

Award No. 9417

Docket No. CLX-8726

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Merton C. Bernstein, Referee

PARTIES TO DISPUTE:

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

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

(a) The agreement governing hours of service and working conditions between Railway Express Agency and the Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express & Station Employees, effective September 1, 1949, was violated at the New Orleans, Louisiana Agency April 24, 1951, when Carrier refused, and continues to refuse to properly adjust the basic salary attaching to Position 2, Group 163, titled "Clerk"; and

(b) G. T. McGittigan shall no be additionally compensated in the amount of \$22.61 per month, retroactive to an including October 14, 1952.

EMPLOYEES' STATEMENT OF FACTS: G. T. McGittigan, with a seniority date of March 25, 1919 (Seniority District No. 2) is the regular occupant of position titled "Clerk", Group 163, Position 2; hours of assignment 8:30 A. M. to 5:30 P. M.; work week assignment Tuesday through Saturday with Sunday and Monday as days of rest; rate of pay \$273.10 basic per month. Duties and responsibilities attaching to this position as shown on Bulletin 36 dated April 24, 1951 are:

"Handling with railroads all carload and L.C.L. matters—Handling outside 'phone calls with general public—Handling variation and car reports—Assisting Chief Clerk handling correspondence and making daily turnover—Must be able to operate typewriter."

There is also in existence in Seniority District No. 2, a position titled "Clerk", Group 156, Position 1; hours of assignment 8:30 A. M. to 5:00 P. M.; work week assignment Monday through Friday with Saturday and Sunday as day of rest; rate of pay \$285.63 basic per month. Duties and responsibilities attaching to this position are:

"Handling telephone inquiries. Compiling data for accessorial work. Preparation of Daily or Monthly Expense Reports. Also compiling daily work measurement reports on Thursday and Friday. Registering

It is nowhere alleged that employe McGittigan has been either temporarily or permanently assigned to a higher rated position under Rule 80.

It is admitted that Position 2, Group 163, is not a new position falling within the provisions of Rule 82.

Carrier reiterates that the sole dispute in this instance is one of failure of the parties to agree on a rate through the process of negotiation, rather than a dispute concerning violation of any of the rating provisions of the Agreement. In such circumstances the Board may not properly fix rates of pay, but must leave the parties where it finds them, subject to negotiation and agreement if possible. The claim is entirely without merit and should be denied, not only because no rules were violated but also because Employees have delayed unreasonably in progressing the claim.

All evidence and data set forth have been considered by the parties in correspondence and in conference.

(Exhibits not reproduced)

OPINION OF BOARD: The parties are not in agreement as to many of the facts and they contend that different issues are involved.

Briefly stated, Claimant contends that his position at the Company's New Orleans office Group 163, Position 2, titled "Clerk" and with a basic salary of \$273.10 was:

- (1) not properly bulletined because its title "Clerk" was insufficiently descriptive; and
- (2) the actual duties of the position, at least since the time of complaint in 1951, have been greater than the bulletined description and essentially like those of Group 162, Position 1, titled "Clerk", with a basic rate of \$295.71 per month; therefore, claimant contends he is entitled to the higher rate and back pay for the difference since the claim was made.

The Company contends:

- (1) the claim is barred by laches because of failure to prosecute the claim before the Board for some three years after its denial on the property;
- (2) the claim is in reality for a change in the agreed rate of pay requiring a change in the agreement, which is a "major dispute" under the Railway Labor Act not cognizable by this Board;
- (3) the basis for the claim was changed on the property and since submission to the Board so that the violations of Agreement provisions not originally invoked are not properly before the Board; and
- (4) on the merits, the Claimant's job and that whose rate he seeks are so dissimilar as to warrant denial of the claim.

As even on the theory of Claimant himself the claim must be denied, we do not find it necessary to consider the first three "defenses" put forward by the Company.

Originally Claimant laid great stress upon the insufficiency under Rule 10 of the title and description of his position. The rule calls for a listing in bulletins of, among other things, the job's "title" and "description of duties." Claimant took the position that Award 2385 (Carter) held that a bulletin title of "Clerk" is insufficient to fulfill a contractual requirement such as that here. We agree. There the remedy for that claim was a requirement that the position be rebulletined. However, that remedy is not sought here.

What is asked is a determination that the insufficiency of the title employed in the bulletin, the alleged insufficiency of the bulletin description, and the actual similarity of his duties and those of the higher rated position entitle him to the higher rate. As to this requested remedy the insufficiency of the title is of little relevance.

On the property, Claimant invoked Rule 80:

"Preservation of Rates—Rule 80. Employees temporarily or permanently assigned to higher rated positions shall receive the higher rates while occupying such positions; employees temporarily assigned to lower rated positions shall not have their rates reduced.

"A 'temporary assignment' contemplates the fulfillment of the duties and responsibilities of the position during the time occupied, whether the regular occupant of the position is absent or whether the temporary assignee does the work irrespective of the presence of the regular employee."

Before the Board, both Rule 80 and Rule 82 were said to sustain the claim. The latter provides:

"New Positions—Rule 82. The wages for new positions as created shall be in conformity with the wages for positions of a similar kind or class—

"(a) At the agency where created if there is a position of similar kind or class;

"(b) If there is no similar position at the agency, then the rate paid for similar positions at other similar offices within the Superintendent's Division;

"(c) In case of train service positions, rate of pay for new positions shall be governed by the rate of pay for positions of similar kind or class within the jurisdiction of the Superintendent."

The Company does not concede the applicability of the these rules and we do not determine that issue. They are set out as the measure of Claimant's proof.

There is little doubt that the burden of proof is upon Claimant. Award 4036 (Parker).

Claimant relies upon the comparison of the bulletined descriptions of the two positions and the uncontroverted descriptions of the duties of the positions by their incumbents.

Neither shows that they are exactly alike. They are dissimilar in several respects, including the performance of duties by the Claimant which are not performed in the higher rated position. This factor and the descriptions themselves also show that the higher rated position has bulletined and actual duties which are different from those of the Claimant's position.

As was held in Award 4567 (Whiting):

" . . . it can only be the assignment of work significant to the position . . . which will justify payment of the rate for [that position."

Also see Award 7353 (Rader and Decision E-1250 (Wolfe) quoted in that report.

Claimant contends that the two positions need not be identical and does not claim that they are. But the record should show what the "significant" duties of the higher rated position are and that they are performed equally by the Claimant. It does not do so.

As the record fails to meet this burden of proof the claim must be denied.

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 contract was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 16th day of May, 1960.