Award Number 294
Docket Number CL-240

NATIONAL RAILROAD ADJUSTMENT BOARD

Third Division

Willard E. Hotchkiss, Referee

PARTIES TO DISPUTE:

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

SOUTHERN PACIFIC LINES IN TEXAS & LOUISIANA

DISPUTE.—

> "Claim of C. A. Brandin, Clerk, Houston Local Freight Station for payment of an additional ten cents per day for each day upon which he performed service in the period, March 7, 1932, to March 27, 1935, representing an adjustment to cover the difference between $4.80 per day paid to him under classification as Inbound Tracing Clerk and $4.90 per day which should have been paid to him for services performed as Claim Inspector."

FINDINGS.—The Third 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.

As a result of a deadlock, Willard E. Hotchkiss was called in as Referee, and on request of the Carrier a second hearing was had on July 9, 1936, in which representation of the parties argued the case before the Division with the Referee sitting as a member thereof.

There is in evidence an agreement between the parties bearing effective date of July 1st, 1922, with *Addendum thereto effective May 16th, 1924.*

C. A. Brandin employed originally as a clerk in the Houston Terminal, Southern Pacific Lines in Texas and Louisiana, entered service on July 5, 1923. He was granted an indefinite leave of absence July 30, 1930, to serve as Secretary of the General Committee of the Clerks' Organization on the lines of this carrier. The position of Claim Inspector, a position which Brandin at one time theretofore held in the Houston Freight Station, was abolished December 5, 1931.

Brandin remained out of the railroad service until March 7, 1932. Shortly prior to that date he made known his intention to return to service and asked that he be permitted to exercise his seniority and assume the duties of the position of the Inbound Tracing Clerk in the Houston Freight Office, the occupant of the position, Clerk Siegert, being junior to him. Brandin displaced Siegert on March 7, 1932, and performed service on the position for exactly three years thereafter before making claim, which is now the subject of this dispute, that he was filling the position of Claim Inspector. On March 7, 1935, Brandin filed claim with the Agent for the rate which was paid to the Claim Inspector when that position existed prior to its abolishment December 5, 1931. The claim was denied as having no basis and because it had not been presented within the time limit for presentation of such claim.

Twenty days subsequent to the filing of the claim, or on March 27, 1935, the position of Claim Inspector was reestablished.

POSITION OF PETITIONERS.—Petitioners claim that Brandin has performed the duties of Claim Clerk during the whole time he has occupied the

position of Inbound Tracing Clerk. They claim that the position of Claim Clerk was abolished in name but not in fact, and they rely primarily on the joint hearing held on April 15, 1935, in which the Superintendent, the General Chairman, the Agent, the Chief Clerk, and others participated. Petitioners contend that the evidence brought out in the hearing corroborating common knowledge around the station, shows that the preponderance of Brandin's duties were those of Claim Clerk, and that he is therefore entitled without qualification to the rate of $4.90 per day for the whole period from March 7, 1932, to March 27, 1935, when the position of Claim Clerk was reestablished and Brandin assigned to it at the $4.90 rate. The claim is based on these alleged facts and on Rules 51 and 64, which read as follows

RULE 51

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

RULE 64

"Established positions shall not be discontinued and new ones created under a different title covering relatively the same class of work for the purpose of reducing the rate of pay or evading the application of these rules."

POSITION OF CARRIER.—Carrier denies jurisdiction of the Board, (1), because the claim is a request to change the rate of pay of an established position and (2), because the claim is barred by Rule 27. Section (a) of Rule 27 reads as follows:

RULE 27

"SEC. (a) An employee disciplined, or who considers himself unjustly treated, shall have a fair and impartial hearing, provided, written request is presented to his immediate superior within five (5) days of the date of the advice of discipline and the hearing shall be granted within ten (10) days thereafter."

On the merits of the case, Carrier submits that Rule 64 could not have been violated since no new position was created. The position of Inbound Tracing Clerk having been in existence and well recognized long before the position of Claim Clerk was discontinued on December 5, 1931. Carrier maintains that the right to reduce force by abolishing unnecessary positions and distributing the work among other employees is incontestible. Carrier further submits that business conditions on December 5, 1931, and prior and subsequent thereto, amply justified the exercise of that right in the manner in which it was exercised. Carrier points out that the silence of claimant from March 7, 1932, when he accepted the position of Inbound Tracing Clerk at the $4.80 rate, until March 7, 1935, even if the long delay should not be held to bar the hearing of the claim as Carrier maintains it should, creates a strong presumption that the classification and the rate were correct.

OPINION OF THE REFEREE.—A. *As to jurisdiction.*—1. The question whether there is a request to change a rate of pay of an established position or a protest against a misclassification and a misrating of a position is the crux of the whole case and can only be determined by hearing the case on its merits. To uphold the Carrier's contention would bar nearly all cases in which violation of Rules 51 and 64 are charged. The Referee cannot believe that this contention was seriously advanced and is not disposed to take it seriously.

