

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Fred L. Fox, Referee

PARTIES TO DISPUTE:

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

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS

**STATEMENT OF CLAIM:** Claim of the Terminal Board of Adjustment, Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees that the carrier (Terminal Railroad Association of St. Louis) violated and continues to violate the Agreement existing between the respective parties when

- (1) on September 11, 1942 it created a position of Tracing Clerk at a rate of \$6.83 per day when there existed upon its payrolls a position performing the same and identical work rated at \$7.05 per day, and
- (2) that the said carrier shall now be required to rate the position of "Tracing Clerk" at \$7.05 per day, and
- (3) shall make the adjustment retroactive to September 11, 1942, and
- (4) shall pay W. J. Berner the difference between what he has been paid and what he should have received had the Agreement not been violated.

**EMPLOYEES' STATEMENT OF FACTS:** On September 11, 1942, there existed on the payrolls of the carrier in the Eads-East St. Louis Seniority District (CD) a position of "Special Duty" Clerk. The duties of this position consisted of the following work: Going through all the receiving records at CD Office for most of the loaded tanks of oil, also most of the empty tanks that are in oil service; looking up the forwarding records; taking all symbol numbers that are shown and telephoning these records on the empties to Mr. Moss and on the loads to Mr. Dolson; watching all incoming records during the day for groups of five or more of one kind of symbol and after the cars are forwarded, telephoning this information to Messrs. Moss and Dolson so that they may wire Washington of the movement. Looking up any cars that Messrs. Moss and Dolson may have that are not covered by previously furnished report; answering telephone and looking up no-bill records; checking tank train moving direct down the main line to St. Louis.

On September 11, 1942, the Carrier created a position at the same location and in the same seniority district with a title of "Tracing Clerk," rate \$6.83 per day. The duties of this position consisted of the following work: Going through all the receiving records at CD Office for most of the loaded tanks of oil, also most of the empty tanks that are in oil service; looking up the forwarding records; taking all symbol numbers that are shown and telephoning these records on the empties to Mr. Moss and on the loads to Mr. Dolson; watching all incoming records during the day for groups of five or

Examination of the payrolls for February 1922 and April 1927 and conversation between Mr. Turner and the Local Chairman in his office developed that the present position is in reality a reincarnation of the 'Claims and Miscellaneous' position abolished sometime after April 1927, modified to meet present day requirements. The payrolls for the particular dates referred to were chosen because the present contract is dated February 1, 1922 and former Assistant to General Manager Harman furnished the organization with a list of all positions in April 1927, at which time there was a general increase of 29 cents per hour to clerical forces.

The application of Rule 66 of the Clerks' agreement and the facts developed in the conference warrant reclassification of the position. We will allow the \$6.09 rate effective as of November 1 and will immediately rebulletin the job.

Yours very truly,

(Signed) John A. Wicks  
Director of Personnel."

The grievance involving the rating of the Tracing Clerk position in the CD Yard seniority district, covered by this submission, was handled after we had reached the agreement about the application of the same rule in connection with the position in the Car Service Department.

**POSITION OF CARRIER:** Our position is fully set out in the correspondence exchanged with the General Chairman, copies of which are attached hereto. Particular attention is called to the statements in letters of December 1, and December 7, 1942 and January 26, 1943 about the ethics of the organization's claim. It will be noted that when they could not prove the claim under their own interpretation of Rule 66, they resorted to other avenues.

As explained in the correspondence, the \$7.05 rate in the CD Yard seniority district was established sometime ago for the sole purpose of covering "special duty" assignments and the rate was made sufficiently high to enable us to use men of proven ability to perform yardclerk work of any caliber so as to avoid arguments about assignment to higher rated work. As also explained, the "special duty" assignment is only invoked when we have special work or are not certain as to the work involved. The latter is what happened when we started to trace oil shipments for the Office of Defense Transportation. As soon as the position assumed a specific character, it was advertised accordingly. The job turned out to be a reincarnation of the tracing clerk job abolished some years previously and, as stated before, was rated according to the organization's own interpretation of the application of Rule 66. It is ridiculous to contend that the "tracing clerk" position should carry the "special duty" rate.

