Award No. 15629
Docket No. CL-15989

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

John J. McGovern, Referee

PARTIES TO DISPUTE:

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

KENTUCKY & INDIANA TERMINAL RAILROAD COMPANY

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

A. (1) Carrier violated the rules of the current working agreement, particularly Rule No. 59 when on January 15, 1965, Mr. J. Hartline instructed Mr. C. R. Boyd to prepare the interchange reports for that day at the rate of the clerical machine operator position.

(2) Carrier be required to pay Mr. Boyd for the difference in the rate of the clerical machine operator position $21.94 and the chief clerical machine operator position $25.44 for the above mentioned date.

B. (1) Carrier violated Rule No. 58 and No. 59 of the current working agreement when on April 6, 7, 13, 14, 20, 21, 27, 28, May 4, 5, 11, 12, 18, 19, 25, and 26, Mr. J. Hartline instructed Mr. B. Renn to prepare the interchange reports for these dates.

(2) Carrier be required to pay Mr. Renn for the difference in rate of the clerical machine operator position $21.94 and the chief clerical machine operator position $25.44 for the above mentioned dates and continuing until these duties have been restored to the position to which they were assigned by bulletin No. 322 dated October 2, 1963.

CARRIER'S STATEMENT OF FACTS: Carrier asserts the Agreement of May 1, 1957, between the Kentucky & Indiana Terminal Railroad Company and the Brotherhood of Railway Clerks, and the Memorandum of Understanding and Attachments dated September 30, 1963, were in effect on the date the instant claim arose.

Work in connection with Car Accounting Department records including but not limited to car records, calculation, preparation and distribution of per diem and reclaim reports, preparation of interchange reports, supplements, and issuing of corrections prior to October 15, 1963, were performed manually seven days per week by employes in Group 1, District 1 Seniority District.

Clerical Machine Operator and Chief Clerk, Car Accounts, both of which have higher rate than a Clerical Machine Operator.

Claims were filed on January 27, April 14, 1965 and May 26, 1965 and were denied in letters from the General Freight Agent under dates of February 10 and May 27, 1965. (Employes' Exhibit C.) Subsequent handling on appeal brought no satisfactory settlement of the claims and resulted in the Director of Labor Relations declining them under dates of June 1 and September 20, 1965; and subsequently the Director of Labor Relations advised this Board, through its Executive Secretary, Mr. S. H. Schulty, of the Carrier's intent to file ex parte submission with the Third Division, National Railroad Adjustment Board. See Employes' Exhibit D.

(Exhibits not reproduced.)

OPINION OF BOARD: The Claimants in this case were instructed to prepare "interchange reports" by the Chief Clerk, Car Accounts, work which they allege belongs to the higher rated position of Chief Clerical Machine Operator. They accordingly demand the difference in the respective rates between their positions and the aforementioned position. The question posed for resolution is whether they are entitled to the higher rate as claimed pursuant to Rule 59, which reads as follows:

"RULE 59.
PRESERVATION OF RATES

> Employes temporarily or permanently assigned to higher rated positions or work for a full day or less shall receive the higher rates for the entire day. Employes temporarily assigned to lower rated positions or work shalll 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 a position is absent or whether the temporary assignee does the work irrespective of the presence of the regular employe. Assisting a higher rated employe due to a temporary increase in the volume of work does not constitute a temporary assignment."

To receive the higher rate of pay under the above rule, Claimants must either be assigned to a higher rated position or given work which is higher rated. Clearly from the factual situation as presented, Claimants were not assigned to the higher rated position. The issue then presented is whether the preparation of interchange reports constitutes higher rated work coming within the meaning and intent of the above cited rule. There is no dispute that the preparation of such reports is done by the higher rated position. There is also no dispute that the higher rated position has numerous other duties and responsibilities, which far out-weigh the instant task both in scope and importance.

