

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**

THE WESTERN PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that the negotiated and proper rate of pay for position of Chief Clerk in Freight Claim Department is \$286.72 per month; that this rate shall now be paid to occupant of position of Chief Clerk and that W. R. Sweet and all other employees adversely affected by reason of failure of Carrier properly to apply terms of the wage agreement of 1927 be compensated for wage loss sustained since April 1, 1929.

EMPLOYES' STATEMENT OF FACTS: As of December 31, 1926 the rate of pay of position of Chief Clerk, Freight Claim Department was \$250.00 per month. In wage agreement of 1927, page seven thereof shows the rate raised to \$256.12.

Through application of National Mediation Board Case No. A-395 of August 5, 1937, this rate became \$266.32.

Through application of wage settlement of December 15, 1941 the rate of this position became \$286.72.

Effective April 1, 1929 Carrier reduced this rate of pay through unilateral action to \$225.00 per month; this rate eventually becoming \$255.00 as of January 1, 1942.

There is no agreement in effect permitting this reduction.

POSITION OF EMPLOYES: There is in evidence an agreement between the parties bearing effective date of October 1, 1930 from which the following rules are cited:

"Rule 6. An established position shall not be discontinued and a new one created under a different title covering relatively the same class of work for the purpose or with the effect of reducing the rate of pay or evading the application of these rules."

"Rule 7. Positions (not employees) shall be rated and the transfer of rates from one position to another shall not be permitted."

"Rule 10. Employees assigned temporarily to higher rated positions shall receive the higher rate. Employees assigned temporarily to lower rated positions shall not have their rates reduced."

Carrier contends:

- (1) At all times, the rate of pay has been adequate and commensurate with the duties and responsibilities existing on the position of chief clerk, office of freight claim agent.
- (2) There is no mandatory or other requirement in the schedule obligating carrier to confer with the authorized representative of clerical employees in the rating and handling of Rule 2 excepted positions.
- (3) That the employees acquiesce in the contention expressed in (2) is evidenced by the fact that the basic rate of \$225.00 per month was in effect for approximately thirteen years prior to the general chairman's letter of April 14, 1942.

OPINION OF BOARD: For a complete understanding of all elements of this dispute it is necessary to go back to January, 1924. At that time the Carrier had in its employ, in its Freight Claim Office, a Chief Clerk, whose basic pay was \$219.08 per month, and an adjuster whose pay was \$209.08. It is claimed by the Carrier that, effective December 1, 1925, there was added to the Chief Clerk's duties and responsibilities the work of handling and supervising perishable claim adjustments; and that in view of this situation, the pay of the Chief Clerk was voluntarily raised by the Carrier to \$250.00 per month. The Carrier having agreed to be bound by an arbitration award affecting employees of the Southern Pacific Company, increased the pay of the Chief Clerk to \$256.12, effective January 1, 1927; and on January 1, 1928, by its voluntary action still further increased the pay to \$275.00, at which figure it remained until April 1, 1929, the date to which we are asked to relate this claim.

According to the claim of the Carrier, its business of handling perishable freight had by April 1, 1929, increased to such an extent that the Chief Clerk was unable to continue the adjustment of the so-called perishable claims, and at the same time handle his clerical and supervisory duties. In this situation, the position of Assistant Freight Claim Agent was created on said date, the duties of which included the handling of perishable claims, and, it is contended, relieved the Chief Clerk of that duty. The then incumbent Chief Clerk was promoted to the position of Assistant Claim Agent, and W. R. Sweet, the person in whose behalf this claim is prosecuted, was promoted to the position of Chief Clerk at a basic monthly salary of \$225.00; and later, in line with wage mediation agreements reached in 1937 and 1941, increases of \$10.20 and \$20.40 were granted, the last effective December 1, 1941, making the pay \$255.60 from and after the last mentioned date. However, it is the contention of the Carrier, that subsequent to the current Clerks' Agreement, effective October 1, 1930, the position of Chief Clerk was outside the Agreement; and that the increases made after that date were not made by reason of the requirements of the two mediation wage agreements, but on a voluntary basis, and solely in order to keep salaries of employees in line with each other.

The Brotherhood vigorously combats this contention, and says that the fact that subsequent to October 1, 1930, the position of Chief Clerk may have been outside the agreement of that date, such a situation had nothing whatever to do with the wage agreement effective January 1, 1927, which, it contends, fixed the monthly wage of the Chief Clerk at \$256.12, and which subsequent advances increased to \$286.72; and that the unilateral action of the Carrier in reducing the monthly salary of this employee from \$256.12 to \$225.00 on April 1, 1929, was a violation of the wage agreement aforesaid, and, on this basis, makes the claim that Sweet, who occupied the position of Chief Clerk from April 1, 1929, to March 21, 1942, should be paid the sum of \$31.12 for each month of such period.

It is interesting to note that what the Carrier did in reducing the salary of the Chief Clerk on April 1, 1929, was, in effect, to restore the salary for such position to what it would have been had the claimed voluntary increases not been made. Prior to the first of these increases the monthly salary was \$219.08 and if we add the \$6.12 increase of January 1, 1927, we have \$225.20.

We are unable to agree with the contention of the Carrier that the current agreement of October 1, 1930, served, in effect, to destroy the right of employes not covered by the agreement to the benefit of wage agreements made in their behalf while they were covered by the Clerks' Agreement. Carrier admits that prior to October 1, 1930, the position of Chief Clerk was covered by the Clerks' Agreement, and, in our opinion, the basis of pay, as it existed prior to October 1, 1930, would ordinarily govern. If that were the simple question presented, we would have no difficulty with the case. But the case is not that simple, for reasons we shall discuss.