**OPINION OF BOARD:** Inasmuch as Rules 59 and 66 are relied on by the parties, for convenience, said Rules are quoted at this point:

"Rule 59. New Positions.—The wages for new positions shall be in conformity with wages for positions of similar class or kind in the seniority district where created."

"Rule 66. Established Positions.—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 rates of pay or evading the application of these rules."

On August 7, 1942, one Walker was assigned to special work in the Eads-East St. Louis Seniority District at a daily wage rate of \$7.05. The work to which he was assigned was that of tracing tank car shipments for the Office of Defense Transportation, and he continued in his employment until September 18, 1942. Petitioner, in his original statement of his claim, con-

tends that the position of a "Special Duty" Clerk was created, but later changed his claim to one that a position abolished in 1930 had been re-established. The position of the Carrier is that no established position in the seniority district, carrying a wage rate of \$7.05, existed, or was created on August 7, 1942, or thereafter; that its agent had floating authority for a rate of \$7.05, for Special Duty Clerk, which was used in connection with temporary work of various types, and that to create a new position, payroll authority for the position and rate of pay was required; that when it became necessary to develop special information for the Office of Defense Transportation, in connection with the movement of tank cars, Walker was assigned to this special duty; that later the position of tracing clerk for the same work was bulletined at the rate of \$6.88 per day.

On September 11, 1942, the position of tracing clerk at the rate of \$6.83 per day was bulletined, and bid in by the petitioner, who began work on September 18, 1942. He protested the rate of pay, and, in the ensuing controversy, it developed that in 1927 a position of tracing clerk had existed in the Seniority District, and had been abolished that year; thereupon, the Carrier, on November 12, 1942, proceeding under Rule 66, rebulletined the position at a rate of \$6.62, demonstrating that, considering wage adjustments, such rate was proper as applied to the formerly existing position of tracing clerk. This rate is also protested. The claim of the petitioner is that under Rule 59 the position should carry a wage rate of \$7.05, and that he should be paid the difference between that sum and the rates he has been paid.

It is interesting to observe the shifting positions of the parties to this controversy. Petitioner's original position was that, "On September 11, 1942, the Carrier created a position at the same location and in the same Seniority District with a title of 'tracing clerk,' rate \$6.83 per day," and the General Chairman refers to a "new position" in his letter of September 24, 1942, addressed to the Carrier, and to which the Carrier replied on September 29, 1942. The Carrier's letter merits quoting as clearly stating its position:

"When we started tracing the oil shipments for the Office of Defense Transportation at CD yard we thought that the job would be temporary and, inasmuch as we did not know just what would be involved, we paid the 'special duty' rate of \$7.05 per day established by former Agent Maher in order that the incumbent would be capable of doing any and all kinds of work. However, after a trial period it developed that nothing would be required of the incumbent of the position but tracing and, inasmuch as that phase of the work had to be continued, we advertised the job for bid. We naturally advertised it at the rate applicable to the class of work required."

A conference was held, and other aspects of the situation developed. The General Chairman seems to have discovered that a position of a similar nature to that bulletined, referred to as "No Bill Clerk," had been abolished in 1930. This position was different from the position of Tracing Clerk abolished in 1927, and allowing for wage adjustments, carried a wage rate of \$7.26. The General Chairman, with this position in mind, wrote a letter to the Carrier on October 5, 1942, in which he says:

"The purpose of the conference was to discuss the employees' request that the rate of pay of the position bulletined by Agent Wilson on September 11 under his Bulletin No. 16 be adjusted to conform with the rate of pay of a similar position which was abolished in 1930 and which position prior to its abolishment was known as 'No Bill Clerk.' This position was last held by Clerk Rolf and at the time of its abolishment carried the rate of pay of \$6.06 which with the increases of August 1, 1937 and December 1, 1941, would bring the present rate to \$7.26 per day."

and further in the same letter:

"We do not admit that this is a new position, but we contend that it is the reestablishment of an old position which was abolished in 1930 and is being re-created under a different title covering relatively the same class of work, as the abolished position, for the purpose of reducing the rates of pay which is in violation of Rule 66 which is quoted herewith."

