66, 68 and 76. The negotiated rates covering positions of course took into consideration the attendand duties, and if after agreeing upon the rates the carrier could switch the duties around in this manner, it could completely nullify the wage scale.

The four-hour line of demarcation between class 1 and class 2 employes provided by the scope rule has no bearing in the matter. If it were permissible to parcel out regularly three hours as here, no reason is perceived why it could not also be permissible to assign the whole eight hours out to three lower-rated employes in allotments of three, three, and two hours and thus procure the doing of work agreed to be worth $5.39 per day for $4.79."

And in Third Division Award No. 8526:

"On the basis of these facts, the Petitioner charges that the abolition of the B-1 position and assignments of its duties to lower-rated and exempted employes constitute violations of its Agreement with the Carrier. The latter replies that its actions were well justified by the Agreement and economic considerations.

It is well-established that, in the absence of limitations imposed by law or a collective bargaining agreement, it is the prerogative of Management to abolish a position if a substantial part of the work thereof has disappeared. See Awards 6022 and 6945. We here reaffirm that principle, particularly where the discontinuance of positions is essential to a program of good management and sound economy. Nevertheless, where obligations were imposed by collective bargaining agreements with respect to job classifications and their compensation or other incidents, the contracting parties must live and comply with these obligations, unless they are changed by mutual agreement.

In the present case, the Agreement provides for the rating of positions. Section 4-G-1 (a) of the Agreement reads as follows:

'Positions (not employes) shall be rated and transfer of rates from one position to another shall not be permitted.'

Section 4-G-2 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 reducing rates of pay or evading the application of these rules.'

From an examination of these provisions, it is apparent that if the Carrier unilaterally abolished a position and assigned its services to a new lower-rated position, the Agreement would be breached. This is nonetheless true if the Carrier distributes the work of the abolished position among several employes to be performed in addition to their duties in existing positions, even though a new position is not created. It is a familiar proposition of law that one may not accomplish by indirection what he is forbidden to do in a direct manner. The positions covered by the Agreement consist of certain definite duties and on the basis of these duties ratings and other incidents have been determined. If these duties could with impunity be assigned to lower-rated or excepted positions, then a very fundamental basis of the Agreement would fall and be emasculated. This is not to infer that where the volume of work in a position is shown to have substantially decreased, the Carrier could not properly abolish the position.

"It is not necessary that all or almost all the duties of a position disappear but, in the present case, there is not an iota of evidence that the work requirements of the abolished position substantially decreased. On the contrary, it affirmatively appears that right up to the day it was abolished, its incumbent was required to work at it full time.

The Carrier at no time consulted or notified the Petitioner regarding so vital an element of collective bargaining as the discontinuance of a position until its abolition and the assignments had been accomplished. The Carrier claims that a questionnaire procedure adequately protects the employes but the use of this procedure was not suggested until after the acts here complained of had become accomplished facts.

The Carrier also argues that there is no evidence of a substantial increase in the workload of employes assigned some of the duties of the abolished position. While that point could have some merit in a proper setting, it lacks force here. It is a far more compelling circumstance that the work time required by the position in question did not decrease and its incumbent continued to work full-time right up to the time it was abolished. We also note that, after the work had been transferred, it was performed by four or more employes with extra help from time to time.

In the light of the above related circumstances, it is clear that the assignments of duties to lower-rated employes in the present case constitute a violation of the Agreement. Awards 4932, 751 and 7321. This conclusion is not inconsistent with Awards 5486, 6187, 6839, 6945, 7073 and other citations on which the Carrier relies, since in each of those cases, unlike the situation before us, it was established that the duties of the abolished positions had been materially reduced prior to their discontinuance. That we are not free to consider whatever equities exist in favor of the Carrier is axiomatic; we are limited to the Agreement and record before us."

We wish to point out that the agreement also contains a Rule 5 (a) reading as follows:

"(a) A supervisor temporarily assigned by the official in charge to the position of a higher rated supervisor subject to this agreement shall receive the higher rate for the day or days so assigned."

