Award No. 4898
Docket No. CL-5007

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

KANSAS CITY TERMINAL RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(a) The Carrier violated the Agreement when it declined to bulletin relief positions which existed prior to September 1, 1949, as new positions in all instances where the character of the position was changed effective September 1, 1949; arbitrarily assigned the previous incumbents to such changed relief positions and declined to permit such changed relief positions and declined to permit such incumbents of relief positions to exercise displacement rights, and

(b) The Carrier shall now bulletin such positions, allow employes affected the opportunity to exercise displacement rights and pay to all employes affected the difference in earnings, retroactive to September 1, 1949, which may be due upon the proper bulletining of the positions in question and exercise of displacement rights.

EMPLOYES' STATEMENT OF FACTS: There is an Agreement in effect between the parties effective October 1, 1942, which has been amended by Memorandum Agreement dated September 13, 1946, and Supplemental Agreement dated August 23, 1949, the latter Agreement serving to revise the prior Agreement in accordance with the National 40-Hour-Week Agreement of March 19, 1949. Copies of the Agreement of October 1, 1942, as revised, have been filed with the National Railroad Adjustment Board and by reference are made a part of this Submission and Statement of Facts.

Rule 6 of the current Agreement (as revised September 13, 1946) reads as follows:

"RULE 6—BULLETINS

"New positions created or vacancies occurring will be promptly bulletined in agreed upon places accessible to all employes affected for a period of five (5) days in the seniority department where they occur (except Class 3, Freight Department and Class 3, Purchasing and Stores Department), bulletin to show location, title and description of position, assigned hours of service, assigned day of rest and rate of pay. Employes desiring such positions will file their applications with the designated official within that time, and an assignment will be made within five (5) days thereafter; the name of the successful

constitute a new position." This rule coupled with the language of Article II, Section 1(k), is explicit enough to cover the present case. Should the Carrier place the August 31, 1949, relief positions up for bid the incumbents would have a claim for taking their positions away from them under the express language of the Chicago Agreement.

No relief man was arbitrarily held on his relief position as there were 175 additional relief positions bulletined to place in effect a 40 hour work week for employes covered by the Clerks' Agreement.

(Exhibits not reproduced.)

OPINION OF BOARD: The Brotherhood and the Carrier were parties to what is now known as the 40-Hour Week Agreement of March 19, 1949. In order to place in effect the 40-Hour Week on September 1, 1949, as required by its terms it was, of course, necessary to revise individual agreements so as to make them conform therewith. The parties to this dispute entered into certain agreements in order to accomplish that result. Pursuant to these subsequent agreements they met and attempted to agree upon a revision of their then existing contract.

One of the rules on which they failed to agree was Rule 6 of their Agreement dealing with the bulletining of new positions and vacancies. This rule, as it then existed read:

> "New positions created or vacancies occurring will be promptly bulletined in agreed upon places accessible to all employes affected for a period of five (5) days in the seniority department where they occur (except Class 3, Freight Department and Class 3, Purchasing and Stores Department), bulletin to show location, title and description of position, assigned hours of service, assigned day of rest and rate of pay. Employes desiring such positions will file their applications with the designated official within that time, and an assignment will be made within five (5) days thereafter; the name of the successful applicant will immediately thereafter be posted for a period of five (5) days where the position was bulletined. Except as specifically provided in Rules 13, 14, 15, 16, nothing in this Agreement shall be construed as permitting senior employes to displace regularly assigned employes.
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> "The description of duties in bulletins covering Mail and Baggage Handler positions shall not prevent temporary changes in assignments in the course of a day's work which may become necessary because of irregularities in train arrivals and departures and volume of business to be handled."

The Carrier proposed that the foregoing rule should be revised so paragraph (k), Section 2, Article II, of the Agreement of March 19, 1949, would be included in and become a permanent part of the contract. Paragraph (k), just mentioned, read as follows:

> "Existing assignments reduced to a five day basis under this agreement shall not be considered new jobs under bulletin rules and employes will not be permitted to exercise displacement privileges as a result of such reductions. However, employes will be notified of their assigned rest days by the posting of notices or otherwise."