The Organization lays great stress on the words "or work" in the rule, and urge upon us the thesis that because this work is done by the higher rated position, the claim should be sustained. We invite attention to the second paragraph of the rule wherein it states "A 'temporary assignment' contemplates the fulfillment of the duties and responsibilities of the position during the time occupied . . ." etc. Although factually, there is no claim that the Claimants occupied the position as such, the connotation one deduces from

this language, even though it does not specifically refer to the "or work" phrase of Paragraph 1, appears to contemplate within its intendment one assuming, if not all duties and responsibilities, at least a substantial portion of them. All positions contain demands for higher rated work and lower rated work. Can we say that the assignment of an isolated task, whether it be higher rated or lower rated, encompassing 2½ hours was within the contemplation of the Parties when Agreement was had on Rule 59? If the Claimants had been assigned to the position with its other duties and responsibilities, we would without hesitation sustain the claim. We do not necessarily conclude that one must assume all duties and responsibilities, or that one must assume all the work involved. We do conclude however that Rule 59 contemplates at least a substantial fulfillment of the position or work in order for a claimant to collect the higher rate of pay. To say that the performance of the work in question was such a substantial fulfillment, when it involved approximately 2½ hours on each occasion, is tantamount to an unreasonable construction of the rule itself. We do not believe that the Parties to the Agreement had such a factual situation in mind. We will deny the claim.

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 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 Carrier did not violate the Agreement.

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 June 1967.

LABOR MEMBER'S DISSENT TO AWARD 15629, DOCKET CL-15989

Award 15629 is a prime example of this Referee insisting that his predilections must prevail over the rules of the Clerks' Agreement and that he is free to impose more burdensome tests on the Employes than the rules demand.

For example, he calls 2½ hours' work, or 31.25% of the work load of the Chief Clerical Machine Operator position, "an isolated task," obviously for the purpose of distinguishing that amount of work from the "substantial" amount of work he will require before the rules, as written, will be enforced.

The rule he has thus so improperly interpreted reads in part:

> "Employes temporarily or permanently assigned to higher rated positions **or work for a full day or less** shall receive the higher rates

for the entire day. . . . A 'temporary assignment' contemplates the fulfillment of the duties and responsibilities of the position **during the time occupied.**"

Such rules have usually been interpreted in the manner set forth in Award 14681, i.e.:

> "Rule 40 does not contemplate and require an employe to perform all the duties of a higher rated position before being entitled to the higher rate. Nor does it contain any exception predicated on comparison of skill and knowledge required as between the duties of the higher rated position performed and those not performed. It is enough that the duties performed are duties of the higher rated position. Cf Award No. 4669."

That Award was directly in point with the instant case but, with the present Referee, it is not enough that the duties performed are duties of the higher rated position of Chief Clerical Machine Operator and/or Chief Clerk, Car Accounts. As a matter of fact the interchange work has historically been assigned to and performed by the higher rated positions — it is higher rated work — and to hold that the language of the rule requires the performance of more than 2½ hours, or 31.25% of the work of the higher rated position is quite uncalled for and insupportable. In addition to Award 14681 many other Awards, such as 751, 2270, 3032, 4339, 4545, 5252, 6129, 6257, 6830, 7354, 9482, 10452, 10704, 11981, 12088, 12225, and 15475, have correctly applied similar rules as written and fully supported the instant case and correctly answered the Referee's question "Can we say that the assignment of an isolated task, whether it be higher rated or lower rated, encompassing 2½ hours was within the contemplation of the parties when Agreement was had on Rule 59." "They" have answered "yes, we must" while the present Referee, for reasons best known to him, obviously must answer "No, I can't." For the above reasons and those set forth in my dissents to Awards 15628 and 15630 I dissent to this highly erroneous award.

D. E. Watkins
Labor Member
7-7-67

CARRIER MEMBERS' ANSWERS TO DISSENTS TO AWARDS 15628, 15629 and 15630

These awards are correct both in the evaluation of the facts and the application of rules. The Dissenter had the opportunity, both in panel and by brief, to convince the Referee of the soundness of his position and nothing he has now said in his dissents detracts from the awards.

It is our understanding that the purpose of a dissent is to show where an award is in error; however, it is obvious that the Dissenter is using the dissent for a purpose other than intended.

J. R. Mathieu
R. A. DeRossett
W. B. Jones
C. H. Manoogian
W. M. Roberts

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