This rule is merely another safeguard to protect the rates of pay which are established by agreement for certain work. This rule prevents the Carrier from cutting rates by assigning a lower rated employe to a higher rated position or work, even on a temporary basis. Rule 7 covers the same thing if done on a permanent basis. The Adjustment Board has also ruled many times that the performance of higher rated work by a lower rated employe must be compensated for at the higher rate. In Third Division Award No. 5252 it was said:

"OPINION OF BOARD: For a period of three hours on June 2, 1948, the claimant, a price clerk, performed work described in the submission as that of the head price clerk. The Carrier asserts that claimant did not assume the responsibilities of the position and, therefore, did not qualify under the terms of Paragraph 52 of the Rules for the pay of the higher position. In an office that was comprised

of a head price clerk and two price clerks, the work and responsibilities of the position of head price clerk would be largely the performance of the work. The supervising duties at the most, except with untrained employes, would be nominal, and the mere fact that during the three hours the claimant did the work of the head price clerk and did not exercise other nominal duties of such position does not indicate that he did not perform the duties and responsibilities of the higher rated position. The claimant was required to work the higher rated position because the head price clerk had worked on other duties and had permitted his work to accumulate. Thus the temporary assignment was not due to an increase in volume of the work.

When employes work in a higher rated position they are entitled to the higher rates while occupying the position. (Rule 52.) As the claimant worked at the higher rate for three hours, he should be compensated at the higher rate for such period, less what has been paid for this time."

And in Third Division Award No. 4545:

"Admittedly the Claimant did not perform all of the duties and responsibilities of the position of Supervisor—Rate Department during the period here involved but he did, during this period, devote his time to performing duties of the Supervisor—Rate Department, which includes that of handling carload corrections. The question therefore arises, does Rule 34 contemplate and require an employe to fulfill and perform all of the duties and responsibilities of the higher rated position before being entitled to the rate thereof? It will be observed that under the rule there may be an assignment irrespective of the presence of the regular employe. This clearly indicates that the rule does not contemplate that the employe assigned must necessarily fulfill and perform all of the duties and responsibilities of the higher rated position. We think the rule means that when an employe is assigned to and devotes his time to the performance of duties and responsibilities of a higher rated position he is entitled to the rate thereof although he may not necessarily perform all the duties and responsibilities thereof. See Awards 2270 and 3032 of this Division. We find that Claimant, during the period herein involved, was assigned to and performed work of a Supervisor—Rate Department and, under Rule 34, was entitled to be paid at the agreed rate of that position."

Whether the Carrier's action is considered as a unilateral reclassification of the abolished position of Shop Foreman to a lesser rated position of Assistant Foreman Shop Inspector; a unilateral reclassification of the position of Assistant Foreman Shop Inspector (without proper compensation as provided in Rule 7); or a temporary assignment of Assistant Foreman Shop Inspector Glesser to duties nominally assigned to Repair Track Foreman Mohr; the result is the same—the Carrier has violated the agreement.

The record is clear that the Carrier has made a saving of $549.09 by the abolishment of the Shop Foreman's position on July 31, 1959. The transfer of the duties and responsibilities of the Shop to the Repair Track Foreman has been shown to be merely a paper or token transfer. No change in the forces or work in the shop was made and this can only mean that the full-time work of the Shop Foreman remained after the abolishment. It was physically impossible for the Repair Track Foreman to perform two full-time

jobs and the only reason for assigning the work to him in the first place was because of his rate. To assign this work directly to the lesser paid position of Assistant Foreman Shop Inspector would have been an obvious and positive violation of Rule 7. The actions taken were probably intended to confuse the issue, but if so, they have failed as it is only necessary to look at the situation existing prior to the change and that existing after the smoke screen had cleared away to see that Mr. Glesser is still the Shop Foreman exactly as before with the exception of his title and rate of pay. Such action makes a mockery of the agreed-upon rates of pay and is, in our opinion, a violation of the agreement.

The petitioning organization hereby affirms that the dispute presented herein for adjudication has been a matter of correspondence; that conferences have been held between the parties in attempting to compose the matter in dispute, and; that all data submitted in support of Petitioner's presentation has been made known to Respondent Carrier, such data being hereby made a part of the record in this dispute.

Oral hearing is desired.