The local committee of the Brotherhood refused to agree to the incorporation of such paragraph in the Rules Agreement but nevertheless at all times acknowledged and conceded it was binding upon them for all purposes required by the conversion to the 40-Hour Week. Indeed the Carrier admits that fact by statements to the effect that although the employes would not agree to place paragraph (k) in the Agreement, they did agree to it in practice. Thereafter, and on July 29, 1949, the question whether the paragraph should be included in the Agreement as proposed by the Carrier was submitted jointly to the Disputes Committee established by Article VI of the 40-Hour W

Agreement. It is conceded that Committee has never taken any action with respect to the matter so submitted.

As the effective date for the 40-Hour Week approached the Carrier, who notwithstanding the failure of the Disputes Committee to render a decision on the matter which had been submitted to it was nevertheless required to place such Agreement in force and effect on its property, proceeded to effect the conversion required by its terms. Under the record there can be no question but that in doing so it interpreted and applied the provisions of paragraph (k) as if such paragraph were a part and parcel of the current Agreement. Neither can it be said the Brotherhood disputed the Carrier's right to treat and regard the rules in force and effect. It permitted the employes who were included within its membership to take the positions assigned to them without question or disturbance even though it was contending that in some instances, particularly with respect to relief positions, the interpretation placed upon such paragraph by the Carrier was resulting in a violation of the contract.

One of the principal contentions advanced by the Carrier as grounds for denial of the instant claim is that under the foregoing facts and circumstances the dispute is not properly before this Division because the same sontroversy has been submitted to another tribunal and is now pending there without decision. If that were so there might, under our Awards, be considerable merit to the Carrier's contention. But is it? Let us see.

From what has been heretofore stated, it is apparent the question submitted to the Committee was whether the rule should be permanently included in the current Agreement, not the interpretation to be given its terms. Standing alone that would seem to preclude the sustaining of the Carrier's contention. But that is not all. Where, as here, it is conceded that for all intents and purposes of the conversion a rule essential to its completion has been applied as though it were a portion of the agreement governing the rights of the parties, we are convinced it must be regarded as having a defacto existence for all such intents and purposes. This, of course, compels the conclusion that it was a part of the Agreement and a proper subject for construction by this Division, where the interpretation to be given its terms is the basis upon which the dispute between the parties is predicated.

Thus we come to a decision on the merits of the claim.

The Carrier admits that in all cases where an employe was hold a regular relief assignment it construed and applied paragraph (k) as authorizing and requiring the retention of that employe on such assignment regardless of the changes it was required to make in the position as a result of the conversion from a six to five-day week. Otherwise and more briefly stated, its position is that changes in the hours of the assignment, irrespective of how drastic they might be, did not result in the creation of a new position or require that it be bulletined as such. Indeed it frankly states that even as to relief assignments, it construed and applied such paragraph as if it held the bulletin and displacement rules of the contract in abeyance while the conversion was being effected and assigned the previous incumbents of such positions to such changed relief positions regardless of the character of the changes made therein. In fact, it goes so far as to concede that either before or after the conversion period and except therefor its action with respect to the assignments thus made by it would have resulted in a violation of the bulletin and displacement provisions of Rule 6.

Contrary to the Carrier's position, the Petitioner, although conceding the purpose of paragraph (k) as promulgated was to facilitate orderly procedure while the conversion was being effected, insists that its provisions merely supplemented other terms of the contract in force and effect and that such paragraph is in no sense subject to the construction that it superseded or did away with their requirements. Boiled down, the very essence of the Petitioner's claim is that where, due to the exigencies of the conversion, a change in the essential character of the duties of a position resulted, a new job was created

which must be bulletined as required by Rule 6, the provisions of paragraph (k) notwithstanding. However, it is to be noted it admits the dropping of one day from a regularly assigned relief postion would come within the scope of such paragraph and would not be in violation of other rules of the Agreement.