Then on October 12, 1942, the Carrier, altho expressing its belief that Rule 59 should govern, finally agreed that Rule 66 might be applied, but sought to apply the Rule to the tracing clerk position abolished in 1927, rather than to the "No Bill Clerk" position abolished in 1930. At this point both the petitioner and the Carrier were in agreement that Rule 66 should govern, but they differed widely as to the position to which it should be applied. The Carrier now adheres to its contention that the job bulletined on September 11, 1942, was a re-establishment or reincarnation of the tracing clerk position abolished in 1927, and that, as applied thereto, \$6.62 is the proper rate of pay; while the petitioner has reverted to his original position that a new position was created, and that the rate of pay should be the same as that paid Walker, who performed the work required under the position from August 7, 1942, to September 18, which, it is contended, would be the correct application of Rule 59, and did this as early as November 30, 1942.

The parties were never discussing the application of either Rule 59 or 66, as applied to the same situation. In the first instance, the petitioner wanted Rule 59 applied, but when it was discovered that the work required to be done was of a nature similar to work performed in former years, by persons whose positions had been abolished, one in 1927 and the other in 1930, and that the position abolished in 1930, if re-created in 1942, would carry a wage rate in excess of that which he could obtain under his original claim, changed his position and relied on Rule 66. When he did this, the Carrier yielded to his contention, but sought to apply the rule to the position abolished in 1927, which carried a lower wage rate, and lower than the rate bulletined on September 11, 1942. Both parties assumed the role of opportunists. We think this case should be decided according to what we conceive to be the rules of common sense and justice, and without regard to the changing attitudes of the parties.

We do not think the Carrier had in mind what it terms the "reincarnation" of the tracing clerk position, which it had abolished in 1927, when it bulletined the position Walker had been filling on September 11, 1942. If it had, why did it fix a rate of pay of \$6.83 per day, a sum in excess of that which the former position rated, and not the \$6.62 rate? We think it may fairly be assumed that if the old position was intended to be used in determining the rate of pay, the \$6.62 rate would have been bulletined and not the higher rate. True, the position bulletined was for a tracing clerk, but we do not think this necessarily means that it was intended to re-establish the old position. The long lapse of time argues against this. We think it was intended to create a new position, and to fix the rate of pay "in conformity with wages for similar class or kind in the seniority district where created," as required by Rule 59. No such position being in existence in the seniority district, there was no criterion to operate as a guide other than the rate fixed on August 7, 1942, and paid to Walker. If it was a new position, then resort could not be had either to the old tracing clerk position or the bill clerk position abolished in 1930, and we are left solely to what the agent did when he assigned Walker to the position in question.

The work set up on August 7, 1942, was made necessary by the war emergency, and under the agent's floating authority, he fixed the rate of pay at \$7.05. In the very nature of things, it could not have been contemplated that the job would be temporary. It was work in connection with the Office of Defense Transportation in tracing tank cars. Its nature would not materially

change, nor the work likely cease during the duration of the emergency. This being true, we think the position should have been given the \$7.05 rate of pay, and therefore the petitioner's claim should be sustained.

We reach this result on two grounds: First, we think the judgment of the agent in fixing the rate of pay in the first instance is the safest criterion for determining the proper rate under the conformity rule; and, second, we are not impressed with the wisdom or the justice of resorting to rates of pay applying to positions which have been abolished for fifteen years. Failure to use the position for such a period of time makes it unlikely that it was ever intended to resurrect it at the time the emergency situation made the new work necessary.

**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 employe involved in this dispute are respectively carrier and employe 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 has violated the current agreement in not treating the position created and bulletined on September 11, 1942, as a new position; and, under Rule 59, in not fixing the rate of pay at \$7.05 per day, in conformity with the rate allowed for the position prior to the date the same was bulletined. Payment to petitioner to begin as of September 18, 1942.

#### AWARD

- Claim (1) sustained.
- Claim (2) sustained.
- Claim (3) sustained as of September 18, 1942.
- Claim (4) sustained as of September 18, 1942.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

ATTEST: H. A. Johnson  
Secretary

Dated at Chicago, Illinois, this 16th day of June, 1943.