CARRIER'S STATEMENT OF FACTS: Prior to July 31, 1959 there were two supervisory postions at Fearing Street Repair Track bearing the title Gang Foreman, one with a rate of $516.20 per month and the one referred to in the instant dispute, rate $549.09 per month.

As a result of a study made by the Carrier at its Fearing Street Repair Track, Toledo, Ohio, it was determined that the number of Foremen there employed was in excess of requirements when compared with the reduced number of shop craft men employed.

In order to effect a necessary reorganization of supervisory duties, Bulletin No. 190 was posted on July 27, 1959 abolishing a position titled Gang Foreman, incumbent J. M. Glesser, rate $549.09 per month. The abolishment was effective at the close of business July 31, 1959. Copy of bulletin attached as Carrier Exhibit "A".

The rate ($549.09), however, was not disposed of; it was simply transferred to the position of Up-Grading and Cleaning Track Foreman. The rate formerly assigned to the Up-Grading and Cleaning Track position ($516.20) was the rate disposed of.

Claimant Glesser, as Gang Foreman, supervised nine employes at the time his position was abolished. These employes, all employed in the Machine and Blacksmith Shop and the Woodworking Shop, comprised the following:

1 Blacksmith
1 Blacksmith Helper
1 Electric Welder
1 Machinist
1 Wood Mill Man
2 Car Repairmen
2 Painters

All positions, except one of the Car Repairmen (who was assigned to caboose work), were confined to a small area and did not require constant supervision.

Claimant had sufficient seniority as a supervisor to displace on any position he desired. When the position of Gang Foreman was abolished, Claimant exercised his displacement rights for the position of his choice which was that of Assistant Foreman — Shop Inspector, with rate of $516.20 per month. The more responsible position of Up-Grading and Cleaning Track Foreman, the position to which the $549.09 rate had been transferred was available to the Claimant through displacement but he chose not to displace.

In reorganizing the Fearing Street Track supervisory duties, the over-all supervision over the Repair Track and its facilities (including the Machine and Blacksmith Shop and Woodworking Mill) was assigned to the Repair Track Foreman, who had a Wreckmaster and two Assistant Foremen — Shop Inspectors to assist him. Claimant elected to displace the incumbent of one of these latter positions.

CARRIER'S POSITION: In the Association's Claim, it is contended that Carrier violated the applicable agreement by assigning duties to an Assistant Foreman — Shop Inspector which were formerly assigned to the position of Shop Foreman — (SIC). While it is possible that one, or the other, Assistant Foreman — Shop Inspector may be directed to check the Machine and Blacksmith Shop or the Wood Mill occasionally, this is not part of the regular assignment of either of those positions. The Machine and Blacksmith Shop and the Wood Mill are now part of the over-all responsibility of the Repair Track Foreman. The Repair Track Foreman exercises supervision over all Repair Track forces with the aid of the two Assistant Foreman — Shop Inspectors and the Steam Crane Foreman. How he discharges his responsibilities is his prerogative. He may, on occasion, check the facilities personally; however, it is usually more efficient for him to delegate these checks to either, or both, of the Assistant Foreman — Shop Inspectors, subordinate to him. This can be done without negelecting other work for it has been determined that the remaining duties of the former Gang Foreman position do not warrant a full-time supervisor. The Association's District Chairman, Mr. T. J. Spitulski, admitted this is true in a letter written to the Fearing Street General Foreman on September 4, 1959. Copy of this letter is attached as Carrier's Exhibit 'B'.

In effecting the reorganization, every effort was made to comply with rules of the applicable agreement, and in the handling of this grievance on the property the Association made no showing that Carrier did otherwise. On the contrary, Carrier went beyond its obligations when it retained the $549.09 rate in lieu of the $516.20 rate.

The end result of the aforementioned reorganization was to keep the average number of Shop Craft employes per supervisor at a level consistent with the number of shop craft employes remaining after reduction of force. Prior to the reorganization, there averaged one supervisor for 11.5 workers. Even after the reorganization this average did not change materially; in fact, the average actually dropped to 11.4 or less Shop Craft men per supervisor than before the reorganization. This is ample evidence that the reorganization was an absolute necessity. Were it not for the abolishment of Mr. Glesser's position, the average after July 31, 1959 would have fallen to 9.5 employes per supervisor.

