

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Harold M. Weston, Referee

PARTIES TO DISPUTE:

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

CENTRAL OF GEORGIA RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5411) that:

(1) The Carrier violated and continues to violate the Clerks' Agreement of December 1, 1956, as amended, when, without conference and agreement, it arbitrarily and unilaterally established a position of so-called "Utility Clerk," effective June 1, 1962, in lieu of a previously similar position which was designated as a "Trailer Train-Piggyback and Utility Clerk" which was also arbitrarily and unilaterally established at same salary — which latter position was abolished — both positions being compensated at salary of \$455.79 per month, which position should be compensated at salary of \$570.04 per month (subject to adjustment of \$17.89 per month which was accorded by the Agreement of June 5, 1962 and any and all subsequent adjustments, if any), and that, therefore

(2) Clerk H. D. Williams, Accounting Department, Office of Superintendent Car Accounting, Mail and Express, shall now be assigned to this position and paid the difference between salary of \$570.04 per month and \$455.79 per month (both subject to adjustment of \$17.89 per month which was accorded by the Agreement of June 5, 1962 and any and all subsequent adjustments, if any, which may occur in National, Regional, or System application), IN ADDITION to salary of \$434.21 per month, his present salary (subject to adjustment of \$17.89 per month which was accorded by the Agreement of June 5, 1962 and any and all subsequent adjustments, if any, which may occur in National, Regional or System application), this ADDITIONAL present salary to be paid until Claimant Williams is awarded the position, retroactive to June 1, 1962, the date an employee junior to Claimant H. D. Williams was assigned to this position, and that

(3) Mr. J. N. Kessler, the junior employee to whom the position was assigned, shall now be paid the difference between salary of \$570.04 per month and \$455.79 per month, his present salary, (both subject to adjustment of \$17.89 per month which was accorded by the

Agreement of June 5, 1962 and any and all subsequent adjustments, if any, which may occur in National, Regional, or System application), retroactive to June 1, 1962, the date this employee junior in service to Claimant H. D. Williams was assigned to this position, and that

(4) The successor or successors in interest, namely any other employe or employees who may have stood in the same status as claimant(s), and who were adversely affected, shall be paid the difference between salary of \$570.04 per month and their present salary (both subject to adjustment of \$17.89 per month which was accorded by the Agreement of June 5, 1962 and any and all subsequent adjustments, if any, which may occur in National, Regional, or System application), retroactive to the date they are assigned to or may occupy this position, and that

(5) The Carrier's payrolls shall be checked to determine the full amounts which are due all the above referred to employees.

EMPLOYEES' STATEMENT OF FACTS: May 16, 1962, Carrier issued Vacancy Bulletin No. 1-1962, covering position effective June 1, 1962, position of Trailer Train-Piggyback and Utility Clerk, at salary of \$455.79 per month, copy of which is hereto attached and identified as Employees' Exhibit No. 1.

May 21, 1962 protest concerning the rate of pay for this position was registered with Mr. J. H. Footman, Superintendent Car Accounting, Mail and Express, the Officer of the Carrier who issued this Vacancy Bulletin, copy of which protest is hereto attached and identified as Employees' Exhibit No. 2.

May 22, 1962 Claimant H. D. Williams, Accounting Department Office of Superintendent Car Accounting, Mail and Express, an employe holding seniority as of September 1, 1923, after having entered application for position covered by Bulletin No. 1 and being denied same, protested same to Local Chairman E. R. Howard, copy of which protest is hereto attached and identified as Employees' Exhibit No. 3.

May 24, 1962 Claimant H. D. Williams entered formal claim for this position, copy of which letter is hereto attached and identified as Employees' Exhibit No. 4.

May 24, 1962 Superintendent Car Accounting, Mail and Express, J. H. Footman, nominally abolished the position of Trailer Train-Piggyback and Utility Clerk, copy of which is hereto attached and identified as Employees' Exhibit No. 5.

May 24, 1962 Superintendent Car Accounting, Mail and Express, J. H. Footman, issued Vacancy Bulletin No. 3-1962, for position of Utility Clerk, obviously in lieu of the position of Trailer Train-Piggyback and Utility Clerk covered by Bulletin No. 1-1962, which somewhat changed the language but not the meaning of the original Vacancy Bulletin No. 1-1962, copy of which latter Vacancy Bulletin is hereto attached and identified as Employees' Exhibit No. 6.