Unquestionably the basic rate of pay for the Chief Clerk, prior to December 1, 1925, was \$219.08 per month. The Carrier was under no compulsion to increase that rate. It says that on that date it imposed additional duties, outside and different from the regular duties, on this employe, and for that reason voluntarily increased his pay to \$250.00 per month. There is no showing in the record even tending to show the falsity of that statement. True, it is argued, that it is improbable that this was the reason for the increase, but that is insufficient to warrant us in holding the statement to be untrue. When the pay was increased \$6.12 per month on January 1, 1927, it was added to the \$250.00 pay, making the total \$256.12. A year later, and without compulsion from any source, the Carrier, it says voluntarily, increased the pay to \$275.00, because of increased duties in relation to perishable claim adjustments falling on the Chief Clerk. By April 1, 1929, still according to the Carrier's claim, the perishable claim adjustment work became so heavy that it became necessary to divorce it from the Chief Clerk's position, and a position of Assistant Claim Agent was established. The then Chief Clerk was promoted to the newly established position, and it became necessary to select some one for the Chief Clerk's position so vacated. After that date the duties of the Chief Clerk were clerical and supervisory. He had nothing to do with the adjustment of claims, although as pointed out in argument, his duties may have required him to check the payment of claims after they had been adjusted.

W. R. Sweet was selected for the position of Chief Clerk, and was told that his basic monthly pay would be \$225.00, a sum in excess of that he had been receiving from the Carrier for other work. The Carrier says that it was definitely understood by Sweet, through conversation he had with the then Freight Claim Agent, that his salary would be \$225.00 per month, and that his duties would be confined solely to handling routine office matters, and that he would not be expected to handle or settle perishable or livestock claims. It is further contended that Sweet's experience did not qualify him for claim adjustment work.

Sweet denies that anything was ever said to him about any difference in the duties of the Chief Clerk to be performed by him, from those previously performed in that position; but he nowhere contends that he did any claim adjustment work, other than that of checking claims in his office before making payment. We are asked to believe, from his written statement in the record, that he was merely told that he had been appointed Chief Clerk, and that his salary would be \$225.00 per month and nothing more; and that at no time prior to April, 1942, did he know that the agreed upon rate of pay for his position was \$256.12 in 1927. Aside from the difficulty we encounter in believing that a man, so long and so intimately associated with the Freight Claim Office, would know so little about the salary paid to its Chief Clerk,

doubt is thrown upon his statement by the fact that he did know that the salary of the Chief Clerk for the month of February, 1929, was \$275.00; for, acting for the Chief Clerk, he signed the payroll for that month, which stated that fact. He signed, for the Chief Clerk, payrolls for the months of January, May, June and October, 1928, all of which indicates that he must have known the salaries being paid. Appraising the record as a whole, we reach the conclusion that, when Sweet accepted the position of Chief Clerk, he did so with full knowledge of all of the facts which this dispute has developed.

This alone might not have barred a claim seasonably presented. Had he protested, or filed a claim within a reasonable time, his claim would have been entitled to consideration. Even then, the question of what was the basic rate of pay would have been presented. If voluntary increases in pay for increased work did not, in the circumstances, operate to increase the basic rate of pay, as the referee is inclined to believe, then that rate prior to January 1, 1927, was \$219.08, and \$225.20 thereafter, until the increases made in 1937 and 1941. Those were the only rates of pay fixed either by agreement or arbitration. But he did not protest. For thirteen years, lacking ten days, he accepted the salary paid him, including two increases in pay, without complaint, either to his employer or to his Brotherhood. Only after he was removed from the position did he raise the question. True, the question is raised by the Brotherhood, but the Organization stands in no higher position, with reference to the claim, than does the person in whose behalf it is filed. Long and continuing violations of an agreement do not operate to change it, but acquiescence therein for long periods, as in this case, ordinarily sets up a bar to any claim therefor, especially wage claims. Numerous awards so hold. In Award No. 2137 of this Division, it was held:

"It is true that repeated violations of a rule do not change it. But repeated violations acquiesced in by the employes may bring into operation the doctrine of estoppel. This is particularly true when the controversy concerns simply rates of pay. Wages are not accepted over a long period of time without protest if an employe believes that he is not receiving what is due him. Employes should not permit an employer to continue in the belief that the agreement has been complied with and then after a long lapse of time enter a claim for an accumulation of pay. Awards 1289, 1806, 1811."

The Board is not convinced that there has been a violation of the rule. We think the circumstances of this case differentiate it from cases where a party to an agreement, by unilateral action, violates the same. Here, as between the Carrier and the Employe, we think there was an agreement; but, the contract being between the Carrier and the Brotherhood, such an agreement will not be recognized, because to do so would weaken if not destroy collective bargaining. See Awards 522 and 524, this Division. However, we do not base our decision on any agreement between the Carrier and the Employe. It is the Employe's acceptance of his position, and the salary paid him for the long period of thirteen years without complaint, that on the ground of laches, estops him from now asserting his claim; and what he cannot do directly, cannot be done, indirectly, through the Brotherhood. On this basis alone, if none other existed, the claim will be denied.

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 Employee and the Brotherhood, as his representative, are barred by the laches of the Employee from maintaining the claim filed.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 13th day of August, 1943