

Award No. 8784
Docket No. CL-8257

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Norris C. Bakke, Referee

PARTIES TO DISPUTE:

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

ERIE RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that the Carrier violated the rules of the Clerks' Agreement at Chicago, Illinois when on April 2, 1954 and subsequent dates the Carrier failed and refused to fill regularly-assigned position of Delivery Clerk, occupant T. Baker, and

That Carrier shall now compensate Employee E. Meyers or A. Jarmon or W. C. Clark or C. Teemor or any other employee for a day's pay at Delivery Clerk rate for each day that employees were sent home. (Claim 1051)

EMPLOYEES' STATEMENT OF FACTS: The position of Delivery Clerk, Chicago Freight House, is a regular-assigned position, T. Baker, occupant, established under formula contained in Rule 23 of the Clerks' Agreement. On April 2, 1954 and subsequent dates, the Carrier required T. Baker to suspend work on his regular position of Delivery Clerk and work the regularly-assigned position of Sealer, starting at 12:01 a.m. Mr. Baker's position was left unfilled on April 2, 1954 and subsequent dates while employees who could have been assigned to fill the vacant position were denied employment and were sent home.

This claim was handled in usual order of progression up to and including the highest officer designated for handling employee matters. This claim was handled at conference in Cleveland, Ohio on November 19, 1954, and it was agreed that the facts in the case be developed at conference to be held in Chicago, Illinois. This conference was held in Chicago, Illinois on December 1, 1954, and it was agreed that a joint check be made to develop who, if any men, were sent home and Delivery Clerk position blanked. Mr. Patrick was designated by the Organization to make the joint check, and Mr. Von Posch, Chief Timekeeper, to represent the Carrier.

A joint check was made from time records, but Carrier representative refused to sign the joint check. On January 26, 1955, Employees' Exhibit "A", the result of the check was communicated to the Carrier. Under date of March 28, 1955 Carrier replied taking exception to the check and asked if the

ment, the Carrier was required to put on one more delivery clerk on each day here in question in addition to the number of delivery clerks working on such days. In Award 6828, the Board held:

"The authority of this Division is limited to interpreting and applying the rules agreed upon by the parties. If inequities among employes arise by reason thereof, this Division is without authority to correct them as it has not been given equity powers. In other words, we cannot make a rule or modify existing rules to prevent inequities thus created. Renegotiation thereof is the manner provided by the Railway Labor Act, which is the proper source of authority for that purpose. See Award 5703. See, also, Awards 4439, 5864, 2491."

The Carrier has shown that the applicable agreement was not violated, and that the claimants, as indicated by (RX) on Carrier's Exhibit "B-1," are not entitled to the compensation which they claim.

It is submitted, therefore, that the claim herein is not justified and should be denied.

All data contained herein have been presented to or are known to Petitioner.

OPINION OF BOARD: This is another case arising out of the operation of Carrier's 14th Street Freight House in Chicago.

The question is whether, under the particular rules involved, the Carrier was obligated to fill the regular assigned position of Mr. Baker on the ten days that he was absent from his admittedly regularly assigned position.

The Organization contends that the question is answered by Award 5114, while the Carrier says that award is not controlling because the Memorandum of Agreement of March 30, 1948, was not in effect under that award. However, under the rules of procedure of this Board (Circular No. 1, issued October 10, 1934) and Awards 8234, 8377, 8411 and 8484, the Carrier may not rely on that Memorandum here because it was not urged or used as a defense on the property.

Nevertheless Carrier asserts there were more than enough of the "additional force employes" to fill all the delivery clerk assignments and that therefore Baker's position was filled, but Award 5114 answers that in saying:

"The foregoing requirement was not met by the fact that on the dates such regularly established positions were not occupied the Carrier used additional forces pursuant to the Rule 23 (a) 4 in number sufficient to equal the number of regularly established positions then vacant. * * *"

But, says the Carrier, also quoting from Award 5114—

"Of course, if an extra or additional force employe is actually assigned to the regularly established position on which there is a vacancy and he performs the work thereof on the day the regular occupant is absent and is paid the wages thereof, then Carrier has fulfilled its obligations under the rules in relation thereto."

It may well be that under the position formerly taken by the Carrier, viz., that the guarantee (Rule 28) followed the employe rather than the position, it should be permitted to show that Baker in this case was paid the same wage or more while temporarily on other work as that paid on his regular position and, therefore, the guarantee rule was complied with, but here the Carrier admits that the guarantee follows the position and the duty devolves upon the Carrier to show that the position was filled.

Carrier says we cannot do that, because the work that Baker did was similar to that of many of the "additional force employes" that were doing all the work, and that Baker's work as such was not identifiable.

The obvious answer to that is that if Baker's work was sufficiently identifiable on which to predicate a regularly assigned position it must be assumed that it continued to be identifiable for the purpose of filling the position when Baker was temporarily absent.

We conclude that the claim should be sustained in accordance with Employes' Exhibit "F" which shows the ten days when Baker's position was vacant and claimants sent home, excusing the immaterial variance in the claim as to dates.

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

That the parties waived hearing on this dispute; and

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 the Agreement as indicated in Opinion.

AWARD

Claim sustained as indicated in Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 15th day of April, 1959.