

Award No. 1844
Docket No. CL-1832

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

John W. Yeager, Referee

PARTIES TO DISPUTE:

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

THE ERIE RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, that the carrier violates the rules of the Clerks' Agreement at Dayton, Ohio, when it requires employes at that point to perform higher rated work at the lower rates of pay, and

That carrier shall now be required to establish a position of Receiving and Delivery Clerk at Dayton, Ohio, and

That such position shall be bulletined, awarded and assigned to the senior qualified employe making application for same; that such senior qualified applicant and others affected be reimbursed for any and all wage loss sustained retroactive to November 1, 1939.

EMPLOYES' STATEMENT OF FACTS: During January 1924 there was in effect at Dayton the following force:

1 Foreman	Rate \$105.00 per month
1 Receiving Clerk	" .49 per hour
1 Delivery Clerk	" .49 " "
1 Caller	" .45 " "
5 Truckers	" .40¼ " "

Receiving and Delivery Clerk each performed the work ordinarily done by a Checker and this force remained substantially the same with the exception that during 1927 an increase in wages was granted which changed the rate of the Receiving and Delivery Clerks and the Checker's rate so that the force in August 1927 was composed of:

1 Foreman	Rate \$105.00 per month
1 Receiving Clerk	.52 per hour
1 Checker	.52 " "
1 Caller	.45 " "
4 Truckers	.40¼ " "

This force remained fairly constant until July 1931 when it was changed to:

1 Foreman
1 Receiving Clerk
1 Delivery Clerk
4 Truckers.

assigned to the senior qualified applicant, and that such senior qualified applicant and others affected be reimbursed for wage loss sustained retroactive to November 1, 1939, date claim was filed.

POSITION OF CARRIER: The question that is involved concerns rates of pay of station employes at Dayton, Ohio freight station and is a question for mutual negotiations under the Railway Labor Act, and is not a grievance or dispute properly submitted to the Third Division, National Railroad Adjustment Board, and should therefore be dismissed.

OPINION OF BOARD: This is a claim by the System Committee of the Brotherhood that the Carrier has, at Dayton, Ohio, violated and continues to violate the Clerks' Agreement by requiring employes of a class to perform higher rated work at the lower classified rate of pay. For this claimed violation the Committee of the Brotherhood seeks retroactive reimbursement to the employes affected to November 1, 1939, and further that a new position of Receiving and Delivery Clerk be bulletined and established for the future with appropriate pay.

This twofold complaint presents the following: First, it is contended that hourly rated employes have been and are performing more than four hours work per day in a higher rated clerical positions without receiving the higher daily rate of pay in violation of Rule 2. Second, it is substantially contended that there is a sufficient amount of the character of clerical work involved to require the establishment of a new and regular position to take care of this clerical work.

As to the first phase of the complaint, if the evidence were before this Division showing a violation on any day or days it would be our duty to sustain the claim for such day or days but a search of the record discloses nothing more than a general claim of continuing practice without any factual information. There is nothing in the record upon which to make an award favorable to the claimant on this phase of the claim.

As to the second phase, if in fact an employee in a lower rated position is regularly performing work for more than four hours per day in a higher rated position or in a higher rated classification he is entitled to the pay of the higher rated position if there is one, and if there is none then it is the duty of the carrier to bulletin and establish one and a rate of pay therefor agreeable to the provisions of Rule 37. It may be added also that, in reason and fair dealing, if the carrier is parcelling clerical work to two or more lower rated positions with the design of evading the operation of Rules 2 and 37 the Committee should have the right to insist upon a consideration of the sum total of the entire parcelling in a determination of whether or not a new position should be established.

But here again the information furnished is insufficient upon which to base a factual determination that the rules are being violated.

In its presentation the carrier stresses the point that there has been no change in practice under the agreement from that which existed for a long period before the agreement was adopted. A prior practice carried over is not controlling and may not operate to modify, waive or vary the terms of the agreement, and in truth should receive no consideration if it is violative of the plain terms of the agreement. The agreement itself controls the relations of the parties and their duties and obligations each to the other. It is only where there is ambiguity, uncertainty, capability in the agreement for more than one interpretation, or incompleteness that resort may be had to prior practices, prior mutual interpretations, or prior ex parte interpretations, accepted by other parties for the purpose of ascertainment of the intent, purpose, or scope of the agreement.

By reason of lack of sufficient factual information to make a determination the claim should be referred back for a joint check on the property to develop the facts sufficiently for ascertainment of whether or not the agreement has been violated as claimed.

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 factual information is insufficient upon which to base a determination.

AWARD

The claim is referred back for joint check on the property for the purpose of ascertaining factually whether or not the carrier has violated the Agreement as claimed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 18th day of June, 1942.