The claimant's ex parte submission contains a number of exhibits evidencing the relief positions involved under the claim. We cannot, of course, analyze those exhibits and deal with each particular situation. All we can be expected to do, in fact all we are asked to do, is lay down a general rule of interpretation from which the rights of those involved can be determined.

Illustrative of the Carrier's construction of pargarph (k) and, we might add, the Petitioner's as well, as is a portion of the Employes' Exhibit 3 showing the action taken by the Carrier with respect to employe Klugman, the incumbent of a regularly assigned relief position at the time the Carrier effected the conversion, who was assigned to the position without it being bulletined. The letter "(A)" indicates the position as assigned before the conversion; the letter "(B)" the position as assigned by the Carrier thereafter. Such exhibit reads:

"Title	Incumbent	Hours	Rate	Rest Day
		(A)		
Clerk	Reimer	12:00 to 8:30 AM	$12.656	Saturday
Cashier	Peck	7:00 AM to 3:00 PM	13.424	Sunday
Chief Clerk	Prosser	8:00 AM to 4:30 PM	12.878	Monday
Clerk	Kluck	3:30 PM to 12:00	12.656	Tuesday
Asst. Cashier	Dee	3:30 PM to 12:00	12.89	Wednesday
Asst. Cashier	Anderson	3:30 PM to 12:00	12.89	Thursday
Relief Clerk	Klugman			Friday
		(B)		
Cashier	Peck	7:00 AM to 3:30 PM	13.424	Saturday
Cashier	Peck	7:00 AM to 3:30 PM	13.424	Sunday
Chief Clerk	Prosser	8:00 AM to 4:30 PM	12.878	Monday
Chief Clerk	Prosser	8:00 AM to 4:30 PM	12.878	Tuesday
Asst. Cashier	Dee	3:30 PM to 12:00	12.89	Wednesday
Relief Clerk	Klugman			Thursday
Relief Clerk	Klugman			Friday"

When the foregoing exhibit is analyzed it clearly appears that prior to the conversion Klugman relieved employes on day or first trick positions two days out of six; three second trick or afternoon positions each week, and one third trick or midnight position one day each week. After the conversion he relieved four day or first trick positions and one second trick or afternoon position each week.

For reasons so obvious as to preclude all necessity for detailing them, we are impelled to conclude the action of the Carrier with respect to the position occupied by Klugman resulted in a complete change of the assigned duties of such position and, in the absence of any rule to the contrary, compelled that it be bulletined as a new position.

We also conclude that when so changed the position was not an "existing assignment reduced to a five-day basis" within the meaning of that phrase as used in paragraph (k) but a completely new position necessitated by the exigencies of the conversion. We find nothing in such paragraph which precludes the Carrier from creating a new position where the requirements of the conversion make it absolutely necessary and demand it. Indeed we have no doubt the signatories to the 40-Hour Week Agreement were aware that situations would arise where it would be impossible to change an existing relief assignment to a five-day basis and contemplated just that action. Therefore, we further conclude that when such action was deemed by the Carrier to be essential to proper effectuation of the conversion and the new position was so created it then became the Carrier's obligation to bulletin it as required by the provisions of Rule 6.

We have not overlooked the Carrier's claim that Rules 44 and 45 of the Agreement contain provisions which preclude the sustaining of the Petitioner's claim. The first rule relates to the rating of positions and the second to the changing of rates as the result of negotiations or adjustments. Nothing of such character is here involved. Hence, the provisions of neither rule have application to a decision of the instant controversy.

Based on what has been heretofore related, it follows that all changes in relief positions of kind and character similar to the one made with respect to the employe Klugman should be bulletined by the Carrier and all employes thereafter exercising displacement rights and found to have been affected by the Carrier's action in failing to bulletin the position, and thus permit them to exercise those rights at the time of the conversion, should be compensated for the difference in their earnings, retroactive to September 1, 1949. It is so ordered.

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 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 the Agreement.

AWARD

Claim sustained to the extent indicated in the Opnion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 27th day of June, 1950.

