Award Number 197
Docket Number CL–217

NATIONAL RAILROAD ADJUSTMENT BOARD

Third Division

Wm. H. Spencer, Referee

PARTIES TO DISPUTE:

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

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY

DISPUTE.—"(*a*) Claim of C. W. Fink for the difference between rate of $4.95 per day and rate of $6.72 per day for position formerly carried with title of revising clerk, now carried with title of passing record typist, retroactive to April 13, 1932, Kansas City, Mo.

"(*b*) Claim of E. G. Gabel for the difference between rate of $4.95 per day and rate of $6.72 per day for position formerly carried with title of revising clerk, now carried with title of passing record typist, retroactive to April 13, 1932, Kansas City, Mo."

FINDINGS.—The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that—

The carrier and employees involved in this dispute are respectively carrier and employees within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board, as indicated more fully herein, has jurisdiction over the present dispute.

The parties to the dispute were given due notice of the hearing thereon.

As a result of a deadlock, Wm. H. Spencer was called in as Referee to sit with the Division as a member thereof.

There is in evidence an agreement between the parties, bearing effective date of September 15, 1924.

FURTHER FINDINGS.—Prior to May 1, 1918, the freight office at Kansas City, Missouri, accounted for waybills of through carload shipments, except in those cases in which, because joint rates had been established between connecting carriers, the accounting department of the carrier had authorized through billings. In cases in which through billings were not authorized, the freight office in question made out expense bills to receiving carriers for the shipment of goods beyond the connecting point.

The Director General of Railroads, on March 16, 1918, issued General Order No. 11, which provided that, effective May 1, 1918, all freight forwarded from one point to another in the United States over two or more railways or boat lines under federal control should be billed from the point of origin to the point of destination, regardless of the absence of joint rates between the connecting carriers. The order in question also provided that waybills should accompany the through carload shipments.

To facilitate the movement of through freight as contemplated by General Order No. 11, the Frisco and the Missouri-Kansas-Texas railroads established a joint terminal freight yard in Kansas City. To perform its part of the work at this joint terminal, the carrier herein established three revising rate clerks on May 1, 1918, the positions involved in the present controversy, and three assistant rate clerks. Prior to the date in question, the work assigned to these employees had been performed by rate clerks in the agent's office in Kansas City. For the proper performance of their work, the carrier furnished these employees with tariffs, and held them responsible for the proper revision of through freight rates which were not handled by the local freight agent and his assistants. The rates per hour, with additions through subsequent wage agreements, assigned to these positions are the rates of pay for which the employees are contending in the present dispute.

On November 1, 1919, when the federal government abandoned control over the carrier and when the Frisco and the M-K-T resumed control of their own through shipments, the carrier herein discontinued the three assistant clerks, but retained the three revising clerks. On August 1, 1931, the carrier abolished

the first trick position. On April 13, 1932, it purported to abolish the second and third trick positions of revising clerks, with rates of $6.72 per day, and to create two positions of passing record typists with rates of pay of $4.95 per day.

Under the authority of the Railway Labor Act of May 20, 1926, the Brotherhood of Clerks and the St. Louis-San Francisco Railway, under the jurisdiction of the United States Mediation Board, entered into an agreement on March 26, 1930, to establish a board of adjustment to be known as the Frisco Clerical Forces Adjustment Board. Section 16 of the Mediation Agreement providing for the establishment of the board in question follows:

> "This agreement shall become effective upon its execution and shall remain in full force and effect until it is changed or terminated as herein provided. Should either of the parties to this agreement desire to revise, modify, or terminate its provisions, ninety (90) days written advance notice containing the proposal for modification, revision, or termination, shall be given and if only modification and/or revision is desired, conferences shall be held between the parties to this agreement immediately on the date of expiration of said notice unless another date is mutually agreed upon."

In pursuance of this agreement, the parties to the present controversy organized a local adjustment board on April 15, 1930.

The representatives of the employees, although they sought to secure a settlement of the claims herein presented by direct negotiations with representatives of the carrier, have at no time prosecuted these claims to the Frisco Clerical Forces Adjustment Board.

Neither before nor since the enactment of the Railway Labor Act of June 21, 1934, has either party served notice upon the other of its desire to abandon the local adjustment board.

POSITION OF EMPLOYEES.—The petitioner contended that the positions in question, although originally so designated, were not those of revising rate clerks; that the rate-revising duties of these positions were at the outset and continued to be incidental to the primary duties of the positions; that the primary duties of the positions were those of checking and routing cars, receiving inbound, making passing reports, making arrival reports, handling diversions, and reconsigning; that since April 13, 1932, the occupants of these positions have been performing substantially the same duties they have always performed; that the rate of $6.72 per day was and is the proper rate per day for the positions in question.

In support of its position, the petitioner cited and relied upon these rules of the agreement between the parties:

> "RULE 54. Positions (not employees) shall be rated and the transfer of rates from one position to another shall not be permitted."
>
> "RULE 83. Established positions shall not be discontinued and new ones created under same or different titles covering relatively the same class of work serving the purpose of reducing the rate of pay or evading the application of these rules."

POSITION OF CARRIER.—The carrier contended, in the first place, that this Division of the National Railroad Adjustment Board has no jurisdiction over the controversy in question; that the Frisco Clerical Forces Adjustment Board, created on April 15, 1930, is still in existence; and that, under the Mediation Agreement of March 26, 1930, the local system board alone has jurisdiction over the present dispute.