The Association claimed, on the property, that there has been no substantial changes in the duties and responsibilities of the abolished position, and that there were eleven employes working in the Machine and Blacksmith Shop and Wood Working Mill both before and after the position was abolished.

Carrier has consistently denied this, and will continue to do so. Carrier shows in its "Statement of Facts", there were nine employes working under the jurisdiction of the claimant prior to July 31, 1959.

In all other gangs at Fearing Street there had been reductions in Shop Craft employes bringing the supervisor-employe ratio way out of proportion. It is not logical to assume that the number of supervisors necessary to provide proper supervision should remain constant in the light of continued furloughs of the employes they supervise. From 1956 forward the number of shop craftsmen employed at Fearing Street has decreased, due to furloughs necessitated by business conditions. Unfortunately there have also been necessary furloughs in the supervisory forces. An indication of the number and rapidity of personnel changes at Fearing Street can be found in the following comparison:

Year	Shop Craft Employes	Supervisors	Average number of shop craft employes supervised by one Supervisor
1956	183	13	14.06
1957	150	13	11.53
1958	145	10	14.5
July 1959	69	6	11.5
Aug. 1959	57	5	11.4

From the foregoing it can be easily determined that the reorganization was necessary and the continuation of six supervisors to provide supervision for 57 men would result in an average of 9.5 men per supervisor disproportional to prior years.

In its letter notice to this Division dated September 15, 1960, the Association neglected to indicate which rule, or rules, of the applicable agreement it believes has been violated. The general claim of "violative action" is not specific enough to warrant this Board's consideration.

Carrier further submits that there is no rule of the applicable agreement which was violated. It obviously did not circumvent any of the provisions of Rule 12—Reduction of Force, (quoted below for ready reference):

> "(a) In the application of this agreement it is recognized by the parties that the determination of any question as to whether supervisor's positions should be established or maintained at any point or in any shop, and any question as to the number of such positions which will be maintained at any point or in any shop, is a managerial prerogative.
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> "(b) When it becomes necessary to reduce the number of supervisors at any point, at least four working days' notice shall be given supervisors whose positions are to be abolished. Supervisors affected by such notice may exercise their seniority rights under the provisions of Rule 11.
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> "(c) In the restoration of supervisory forces, senior laid-off supervisors will be given preference in returning to service, is available within a reasonable time, and shall be returned to their former positions if possible. In partial restoration of forces senior supervisors will be given preference for the work available, but may, through mutual

agreement between local management and local committee, waive their rights to such employment in favor of junior supervisors who are qualified and may desire the work."

A casual perusal of Rule 12 with relation to the facts in the instant dispute will clearly show that Carrier—

(Section a) Had the prerogative to determine if, where and how many supervisors would be established or maintained and this is clearly recognized by the parties signatory to the agreement;

(Section b) Posted the reduction notice July 27, 1959, a full five days before the July 31 effective date;

(Section c) Did not restore any supervisory forces.

The Association originated the instant claim on the property based on the contention that Rule 7 had been violated.

The claim as handled on the property from lowest level through Carrier's Final Appeals Officer is as shown in the Association's Ex Parte Submission attached hereto as Carrier's Exhibit "C".

Rule 7 of the applicable agreement is as follows:

"(a) Positions coming within the scope of this agreement will not be reclassified for the purpose of establishing a less favorable rate of pay or condition of employment. When positions are reclassified due to substantial change in duties and responsibilities, the adjusted rates shall conform with rates of existing positions of comparable character in the same seniority district. When a new position is created, the rate of pay will be established in conformity with rates of positions of similar character and responsibility in the same seniority district.

Excepting changes provided for in the first paragraph of this section, no change in rates shall be made unless agreed to by the parties to this agreement.

"(b) If it is found that this rule does not produce adequate compensation for supervisors affected, the rates may be taken up for adjustment. The committee has the right, and management has an equal right, at any time to request an adjustment in the rate of pay of any position subject to this agreement."

A simple comparison of Paragraph (a) of Rule 7 with the facts in this case more than confirms Carrier's compliance with this rule. The very fact that the higher rate of $549.09 was allowed to remain in effect at Fearing Street, in lieu of the $516.20 rate, negates any possibility of a Rule 7 violation.

