

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**

GULF, COLORADO AND SANTA FE RAILWAY COMPANY

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

(a) Position No. 444, Sweetwater, Texas, known and classified as Car Clerk, rate of pay \$6.29 (now \$11.37) per day, shall be reclassified as position of Yard Clerk or Train Checker at rate of \$6.93 (now \$12.14) per day; and,

(b) Claim that C. H. Damman and/or other employees occupying Position No. 444 shall be paid the difference between the rate of \$6.29 (now \$11.37) per day and \$6.93 (now \$12.14) per day from July 27, 1944, to date rate is corrected.

EMPLOYEES' STATEMENT OF FACTS: On July 27, 1944, the Superintendent of the Southern Division of the G.C. & S.F. Railway Company established at Sweetwater, Texas, Position No. 444, titled Car Clerk, rate \$6.29 (now \$11.37) per day, hours 7:45 A.M. to 3:45 P.M. Subsequent investigation developed that this position was not assigned to perform the normal, ordinary and regular duties of a Car Clerk as the title would imply, but rather was assigned to check line-up track, check trains, check yards, weigh cars, pull waybills, figure tonnage for trains and fills, write up wheel reports, write up Government bill of lading reports, make Red Ball reports and call crews as well as other duties normally attaching to positions titled "Yard Clerk" or "Train Checker" in the same seniority district and rated at \$6.93 (now \$12.14) per day.

All other positions in the yard office at Sweetwater, Brownwood, Temple and Somerville on the same seniority district, some twelve in all, assigned similar duties and responsibilities on July 27, 1944, the date this position was established, are rated at not less than \$6.93 (now \$12.14) per day, except Car Clerk Positions No. 443 and 442 at Sweetwater, the rates of which are also under protest and are being presented to this Honorable Board under separate dockets.

POSITION OF EMPLOYEES: This dispute arose as a result of Carrier's refusal to comply with the requirements of the applicable agreement in establishing a new position at the yard office in Sweetwater, Texas. The Employees contend that the following rules in the agreement bearing effective date October 1, 1942, were violated when Position No. 444, titled Car Clerk, was

POS. 426. Checks yard, makes and checks interchange with connecting line, writes up cars interchanged, keeps average agreements and demurrage records, writes up waybills on car loads to and from T&P Form 400 and 403, makes 1340 interchange corrections.

Pos. 427. Checks cars from and to T&P when placed on interchange tracks, writes up interchange on Forms 400 and 403, makes lists of cars received from T&P, makes Form 1850, answers stock claims, assists with Jumbo record book, handles mail and baggage from Trains 91, 75 and 45.

Pos. 428. Checks cars to and from T&P when placed on interchange tracks, writes up interchange on Forms 400 and 403, makes lists of cars received from T&P, makes Forms 1850, helps work mail and baggage for No. 95, sells tickets for No. 94, and calls crews for this train, assists with Jumbo record book.

It will thus be apparent that if the employees' claim in the instant dispute was to be sustained in disregard of the real and actual meaning and intent of the new position rule (Article XI, Section 4) of the current Clerks' Agreement, it would have the effect of establishing a higher rate (\$6.93) for Car Clerk Position No. 444 than that of \$6.29 which the Brotherhood has recognized as proper for the more important and responsible Car Clerk Positions Nos. 426, 427 and 428 at the Sweetwater freight station in the same seniority district. Such an unreasonable and preposterous situation cannot be supported by the agreement rules and was certainly never contemplated by those rules.