In support of this position, the carrier relies upon the Mediation Agreement, above referred to, which provides for the mode of terminating the local system adjustment board. It also relies upon Section 3 (2) of the Railway Labor Act of 1926 which stated:

> "Nothing in this Act shall be construed to prohibit an individual carrier and its employees from agreeing upon the settlement of disputes through such machinery of contract and adjustment as they may mutually establish."

In this connection, the carrier calls attention to this portion of Section 3 of the Amended Railway Labor Act of 1934:

> "In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon

ninety days notice to the other party elect to come under the jurisdiction of the Adjustment Board."

In the second place, the carrier contended that, assuming this Division has jurisdiction, there is no merit in the claim; that, as it had the right to do under the agreement between the parties, it discontinued two positions and created new and distinct positions; and that it assigned proper rates of pay to the new positions.

CONCLUSIONS OF THE DIVISION

JURISDICTION OVER DISPUTE.—The Referee is of the opinion that this Division has jurisdiction over the dispute herein presented, and should proceed to render an award on its merits.

It seems clear that Congress, in the enactment of the Railway Labor Act of June 21, 1934, intended to eliminate the local adjustment boards which had been organized under authority of the Railway Labor Act of 1926. An important reason for the adoption of the Act of 1934 was the fact that the local adjustment boards established under Section 3 of the Act of 1926 had largely proved ineffective. In these circumstances, it would have been strange, indeed, for Congress by implication to have authorized the continuation of the adjustment boards created under the Railway Labor Act of 1926, the failure of which to a considerable extent had created the need for the new legislation.

Section 3, Second, of the Act of 1934, does, of course, provide:

> "Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this act, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. * * *"

This language, in the opinion of the Referee, merely permits the establishment of such boards by agreement after the new Railway Labor Act had gone into operation, and does not expressly or by fair implication provide for the continuation of the adjustment boards which had been set up under the old Railway Labor Act.

Even if it be assumed that the Act of 1934 did not per se abolish the adjustment boards organized under the Act of 1926, the record contains ample and convincing evidence that the parties to the present dispute had by mutual agreement abandoned the Frisco Clerical Forces Adjustment Board prior to the time when the respondent carrier had questioned the jurisdiction of the Third Division of the National Railroad Adjustment Board over the present dispute. The last meeting of the system board of adjustment occurred in February 1933, some fifteen months before the enactment of the Railway Labor Act of 1934. Following the adoption of this legislation, the carrier herein participated in the organization of the National Railroad Adjustment Board. On October 29, 1934, the petitioner transmitted to the carrier a list of "pending and unadjusted cases" on which it asked conferences, and informed the carrier that it intended to submit them to this Division unless it could secure satisfactory adjustments. On April 12, 1935, the carrier agreed to join with the Brotherhood of Clerks in jointly submitting the disputes in question to the Adjustment Board. At no time during these negotiations did the carrier claim that the local adjustment board was still functioning. These facts clearly indicate that the parties by mutual agreement had abandoned the local board prior to the time when the petitioner submitted this dispute to the Third Division.

The fact that the Mediation Agreement of March 26, 1930, contained a provision for "ninety (90) days' written advance notice" to be given by the party desiring to terminate the agreement to the other party does not alter this conclusion. This provision related to the procedure to be followed when one party desired to terminate the agreement by an ex parte act. It did not preclude the bilateral abandonment or rescission of the agreement.

MERITS OF CONTROVERSY.—In view of the miscellaneous character of the duties which the occupants of the positions in controversy performed before and after the changes on April 13, 1932, the Referee has encountered considerable difficulty in determining whether the agreement between the parties has been violated, and if so, what the award herein should be.

It seems clear to the Referee that the carrier in fixing the original rates of pay for the positions in controversy was largely, if not principally, influenced by the fact that the occupants of the positions were to be required to perform a very important type of work—rate revision of through shipments; and for this reason designated the positions as rate revision clerks, although their incumbents were to devote only a small part of a daily tour of duty to the performance of rate revising duties. The assignments contemplated that the occupants of the positions would devote the remaining part of their daily tour of duty to a variety of tasks, including the making by longhand of a record of through shipments passing through the terminal. In these circumstances, the Referee is of the opinion that the carrier, with the discontinuance of the rate revising work, was entitled to abolish the positions in question and to create new ones more nearly in keeping with the class of the duties to be performed.

The Referee, however, is strongly of the opinion that the carrier was not justified under the agreement between the parties in seizing upon the lowest-paid activity of the positions in question as a basis for the creation of new positions and the assignment of new rates of pay.

What positions should the carrier have created, and at what rates of pay? The record indicates that the carrier, when it removed from the positions in question the duties of revising rates on through shipments, added interchange work to them. The record further indicates that, following the change in question, the occupants of the positions in question were spending more than an average of an hour each day on interchange work. This is a fair equivalent of the amount of time which the employees were devoting to rate revision work on the basis of which the carrier originally classified the positions. In these circumstances, the carrier, in the opinion of the Referee, should have classified these positions as interchange clerks at the basic rate of $5.23 per day.

AWARD

(*a*) It is the Award of this Division that the carrier shall pay to C. W. Fink the difference between $4.95 and $5.23 per day, retroactive to April 13, 1932.

(*b*) It is the Award of this Division that the carrier shall pay to E. G. Gabel the difference between $4.95 and $5.23 per day, retroactive to April 13, 1932.

By Order of Third Division:

NATIONAL RAILROAD ADJUSTMENT BOARD.

Attest:

H. A. JOHNSON,
Secretary.

Dated at Chicago, Illinois, this 7th day of February 1936.