It was common knowledge to supervisors at Fearing Street that the higher rate was not to be abolished but would be transferred to the Upgrading and Cleaning Track Foreman's position. Inasmuch as the claimant had displacement rights it was merely a matter of his choice that deprived him of this higher rate causing him to assume the lower rate of the position which he finally displaced. The transfer of the rate to the Upgrading and Cleaning Track position brought the pay for that position more in line with the responsibilities attached to it and conformed to the intent of Paragraph (a) of Rule 7. The

upgrading and cleaning of cars is a constant operation, one that requires constant supervision.

Further, it appears the claimant was only interested in the higher rate of pay and not the added responsibilities. He not only did not choose to displace the higher rated Cleaning Track Foreman, but also made no attempt to avail himself of the opportunity to obtain the position of Repair Track Foreman when it became vacant November 1, 1959 due to retirement of the incumbent. The rate of the Repair Track Foreman position was $27.50 per month more than the Cleaning Track Foreman's position.

The reassignment of supervisory responsibilities in the instant dispute cannot be considered as a reclassification within the meaning of Rule 7. Carrier's study indicated that the duties performed by the claimant in the Machine and Blacksmith Shop and Wood Working Mill had diminished to the point where they could easily be discharged in one to three hours and the position was likely to become even less important in time. In view of this, it was no longer necessary or economically feasible to continue this position. In fact, the nature of the work, and the skill of the Blacksmith, Machinist, Carpenter and other shop men formerly under the supervision of a Gang Foreman made any direct supervision almost unnecessary.

The intent of the reorganization was not to effect a reduction in the rate of pay for the Gang Foreman's position held by the claimant as the claim implies. The redistribution of duties could have been made prior to July 31, 1959; however, the continuation of furloughs of shop craft men made redistribution more urgent.

Many Awards of this Board, and others, recognize Carrier's inherent managerial prerogative to abolish unnecessary positions in order to effect efficient operation. One of these Awards is Award 93 of this Division wherein it is stated in the "Opinion":

> "On many occasions it has been pointed out in other decisions that due to the very nature of the work in the railroad industry flexibility in the assignment of work is highly essential to the welfare of both the Carrier and the employes. So in considering cases of this nature the decision must turn on the presented facts in each case. In the instant case the amount of supervision that is required outside of the ore season * * * is extremely negligible. If there is any merit to the flexibility theory then this is a case that thoroughly warrants it. We see no bona fide reason why the Carrier should, over the period covered, be required to retain at this enginehouse two enginehouse foremen. To compel the Carrier to do so under the circumstances as here presented would be an injustice."

Awards of your Board have recognized this Carrier's right under the provisions of Rule 12 to determine whether supervisors' positions and the number of such positions should be maintained.

In Award No. 1329, with Referee Gilden, also between the same parties to the within dispute, which denied claim that Carrier violated the Agreement when it eliminated the position of Assistant Terminal Foreman, it was stated in the Opinion of Board:

> "Where, as here, there is a clear showing of such a substantial diminution in volume and extent of the maintenance work performed at

Massey Engine House, prompting a marked decrease in the size of the Mechanical Department work force, as to obviate the need for more than one Terminal Foreman on a particular trick, the surplus Assistant Terminal Foreman job may be dispensed with. In that event, the Terminal Foreman alone may properly be delegated to the handling of those supervisory tasks which are an intrinsic part of his job.

In Award No. 1169 with Referee Nahstoll, between the same parties to the within dispute, which denied claim that Carrier violated the agreement when it created supervisory positions outside the scope of the Agreement, it was stated in the Opinion of Board:

"* * * On the record, however, we believe that to override the Carrier's managerial judgment in establishing the three (3) challenged positions would be an undue interference with a recognized, and proper, function of management. In Third Division Award 7066, Referee Carter, it was held:

'It is the prerogative of the Carrier to determine the amount and character of the supervision required to expeditiously and efficiently handle its work.'

"Accordingly, the claim must be denied."

