

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

LeRoy A. Rader, Referee

PARTIES TO DISPUTE:

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

THE CHESAPEAKE AND OHIO RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that the position with title of Clerk located at the 23rd Street Freight Depot, Newport News, Va., now rated at \$9.39 per day and working under the jurisdiction of the General Agent be classified, rated, advertised, and assigned in accordance with the terms of the Clerical Agreement, the proper title being that of Assistant Cashier, and the rate being not less than \$12.19 per day, as of 9/1/47, and that all employees who have suffered wage loss by reason of the improper handling of this matter be compensated for any and all such wage loss sustained, retroactive to July 23, 1941.

EMPLOYEES' STATEMENT OF FACTS: On July 23, 1941, Superintendent Spengler of Newport News-Norfolk Seniority District issued Bulletin No. 347 advertising position "Clerk", rate \$5.15 per day (present rate being \$9.39 per day) duties reading as follows:

"Prepare Forms AF 449-A and AF 449-B and assist cash clerk.
Applicant must be proficient in use of typewriter."

Under date of July 30, addendum to Bulletin No. 347 was issued, awarding the position to C. R. Chappell.

After being assigned to this position, the employee found that he was doing cashier's work and requested the Division Committee to take up the matter in an effort to have the position properly titled and rated. This was done by the Committee, the Superintendent declining the claim September 4, 1944, stating there was no justification for changing the rate of pay or classification of the position in question. The claim was then appealed to Mr. Parrish, Vice-President, who likewise declined same.

POSITION OF EMPLOYEES: It is the position of the employees that, among others, rules 3, 4, 6, 11, 14, 44, 45, 46, 47, 65 and Memorandum Agreement No. 6 have been violated in the failure and refusal of the Carrier to properly classify, rate, advertise and assign position designated as "Clerk", but in fact being that of "Assistant Cashier."

We quote for the information of the Board the following rules:

Rule 44—Maintaining Rates

"When there is a sufficient increase or decrease in the duties and responsibilities of a position or change in the character of service

It was the opinion of Railway Company Officers that the position of Clerk (here in dispute) and position of Assistant Cashier at Norfolk were positions of similar kind or class, and even though the position of Assistant Cashier at Norfolk was not in existence at the time the position of Clerk (here in dispute) was established, the Railway Company offered on April 8, 1948, to increase the rate on position of Clerk (here in dispute) from \$9.39 to \$10.54 per day with appropriate retroactive adjustment to July 23, 1941 (page 8 of Carrier's Exhibit "B"). On April 18, 1948, the General Chairman of the Clerks' Committee declined this offer (page 9 of Carrier's Exhibit "B").

This Board has held in many instances that the responsibility of fixing an appropriate rate of pay rests, in the first instance, upon the Carrier; but such rate may be protested by the Organization. This Board has also held that in the absence of positions of a similar kind or class, it may not establish or fix rates for new positions, but may only review the rates to determine whether there was any failure to comply with the rule—See Awards 1586, 1684, 2682, 2732, 2734 and others.

CONCLUSION

1. The position of Clerk (here in dispute) and the position of Cashier, rate \$12.19 are not positions of similar kind or class as contemplated by Rule 46 (a) of Clerks' Agreement No. 6.
2. There was no failure on the part of the Railway Company to comply with the rules of Clerks' Agreement No. 6 when the position of Clerk (here in dispute) was established on July 23, 1941.
3. The Railway Company made a fair and just offer in offering to increase the rate on the position of Clerk (here in dispute) from \$9.39 to \$10.54 per day, which is the rate of Assistant Cashier at Norfolk on the same seniority district.

For the above reasons, the claim should be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: This claim is based upon the fixing of a proper rate for a position, the duties of which, with relation to its comparable standing with like positions, has been a matter of controversy for a number of years. Apparently both parties recognized that the rate did not sufficiently meet the situation as an adjustment was offered by the Carrier which was refused by Petitioner on April 14, 1948. The offer made was to reclassify the position and establish a rate of \$10.54 per day, it being contended by the Carrier that the position was comparable to that of Assistant Cashier, a newly created position established in the same seniority district, (Norfolk).

On behalf of the Carrier there was urged the defense of laches in the prosecution of the claim and that it comes within the category of claims which have been the basis of denials by reason of being so-called "stale claims". In support of this theory there was cited the record of various delays in which the claim was in a dormant status for months at a time and Awards 213, 905, 1289, 1606, 1609, 1806, 2281, 3603 and others.

If the claim falls within that category of cases which have been denied by reason of being allowed to lie dormant for a long period of time it fails on the authority of the findings in the awards cited. However, it will be noted in a number of the awards so holding that it is stated that mere delay will not preclude consideration by the Board, and legally there is no bar by limitations set up in the Railway Labor Act. Therefore, the rule of law to be applied differs from that presented under governing laws which provide for a statute of limitations; penalties for laches and setting up the doctrine of estoppel. Suffice to say here that the rule to be applied in the determination of alleged "stale claims" is that of reasonableness in view of the entire fact situation. In other words, it is a matter to be decided entirely on the factual situation presented and the injury sustained, if any, to those affected by delayed prosecution of any given claim.

Apparently, in the instant case it has been contended for a period of approximately eight years that the rate originally established for the position in question was not correct. It has been a matter of controversy over practically the entire period of time since its creation. There have been times in which the claim lay dormant, one such occasion cited by the Carrier being of 26 months duration. However, subsequent to that time Carrier did offer an adjustment in the fixing of the rate.

One reason which may have been a factor in the claim being in a dormant status is that there has been for years a controversy as to duties in other positions which could be considered comparable to the one in question.

On the merits of the claim, the actions of the parties conveys the decided impression that the rate fixed was too low, taking into consideration the nature of the duties performed.

By reason of the delay in prosecution based solely upon the reasonableness presented in the factual situation involved, it is extremely questionable if the claim can be construed to carry with it retroactive consideration as to the date given in the claim and as to its application to all employees as requested as follows:

"* * * and that all employees who have suffered wage loss by reason of the improper handling of this matter be compensated for any and all such wage loss sustained, retroactive to July 23, 1941."

It must be taken into consideration that there never has been an exacting meeting of the minds of those handling negotiations in seeking to establish a just rate as to the proper yardstick to use in fixing the rate.

In view of the continued negotiations on, the rate to be established offers and counter-offers, rejections, delays, etc., it would seem that in sustaining this claim its retroactive application should extend only back to June 15, 1945, when the matter was finally presented after the duties of the position had been clearly established and which presentation and request was refused by the Carrier (August 20, 1945).

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 Employees involved in this dispute are respectively carrier and employees 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 the Agreement; the claim is sustained but is modified as to its retroactive application.

AWARD

Claim sustained but modified as to its retroactive application in accordance with the Findings set out above and limited to June 15, 1945.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 29th day of November, 1948.