

NATIONAL RAILROAD **ADJUSTMENT** BOARD

THIRD DIVISION

Award Number 24757
Docket Number CL-24006

Josef P. **Sirefman**, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks,
(Freight Handlers, Express and Station **Employees**
(Chicago and Illinois Midland Railway Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-9415)
that:

1. Carrier violated the Agreement between the parties beginning March 5, 1980, when it reduced the rate of pay of the Secretary to Auditor position due to the occupant of the position being temporarily absent due to personal injury on Carrier's property. (Carrier File **MP-BRAC-173**)

2. Carrier shall now be required to compensate Clerk **M. E. Burnett** the difference in rate of pay between **\$1,805.78** per month and **\$1,601.1290** per month beginning March 5, 1980, and continuing until violation is corrected.

Note: Claim is to include any successor(s) to Clerk Burnett which can easily be determined by a joint check of Carrier's records, as there is only one (1) Secretary to Auditor position.

OPINION OF BOARD: Up until January 17, 1980 the position of Secretary to the Auditor did not fall within the scope rule. On that date the parties. entered into a supplemental agreement which provided in part that:

"The incumbent of the Secretary to the Auditor position will be subject to the union shop and dues checkoff agreements, effective February 1, 1980. Incumbent D. **U. Eck**, so long as she retains that position, will continue to receive pay allowances as present and will be covered by health and welfare benefits covering regular employees. When D. **U. Eck** vacates this position, the established rate will be equal to that of the Secretary to Superintendent."

According to the agreement between the parties the position came under certain rules of the basic agreement. On March 3, 1980, Ms. Eck fell while on the property and broke her hip necessitating a lengthy recuperation. She did not return to work until June 2, 1980. During her absence the position was posted as a temporary vacancy and Claimant Clerk **M. E. Burnett** filled in beginning on March 5, 1980. Claimant was paid at the Secretary to Superintendent rate (**\$1,601.29**) and not at Ms. Eck's rate of **\$1,805.78** per month. The claim concerns this difference in pay.

The Carrier raises a number of objections to the Organization's claim. It contends that the claim now placed before this Board by the Organization is substantially different from the claim it initially placed before the Carrier on the property. A review of the record establishes that there is no basis for this contention. As Referee **L. Smith** stated in Third Division Award 7923:

"While admittedly there is a variance we do not think that such variance is fatal to its (claim) consideration. We have held that all that is required of a claim is that it be presented in a manner and form that will enable a Carrier to identify the scope thereof and be in a position to prepare an adequate defense thereto."

Also, see Third Division Awards 10918 and 19002. In Third Division Award 20693, Referee I. Lieberman held that **"The** Claim before us is substantially the same as that handled on the property; the Claim has not been enlarged upon nor has the Carrier been misled. The issue involved in this dispute was clearly understood by the parties during the handling on the property and has not been materially changed in its presentation to this Board." In Third Division Award 22616, Referee Carter ruled:

"The Carrier contends in part that the claim submitted to the Board is not the same claim as handled on the property up to and including the Carrier's highest designated officer. We find no proper basis for the contention of the Carrier. The manner of appeal of discipline **cases on** the property is as outlined in Rule 21. The claim was not substantially amended on appeal to the Board. The Carrier was in no way misled or taken by surprise."

The Carrier also contends that the Board should not consider any allegations made by the Organization on the property after the highest designated official had declined the claim on June 6, 1980.' The Organization and Carrier had a conference on August 1, 1980. In a letter dated August 11, 1980 to the Carrier's **Manager** of Personnel, the Local Chairman listed the dates and exact hours for which it **claims** the Carrier paid the higher incumbent rate to four named **employees**. The letter also asked for verification from the Carrier controlled **employee** timeslips. The August 14, 1980 response from the Manager of Personnel covers a number of issues, including an assertion that the August 1st discussion was outside the handling of the claim in the usual manner. However, nowhere in that letter or in the record does the Carrier ever deny that the named employees were paid the higher rate on the days and hours listed as having been worked. The Organization's intention to file an ex parte submission with the **NRAB** is dated January 15, 1981.

In Award 20773 Referee J. Sickles held that:

"Any document presented on the property prior to the date of the Notice of Intention to file an Rx Parte Submission . . . is properly considered by this Board."

Award 22762 cites Award 20773 with approval, and Referee **Scheinman** added:

"It is obvious, therefore, that the material presented to Carrier by Petitioner on October 3, 1978 is properly a part of this case. Carrier's election to ignore it - or at least not to respond thereto - was done at its own peril."

The conclusion is that the material in the August 11, 1980 letter and the absence of a factual rebuttal by Carrier are part of the record before this Board.

Turning to the merits, the **Carrier** contends in effect that Ms. Eck's higher rate of pay in the position in question had been "red-circled", i.e., it applied only to her, and not to those who from time to time did her type of work. Nonetheless, by paying Eck's higher rate to other **employees** who performed that position's work after Eck returned from her injury to the Carrier's employ, the Carrier's actions evidence; its intention that the higher rate was also appropriate for others as long as the job belonged to Ms. Eck. To be an **incumbent** is to hold or retain an office or position. There is nothing in the record to indicate that at the time of her injury and during her convalescence either the Carrier or Ms. Eck **intended** her to no longer remain in the position. The posting of a "temporary" vacancy was prompted by the length of Ms. Eck's indisposition, not by any intention not to return to work. Therefore, if the rate applied to those who did her work from time to time after she had returned to the job, it must also apply to Claimant Burnett who performed Eck's duties while the latter was out awaiting the healing of her injury. This Award is limited to Claimant Burnett who is entitled to the difference between her pay and Ms. Eck's pay for the period Claimant filled in due to the hip injury. No persuasive basis for extending this Award to successors was presented.

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 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

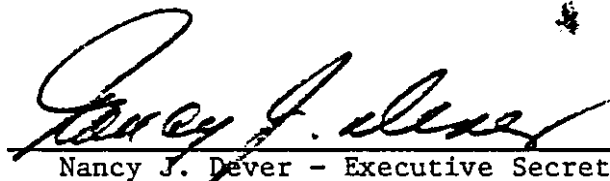
That the Agreement was violated.

A W A R D

Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 30th day of March, 1984.