In summation, Carrier has shown that—

1. Its study at Fearing Street Repair Track clearly indicated that a reorganization of supervisory functions was necessary;

2. The subsequent reorganization was not effected to simply reduce the rate of any position;

3. Claimant was not deprived of his rights under the agreement;

4. The supervisory functions at Fearing Street were directly affected by the number of shop craft forces reduced;

5. No specific rule violation has been cited by the Association in its present claim;

6. Claimant could have displaced on a position with comparable rate of pay to that of his former position; and

7. Awards of this Board support the Carrier in its contention that the prerogative to determine the number of positions maintained rests solely with the Carrier.

For these reasons the contentions of the Association are without merit and claim should be denied.

All data submitted in support of Carrier's position have been presented to the other party and made a part of the particular question in dispute.

Oral hearing is requested.

(Exhibits not reproduced)

OPINION OF BOARD: This is a case involving the construction of an agreement between the parties to the dispute.

An agreement was entered into on February 1, 1948 with certain amendments made at a later date and particular attention is called to Rule 7 relative to the "Preservation Of Rates":

> "(a) Positions coming within the scope of this agreement will not be reclassified for the purpose of establishing a less favorable rate of pay or condition of employment. When positions are reclassified due to substantial change in duties and responsibilities, the adjusted rates shall conform with rates of existing positions of comparable character in the same seniority district. When a new position is created, the rate of pay will be established in conformity with rates of positions of similar character and responsibility in the same seniority district.
>
> Excepting changes provided for in the first paragraph of this section, no change in rates shall be made unless agreed to by the parties to this agreement.
>
> (b) If it is found that this rule does not produce adequate compensation for supervisors affected the rates may be taken up for adjustment. The committee has the right, and management has an equal right, at any time to request an adjustment in the rate of pay of any position subject to this agreement."

It is the contention of the employes that this provision was placed in the agreement to prohibit the juggling of positions.

In the instance of this case J. M. Glesser was a Shop Foreman at Fearing Street, Toledo, Ohio, drawing $549.09 per month and was in charge of the shop and eleven employes. Subsequently this position was abolished on July 31, 1959. This was done by bulletin as required by the agreement. Mr. Glesser thereupon exercised his displacement rights for the position of Assistant Foreman—Shop Inspector. The employes contend that duties were thereafter assigned to the Assistant Foreman—Shop Inspector that were previously assigned to the Shop Foreman and that Mr. Glesser is in fact in actual charge of the Shop performing exactly the same duties he had previously performed except his pay is now $516.20 or $32.89 per month less.

The carrier's position is that this is a reorganization move for the best interests of the company and that there was no violation of the agreement with the employes in any way.

It, therefore, resolves itself into an interpretation of the agreement to see if such action was in violation of the agreement.

It is a well established rule of law that one may not accomplish by indirection what he is forbidden to do in a direct manner. Seniority rights are property rights and have been so held in many court decisions. See Rentschler vs. Missouri Pacific 126 Neb 493; 253 NW 694 95 ALR 1.

In Third Division Award 731 it was held, "In an equally long line of cases the Board has held that the carrier does not have the right, under the guise of abolishing a position to transfer the duties of the position to someone not under the agreement". Certainly positions cannot be discontinued and new ones created which have relatively the same duties for the purpose of reducing the rate of pay or evading the application of the agreement.

It is the position of the Board that there was a violation of Rule 7 and that there was not a strict compliance with the agreement. Rule 7 specifically states that when positions are reclassified due to substantial change in duties and responsibilities, the adjusted rates shall conform with rates of existing positions of comparable character in the same seniority district. We do not feel that was done although there is no evidence to show there was a willful attempt to circumvent the agreement but nevertheless we feel the agreement was violated. See Third Division Awards 4178 and 4385.

It is, therefore, the opinion of this Board that the carrier be required to re-establish the position of Shop Foreman with the rate of $549.09 per month. However, the Board cannot agree with the second request to pay J. M. Glesser and/or his successors at the rate of $549.09 for the number of hours they have worked commencing with September 4, 1959.

The claim is sustained as to the re-establishment of the position of Shop Foreman at $549.09 per month and denied in all other particulars.

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

The carrier and the employe involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

The parties to said dispute were given due notice of hearing thereon.

AWARD

Claim sustained in part in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of FOURTH DIVISION

ATTEST: Patrick V. Pope
Secretary

Dated at Chicago, Illinois, this 12th day of February 1962.