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Interpretation No. 1 to Award No. 4898

Docket No. CL-5007

NAME OF ORGANIZATION: Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes.

NAME OF CARRIER: Kansas City Terminal Railway Company.

Upon application of the representatives of the employes involved in the above Award, that this Division interpret the same in the light of the dispute between the parties as to its meaning and application, as provided for in Section 3, First (m) of the Railway Labor Act, approved June 21, 1934, the following interpretation is made:

The Organization requests an interpretation of that part of the Award reading, "Claim sustained to the extent indicated in the Opinion and Findings."

The claim is filed, which it is to be noted includes all incumbents of relief positions affected when the character of such positions was changed as a result of making provisions of the National Forty Hour Week Agreement effective, reads:

> "(a) The Carrier violated the Agreement when it declined to bulletin relief positions which existed prior to September 1, 1949, as new positions in all instances where the character of the position was *changed effective September 1, 1949; arbitrarily assigned the previous* incumbents to such changed relief positions and declined to permit such incumbents of relief positions to exercise displacement rights, and
>
> "*(b) The Carrier shall now bulletin such positions, allow em-*ployes affected the opportunity to exercise displacement rights and pay to all employes affected the difference in earnings, retroactive to September 1, 1949, which may be due upon the proper bulletining of *the positions in question and exercises of displacement rights.*"

At the outset it should be pointed out that in the opinion on which the Award is based the Division recognized the impossibility of dealing specifically with all factual situations involved, some of which were not spelled out in the record, and stated that all it could be expected or was asked to do was to lay down a general rule of interpretation from which the rights of the parties could be determined. It then used one of the Exhibits of record for illustrative purposes, namely, Exhibit 3, dealing with and setting forth the situation existing with respect to the position of relief employe Klugman before and after inauguration of the Forty Hour Week Agreement and, after detailing its reasons for concluding the claim should be sustained, said:

> "Based on what has been heretofore related, it follows that all changes in relief positions of kind and character similar to the one made with respect to the employe Klugman should be bulletined by the Carrier and all employes thereafter exercising displacement rights and

found to have been affected by the Carrier's action in failing to bulletin the position, and thus permit them to exercise those rights at the time of the conversion, should be compensated for the difference in their earnings, retroactive to September 1, 1949. It is so ordered."

It is clear from the Organization's application and the reply filed by the Carrier that many of the disputes existing between the parties at the time of the filing of the claim have been disposed of on the basis of conclusions announced in Award No. 4898. However, the same source makes it equally clear there is disagreement as to its effect on twelve disputes not yet disposed of. Thus it appears that what we are now called upon to do under the guise of interpretations is to supply the yardstick used in determining the status of Klugman's position to twelve additional, separate, and distinct factual situations.

No useful purpose would be served by reiterating what is said and held in the opinion of the Award in question. It suffices to say the general rule of interpretation therein referred to comprehends that changes in the duties, the hours, and the rates of pay of positions are the tests to be applied and taken into consideration, either separately or concurrently, in determining whether, after the conversion, positions changed to conform to requirements of the Forty Hour Week Agreement were "existing assignments reduced to a five-day basis" or "new jobs" within the meaning of those terms as used in Paragraph (k), proposed by the Carrier for permanent inclusion in such Agreement.

After applying the tests contemplated by such rule to the undisputed facts of record we advise the parties (1) that, although not identical, the changes made in the relief positions, described in Exhibit 9 of the employes' application and elsewehere in the record, occupied by incumbents Morgan, Stonerock, Thomas, Cross, Neeley, and Johnson at the time of the conversion were changes of kind and character similar to the change made with respect to the position held by the employe Klugman, hence such positions should be so regarded in complying with the requirements of Award No. 4898, and (2) that changes in all other positions in dispute between the parties were not of such nature, and therefore do not come within the scope of that Award.

Referee Jay S. Parker who sat with the Division, as a member, when Award No. 4898 was adopted, also participated with the Division in making this interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Acting Secretary

Dated at Chicago, Illinois, this 17th day of April, 1952.