

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Jay S. Parker, 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 Clerks that the carrier violates the rules of the Clerks' Agreement when it fails and refuses to bulletin position of Stockkeeper at Hornell, New York, at the basic rate of pay therefore, and

That carrier shall now rebulletin this position and all others that have not been properly bulletined in accordance with the rules of the Clerks' Agreement.

EMPLOYES' STATEMENT OF FACTS: On December 27, 1943 position of Stockkeeper, Oil House, Hornell, New York was advertised in Bulletin No. 156 showing rate of pay as follows:

"No previous experience	67¢ per hour
Six to nine months as Stockkeeper	68¢ per hour
Over nine months as Stockkeeper	72¢ per hour"

The correct established rate of pay is 72¢ per hour. Copy of Bulletin No. 156 is shown as Employees' Exhibit "A."

POSITION OF EMPLOYES: There is in effect between the parties an agreement bearing effective date of December 1, 1943 which contains the following rules:

Rule 7 (Bulletin) reads as follows:

"(a) Except as otherwise provided new positions or vacancies will be promptly bulletined in standard form as shown on page 17 and posted in places accessible to all employes affected in the seniority district where they occur for a period of five (5) days, less if agreed to.

"(b) Employes desiring such positions or vacancies must prepare their applications in duplicate in standard form as shown on page 18 and file same within the specified time, forwarding both copies to the designated official, who will send one copy to Division Chairman.

"(c) The successful applicant will be notified within five (5) days from close of bulletin and a bulletin in standard form as shown on page 19 designating the name of this applicant will be prepared and posted for a period of five (5) days where the position was bulletined.

We note that you propose to refer this matter ex parte to the Third Division, National Railroad Adjustment Board. This matter is not one of interpretation of a rule of negotiated agreement, but rather is a request for a change in practice that has existed for many years and was in effect when Rules and Regulations September 1, 1936 were negotiated, and has continued in effect since that time under Rule 35 of Rules and Regulations September 1, 1936, which provide that existing rates would be continued in effect. Therefore, under the Railway Labor Act this request for a change in basis of pay is one of negotiation and not a question properly referable to the National Railroad Adjustment Board.

Yours very truly,

(signed) D. J. Maley,
Assistant Vice President."

POSITION OF CARRIER: Obviously this claim by the Brotherhood is an attempt to have the Third Division by an award cancel a rate schedule that has been in effect for many years prior to Rules and Regulations September 1, 1936, and has continued in effect for approximately eight years without protest or request for change by the Brotherhood.

This schedule of rates for stockkeepers was fully known to the employes and to the Brotherhood and all vacancies have been advertised and filled in accord with this rate schedule.

The Carrier maintains, and we believe rightfully so, that under the Railway Labor Act, amended, this request for a change in basis of pay is a question of negotiation and is not a matter of interpretation of rule to be decided by the Third Division.

The Carrier therefore objects to this question being docketed by the Third Division.

OPINION OF BOARD: On December 27, 1943, the position of Stockkeeper located at the oil house, Hornell, New York, was advertised by Bulletin No. 156, showing the rate of pay for the position to be as follows: No previous experience, 67¢ per hour; 6 to 9 months as stockkeeper, 68¢ per hour; over 9 months as stockkeeper, 72¢ per hour.

The claim alleges violation of the Agreement in failing to bulletin the position at 72 cents per hour, which is conceded to be its basic rate, and asks that it and all others that have not been properly bulletined be rebulletined. Likewise conceded is the fact the position was filled by a laborer promoted to the stockkeeper position and not by the hiring of a new employe.

The Petitioner's claim is based on a violation of three rules. The pertinent portions thereof read:

"Rule 7 (a). Except as otherwise provided new positions or vacancies will be promptly bulletined in standard form as shown on page 17 and posted in places accessible to all employes affected in the seniority district where they occur for a period of five (5) days, less if agreed to."

"Rules 32. Positions (not employes) shall be rated and the transfer of rates shall not be permitted, except by agreement between the Management and the General Chairman or their representatives."

"Rule 36. When new Group 1 employes are hired, their minimum probationary rate will be eighty (80) per cent of the established basic rate, and will be increased to the basic rate authorized for the position on the following basis:

Second Three (3) calendar months—minimum of 85% of basic rate.

Third Three (3) calendar months—minimum of 90% of basic rate.

Fourth Three (3) calendar months—minimum of 95% of basic rate.

