Award No. 4731
Docket No. CL-4793

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Francis J. Robertson, Referee

PARTIES TO DISPUTE:

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

MISSOURI PACIFIC RAILWAY COMPANY
(Guy A. Thompson, Trustee)

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes on the Missouri Pacific Railroad, that the Carrier violated the Clerks' Agreement:

1. When following establishment of General Superintendent's District Accounting Office, Western District at Kansas City, Missouri, which was completed on or about January 12, 1932, the Carrier, on a date not presently available to the Employes, created a position of Stenographer on a part time basis or authority for fourteen days each month; and

2. Refused and continued to refuse to establish the position upon a full time basis and advertise and assign it to the employes as contemplated by Agreement provisions.

3. That the Carrier shall be directed by appropriate order and award to comply with Agreement provisions in accordance with the understood and accepted and agreed upon construction of same.

EMPLOYES' STATEMENT OF FACTS: During February of 1949 it was called to the attention of the General Chairman that the Carrier had in effect in the General Superintendent's Western District Accounting Office at Kansas City, Missouri, an arrangement whereby a position of "extra" or "additional" Stenographer was being used each month, over and above the regular force for a period of fourteen or more days during the peak work periods of each month. Some months we were advised the position was worked as many as twenty days and then it would be dispensed with.

On February 24, 1949, the General Chairman conferred with the General Superintendent of the Western District in his office at Kansas City, Missouri and discussed with that officer the arrangement which had just previously come to the General Chairman's attention of establishing a Stenographer position on a temporary authority of fourteen days per month and advised the General Superintendent that such an arrangement was contrary to the intent and purpose of a proper application of the Clerks' Agreement, that the issue or question here involved had been disposed of by agreement between the General Chairman and the Management of the Railroad through its Assistant General Manager in charge of labor matters a number of years ago when

"We think under the facts in this record the parties mutually agreed upon a practical interpretation as to the application of Rules 19 and 25 at the Biddle Street platform. In view of this there was no violation of Rules 19, 25, and 61."

Even if it is felt that acquiescence is not sufficient support for the practice complained of in the instant case, the Carrier has pointed out that the practice is not in violation of any of the provisions of the current agreement between the parties.

The employes have stated they recognize the right of the Carrier to abolish, but in this case we find them questioning this right and the objection is based on frequency and regularity rather than agreement provisions. Their complaint amounts to a demand that some employe's name be placed on the Carrier's payroll and such employe be paid for approximately twelve days each month when there is no work to be done. It is a demand for pay for time not worked.

The position of the Carrier is that there is no effective agreement provision to support this demand.

(Exhibits not reproduced.)

OPINION OF BOARD: About the first of January 1932 the Carrier effected a consolidation in its district office at Kansas City, the result of which was to require the service of extra help at peak periods. This brought about the employment of a stenographer regularly each month to assist the regular forces on an average of approximately fourteen days each month. The Employes claim that the Carrier in refusing to establish this position of stenographer on a full time basis and advertise the same is in violation of the Agreement.

There is no provision of the Agreement which has been called to our attention nor which we can find from a study thereof which spells out specific workload conditions under which the Carrier is required to establish and bulletin regularly assigned positions. Once such a position is established, there are many rules dealing with the perquisites attaching thereto, both with respect to the position itself and to the prospective and eventual holder thereof. To detail the same here would serve no purpose, for they are well known to those familiar with Clerks' Agreements and Awards of this Board. The Agreement recognizes that not all work must be assigned to employes holding regular assignments for it has a provision with respect to the performance of work by extra employes. It also recognizes the right of the Carrier to abolish positions and prescribes the procedure to be followed in doing so. It further recognizes that vacancies in positions of less than thirty days' duration may be filled without bulletining.

Although the Employes have pointed to many rules which they claim are violated by the Carrier's action herein, in our opinion, the rules which merit discussion in connection with this claim are 27 (b) (the so-called guarantee rule) and Rule 31 (b) providing that established positions shall not be discontinued and new ones created under different titles covering relatively the same class of work for the purpose of reducing the rate of pay or evading the application of the rules.

Rule 27 (b) is clearly a guarantee of six days' work per week to employes holding regular assignments, except in those weeks in which holidays occur or when reducing forces or abolishing positions. This Board has consistently held that the guarantee under the rule runs to the employe and not the position. There is nothing in that rule which can be read or implied which requires regularly recurring work in peak periods to be assigned on a monthly basis. Hence, we find no support for the Employes' claim in this rule.

With respect to Rule 31 (b), we find nothing in the manner in which an employe has been assigned to this work one month and then assigned to it each succeeding month with regularity as evading any rule. It may be true

that overtime work is lost to holders of regularly assigned positions. However, employes are not guaranteed any overtime by the Agreement and the fact that the Agreement contemplates the performance of work by extra employes indicates that it is the Carrier's prerogative to eliminate overtime by the use of such employes. It is also true that by Carrier's handling, a fairly sizable amount of work does not become subject to the application of seniority by regularly assigned employes. But we do not see anything in the Agreement which prohibits that. We cannot conclude, therefore, that Carrier's practice with respect to the assignment of this work is evasive of the rules of the Agreement. It may be conceivable that Carrier is taking full advantage of the rules of the Agreement in this instance. If the Employes feel that it is undue advantage, the remedy is by negotiation. Our function is to interpret and apply the rules of the Agreement as they are written. If at times they work a hardship upon either party, it is not within our power to change them or rewrite them.

It has been argued that Carrier has recognized this stenographer assignment as a regular established position in that it gives three days' notice of its termination each time the work is discontinued. This is the same notice period required under Rule 14 (b) when abolishing regular established positions. Carrier explains its reason for giving the notice in its reply to the Employes' submission. It is apparent that the reason therefor is to avoid liability for claims under Rule 14 (b). This may well be a misconception of Carrier as to its obligation under the Agreement but its explanation is a clear indication that the intent was not to recognize the assignment to this work as a regularly established bulletined position. Clearly, the notice, whether required or not under the circumstances, works some benefit to the employes. We cannot say that this action of the Carrier, under the circumstances as herein detailed, lends weight to the Employes' contention.

Considerable reliance has been placed by the Employes upon treatment by Carrier of somewhat similar situations at Osawatomie and Falls City in 1927 and 1934. If we were attempting to arrive at the interpretation of an ambiguous rule, that would be persuasive evidence of the intent of the parties in formulating the rule. Just as persuasive, however, would be the long acquiescence of the Employes in this Kansas City situation, particularly in view of the fact that the Falls City claim was presented and settled after the practice herein complained of, first came into existence.

We find no basis for sustaining the Employes' claim.

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 Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 24th day of February, 1950.