May 25, 1962, Claimant H. D. Williams made application for the position of Utility Clerk covered by Vacancy Bulletin No. 3, copy of which application is hereto attached and identified as Employees' Exhibit No. 7.

May 25, 1962 Superintendent Car Accounting, Mail and Express, J. H. Footman, replied to our protest letter of May 21, 1962 (Employees'

beyond a reasonable doubt that the Carrier has violated the agreement."

THIRD DIVISION AWARD 8768

(Referee Donald F. McMahon)

"The Board is of the opinion that from a review of the record before us, the facts submitted are not sufficient to support a sustaining award."

THIRD DIVISION AWARD 8430

(Referee Carroll R. Daugherty)

"From a study of the whole record the Board is forced to conclude that the Employees have failed to support their contention. That is, the Carrier's decision not to assign Claimant to the new position is not found to have had such an arbitrary, capricious or unreasonable basis as to have constituted a clear abuse of managerial discretion and as to justify this Board now to substitute its own judgment for that of the Carrier. * * *"

Also see other awards, including Third Division Awards Nos. 8172, 7964, 7908, 7861, 7584, 7226, 7200, 7199, 6964, 6885, 6844, 6824, 6748, 6402, 6379, 6378, 6225, 5941, 2676, and others. Also see Second Division Awards Nos. 2938, 2580, 2569, 2545, 2544, 2042, 1996, and others — all of which clearly state that the burden is on the claimant party to prove an alleged violation of the agreement. To date, the Employees have produced no evidence of any violation.

This claim has absolutely no merit, and it should be either dismissed or denied in its entirety.

OPINION OF BOARD: The gravamen of the present claim is that Carrier violated the Agreement both by establishing a monthly rate of \$455.79 instead of \$570.04 for a new Utility Clerk position bulletined on May 24, 1962, and by declining to assign Claimant Williams to that position on June 1, 1962.

Rule 34 (c) bears upon the first portion of the claim and reads as follows:

"The wages for new positions shall be in conformity with the wages for positions of similar kind or class in the seniority district where created. Where no similar positions exists in the seniority district, rates will be established by negotiation."

The record indicates that there were two Utility Clerk positions in existence on May 24, 1962, and that their respective wage rates were \$455.79 and \$430.10. Carrier set the rate of the new position at the \$455.79 rate on the theory that it was somewhat similar to the higher rated of the two existing Utility Clerk positions.

We have been referred to no other position that; in our opinion, is more closely related to the position in question. Petitioner did mention the Traveling Car Agent position that calls for a \$570.04 monthly salary but, on this record, there is no valid basis for a conclusion that its duties more closely approximate those of the disputed position than do the duties of the aforementioned higher rated Utility Clerk position.

If the new position is not substantially similar to any of those already in existence, the proper way to establish a new rate under Rule 34 (c) is by negotiation. That this Board does not possess the authority to establish new rates is well settled and, in our view, sound. (See, e.g., Awards 3484, 7093, 8748 and 12724.) Accordingly, the first paragraph of the claim will be denied.

The second portion of the claim also lacks merit. An essential element of the new position's workload is the performance of key-punch work. Carrier maintains that at the time in question, June, 1962, Claimant Williams did not possess the ability to perform that operation.

Rule 7 (a) prescribes that ". . . Promotions, assignments, and displacements shall be based on seniority, fitness and ability" and that subject to an exception not here material, "fitness and ability being sufficient, seniority shall prevail. . . ." It has been long recognized by this Board that the determination of "fitness and ability" under such a rule is a prerogative of management and that the latter's judgment in that regard will be set aside only if shown to be arbitrary or capricious. (See among many others, Awards 9324, 11780 and 12461.)

While Claimant Williams eventually was awarded the key-punch position, in October 1962, there is no evidence that he was competent to perform the work on the claim date, June 1962.

Rule 51, cited by Petitioner, provides that employes shall be given preference, in accordance with seniority, for employment on new machines and office appliances. That rule, however, is inapplicable to the present situation since it appears that key-punch machines have been in operation in Carrier's office for about seven years prior to the date this claim arose.

Petitioner has failed to meet the burden of proving Claimant Williams qualified on the claim date, June 1, 1962, and we have no alternative but to deny his claim.

Paragraphs (3), (4) and (5) of the claim are dependent upon the disposition of the first two portions or paragraphs of the claim and will also be denied.

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

That the parties waived oral hearing;

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: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 30th day of September 1965.