"The basic rate will be effective at the end of one (1) year period."

The Carrier relies on Rule 35 of a former Agreement and the first portion of Rule 33 (a) of the current one, containing identical language, and alleged past practice in bulletining positions and rating them during the last twenty-two years in a similar manner. For informative purposes we quote Rule 33 (a):

“Except as otherwise agreed to, the present basis of pay (monthly, daily or hourly) will continue in effect. The conversion of monthly, daily or hourly rates to a different basis shall not operate to establish a rate of pay either more or less favorable than is now in effect.”

Perhaps of minor consequence as a decisive factor, although it should be noted, is the fact the Brotherhood did not become the representative of the Storehouse employes until March 6, 1935.

There is some dispute between the parties as to whether step rates for stockkeepers have been treated by them as in effect for the period claimed by the Carrier and, if so, whether they have been shown in prior bulletins in the manner and form disclosed by the one here involved. Assuming for our purposes the correctness of the Carrier's contention that such has been the situation and assuming further for the same purpose that no contention has been raised by either employes or the Brotherhood with respect to the practice, there still remains the question of whether the terms of the current Agreement are being violated by its indulgence. If so, long continued acquiescence or failure to object is not a good defense. This Division is committed to the doctrine, now so well established as to require no citation of awards that, regardless of the prior conduct and attitude of the parties with respect thereto, neither acquiescence nor inaction will defeat a claim predicated upon violation of a current Agreement if it appears the terms thereof prohibit the action which is challenged and the rules relied upon as having that effect have actually been violated. We, therefore, turn directly to an examination of the pertinent rules.

At the outset it must be noted that Rule 36 provides for probationary rates, which are nothing more or less than step rates, when new Group 1 employes are hired. Since an employe from Group 2 was promoted and assigned to the position, it must be conceded that Rule is not directly involved. Nevertheless, it indicates the parties, in executing the Agreement, had step rates in mind and is highly significant when after examination of the entire Agreement it appears there is to be found therein no provision providing for or recognizing step rates for employes having seniority rights. It is significant also for another reason in that it refers to 80 per cent of the **established basic rate** and provides such **basic rate** will be effective as to new employes at the end of one year period. The language to which we have just referred gives foundation for the conclusion that so far as employes having seniority rights are concerned, the Agreement contemplates that one basic rate only for the position involved shall be applicable to them.

What we have just said is not decisive of the issue. It merely gives force to what we are about to say with respect to the rule we have decided does have that result. Rule 32 provides in part: “Positions (not employes) shall be rated.” To elucidate, as we understand the rule, it simply means that positions, not employes, shall be rated at an invariable rate of pay. To go one step further, it implies that every position, unless express provision to the contrary is provided for elsewhere in the Agreement, shall have one basic rate of pay and one only. That in this case is conceded to be 72 cents per hour. Thus regarded, what is to be said for the Carrier's action in bulletining the position of Stockkeeper in the manner heretofore described. For all practical purposes as we view it, the result must be one of two things, or perhaps both. Any other conclusion is inescapable. One is that by including after the title “Rate of pay,” as it appears in the standard form, the limitation, “No previous experience 67¢ per hour, 6 to 9 months as a stockkeeper 68¢ per hour, over 9 months as stockkeeper 72¢ per hour,” it was in effect bulletining three rated positions. The other, that by the use of such phrase-

ology it was actually, even though the employe was not yet ascertainable, rating the employe from the standpoint of length of service, and not rating the position. In any event, regarded as bulletining three positions and/or rating the employe instead of the position, the action resulted in a clear and indisputable violation of Rule 32. It necessarily follows that proper compliance with the Agreement required the position to be bulletined at the basic rate of 72 cents per hour.

It is urged that portions of the claim relating to all others that have not been properly bulletined should be dismissed because the facts of record pertain only to the position at Hornell. As, has been heretofore indicated, the claim involves violation of the Agreement and compliance with its terms but only to the extent that all positions bulletined in violation of the rules found to have been disregarded should be rebulletined. Under such circumstances we find nothing in the law or in our awards to preclude the sustaining of the claim in its entirety.

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

That both parties to this dispute waived hearing thereon;

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 Carrier violated Rule 32 of the current Agreement in bulletining the position of Stockkeeper at Hornell in the manner and form disclosed in the Opinion.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson,
Secretary

Dated at Chicago, Illinois, this 2nd day of March, 1945.