2. The applicability of Rule 27 to this kind of a case was dealt with in Award No. 292, CL–238. Since the parties in the two cases are the same, it is unnecessary to repeat the line of argument followed in that case. The circumstances of the two cases on this point are similar and the decision must be the same.

The Referee holds that the Board has the right and the duty to hear and decide the case on its merits.

B. *On the Merits of the Case.*—It is admitted that the position of Claim Inspector was discontinued on December 5, 1931. The Carrier contends that since no new position was created, there could have been no violation of Rule

64, and by the same token there was no violation of Rule 51 since the duties and the rate of the position of Inbound Tracing Clerk remained as they were except for sharing in the distribution of the duties of the discontinued position of Claim Clerk when poor business and lack of work made it necessary to abolish that position.

The Referee is chiefly concerned with ascertaining whether Brandin was properly classified and paid from March 7, 1932, to March 27, 1935. What he did about his classification and pay during this period, what the organization did, and what the Carrier did, are, of course, important for the light they throw on the basic fact which is the propriety of his classification and pay. It is immaterial to the rights of an employee under the agreement whether failure to secure a proper classification and rating is shown, to have resulted, from an omission or oversight, a misapprehension of essential facts, or a wilful violation of the agreement. It is as much the duty of management to rate employees properly, as it is of the organization and any individual claimant to see that they are so rated. While the management, the organization, and the individual employee may be presumed to know the meaning of the rules and their application to the rating and pay of positions under them, it is obvious that the duties of a position might change from week to week or from month to month so that a rating that was correct at one time might by a gradual process of change become incorrect without anyone being especially at fault.

So in this case we are concerned not merely with the question whether Brandin was correctly or incorrectly rated on March 7, 1932, or March 26, 1935, but we are concerned with the correctness or incorrectness of his rating for the whole period for which the claim runs. If he was incorrectly rated and paid for the whole period, the loss he suffered should be made good. If he was incorrectly rated for a part of the period, the lesser loss suffered should likewise be made good. If he was not incorrectly rated at all, he suffered no loss and his claim must be denied.

Obviously, it is undesirable from every standpoint to throw down the bars and to go back into the distant past to dig up cases of incorrect rating. On the other hand, from the standpoint of the satisfactory operation of the agreement, it is clearly undesirable to have employees constantly demanding re-rating for fear that legitimate claims may become outlawed.

Under normal circumstances, three years would appear to be an unduly long time to wait before raising a question of incorrect rating. However, business conditions were not normal during the period for which this claim runs and it would appear also that there was some abnormality in the conditions on this property. In all the circumstances the Referee believes that the letter, and even more of the spirit of the agreement will be served not only by taking jurisdiction of the case as has already been done, but by considering it on its merits in the light of such evidence as is available for the whole period for which it runs.

The Referee is of the opinion that the joint investigation of April 15, 1935, is the strongest evidence which the petitioners have brought forth in support of Brandin's claim. Also the Referee is aware that this investigation occurred just after the end of the period for which the claim runs and, therefore, the memory of man being what it is, the conclusiveness of the investigation cannot possibly be as great as applied to the earlier part of the period as it is for the later part.

There are then two questions to decide towit:

1. Was Brandin regularly occupied for the major portion of his time with duties properly pertaining to the position of Claim Clerk?

2. If so, was he so occupied for the whole period for which the claim runs or for any substantial portion or portions of such period?

Reverting to question 1, the Referee is convinced that for some time prior to the joint investigation on April 15, 1935, Brandin was doing substantially the work of a Claim Clerk and was entitled to receive the pay therefor.

The answer to question 2 is less obvious. In view of general business conditions in 1934 and 1935 compared with the time when Brandin first accepted the position of Inbound Tracing Clerk, it is possible that for some time subsequent to March 7, 1932, the preponderance of his work was such as to justify the classification of Inbound Tracing Clerk, and that with the improvement of business he gradually came to do more and more of the work of a Claim Clerk. In the investigation of April 15, 1935, Superintendent Marshall asked Brandin

this question: "Has the number of outside inspections of CL and LCL freight been gradually increasing?" Brandin's answer: "Yes, sir; that is my observation." At an earlier point in the investigation, Superintendent Marshall asked this question: "You previously stated that during your assignment as Inbound Tracing Clerk you did not perform the duties of Inbound Tracing Clerk, but such duties were instead performed by Clerk Zischang. Is that correct?" Brandin's answer: "I am sure that I did perform some small portion of the Inbound Tracing Clerk's work in the early part of 1932."

In spite of the fact that the Referee is less positive in respect to the earlier period than he is in respect to the later period, he finds nothing in the record to justify cutting off the claim at any particular date between March 7, 1932, and March 27, 1935. In the face of the evidence and in the absence of convincing evidence to the contrary, the Referee finds that the whole claim should be allowed.

AWARD

A. *Jurisdiction.*—The National Railroad Adjustment Board has jurisdiction.
B. *Merits.*—The claim is sustained.

By Order of Third Division:

NATIONAL RAILROAD ADJUSTMENT BOARD.

Attest:

H. A. JOHNSON, *Secretary.*

Dated at Chicago, Illinois, this 17th day of September 1936.