Attention is also directed to the fact that the instant claim was not presented to the Carrier until December 7, 1944, approximately four months after Position No. 444 was established on July 27, 1944, and after being progressed to and declined by the Carrier's Vice President and General Manager under date of August 23, 1946, the instant claim was thereafter permitted to lie dormant by the Brotherhood representatives for almost one year and three months until November 19, 1947, when it was appealed to the Carrier's Assistant to Vice President and highest officer of appeal. Such inaction on the part of the Brotherhood's representatives would in itself indicate concurrence and recognition on their part that the classification and rate of pay of Car Clerk Position 444 as established by the Carrier was proper and in accord with the agreement rules. See Third Division Award No. 1806, which denied a somewhat similar claim on the basis of the following conclusion expressed in the "Opinion of Board.":

"The committee has called our attention to numerous awards which hold that repeated violation of a rule do not change it. There is no doubt of this principle. But repeated violations acquiesced in by employees may bring into operation the doctrine of estoppel or there may be a bar because of laches. Awards 1289, 1606, 1640, 1645. It seems to us that this is particularly true where the controversy concerns simply the rates of pay. Employees do not ordinarily accept wages over a period of a year and a half or longer without protest if they believe they are not receiving what is due them according to terms of their contract. They 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 accumulations of pay."

In conclusion the Carrier reasserts that the instant claim is entirely without support under the agreement rules and should be denied for the reasons heretofore expressed.

(Exhibits Not Reproduced.)

OPINION OF BOARD: On July 27, 1944, the Carrier established a new position, No. 444, in its Yard Office at Sweetwater, Texas, titled Car Clerk, hours 7:45 to 3:45 p.m.

The parties concede the duties and responsibilities of the new position are identical with those of Car Clerk Position No. 443 established by the Carrier at the same yard office on August 21, 1942 and that Article XI, Section 4 of the Agreement effective October 1, 1942, is the governing rule.

The Section of the Article just mentioned reads:

"The rates of pay for new positions shall be in conformity with the rates of pay for positions of similar duties and responsibilities in the seniority district where created."

Carrier admits the position was assigned the wage rate of Position No. 443 and insists that rating was in conformity with the requirements of the rule just quoted since such position was the only one with identical duties in existence in the seniority district in which Sweetwater was located on the date in question.

The Brotherhood contends that the rule was violated in that on the date Position No. 444 was established it was given the same rate as Position No. 443, the rate of which position was and had been since the date of its creation in August 1942 *erroneously rated as a Car Clerk's position whereas its proper classification and rate, at all times since its establishment, was that of a Yard Clerk's position.* It insists that hence the rate of Position No. 443 constituted no basis for fixing a rate for Position No. 444. It admits the latter position was abolished on October 17, 1945, and that on that account its claim for the difference between its established rate of pay as a Car Clerk and that at which it should have been rated as a Yard Clerk is limited to the period of time commencing on the day it was established to the date on which it was abolished.

The prime issue in this case revolves around the status of Position No. 443 heretofore mentioned. Indeed the parties so concede. In Award 4964 this day adopted, to which we adhere, we held: that such Position was classified and rated in violation of a similar rule, then a portion of the contract in force and effect between the parties; that it should have been classified as a Yard Clerk position instead of a Car Clerk position; and that the claim there involved should be sustained for the difference between the rates of the two positions.

Therefore the only issue remaining in this case is whether the rate of a newly created position can be founded upon the rate of a position classified and rated in violation of an existing agreement. We have little difficulty in concluding that it cannot. The purpose of Article XI, Section 4, heretofore quoted, is to insure that newly created positions will receive the same rates of pay as those of similar positions in the seniority district in which such positions were established. Its provisions do not contemplate the wages of such new positions shall conform to the rate being paid positions that have been improperly rated in violation of its terms. Neither do they contemplate that once a position has been erroneously classified and then given a rate in violation of their requirements that because such rate has been wrongfully established it can be used as the basis for further and continued violations. It follows Position No. 444 was given a rate in violation of the Agreement and that claimant is entitled to a sustaining Award. However, due to the same circumstances as were involved and influenced our decision in Award 4964, we do not believe reparation should commence until December 7, 1944, the date on which the claim was first presented to the Carrier, to end as of the date the position was abolished.

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 Employee involved in this dispute are respectively carrier and employee 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 in accord with the Opinion and the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 31st day of July, 1950.