Award Number 293
Docket Number CL-239

NATIONAL RAILROAD ADJUSTMENT BOARD

Third Division

Willard E. Hotchkiss, Referee

PARTIES TO DISPUTE:

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

SOUTHERN PACIFIC LINES IN TEXAS AND LOUISIANA

DISPUTE.—

"Claim (a) for payment of position established as stenographer to Terminal Trainmaster, Yard Office, El Paso, Texas, at rate of $5.25 per day.

"Claim (b) for back pay adjustment for Mrs. Lillian Salem to make whole payment at the rate of $5.25 per day during her occupancy of the job."

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

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

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

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

As a result of a deadlock, Willard E. Hotchkiss was appointed as Referee, and on request of the carrier a second hearing was had on July 8, 1936, in which representatives of the parties argued the case before the Board with the Referee sitting as a member thereof.

There is in evidence an agreement between the parties bearing effective date of July 1, 1922, and Addendum No. 1 thereto effective May 16, 1924.

Rule 54 of the agreement reads as follows:

"The wages of new positions shall be in conformity with the wages for positions of similar kind or class in the seniority district where created."

Petitioners contend that Rule 54 was violated in that the stenographer to the terminal trainmaster, Yard Office, El Paso, Texas, was improperly rated when the carrier went outside the seniority district for a rate instead of giving the position the rate of a position of similar kind or class in the seniority district in which the position was created. Petitioners contend further that the improper rating has continued from that day to this, but they are asking a monetary award only as applied to the time the incumbent at the time the claim was filed, Mrs. Lillian Salem, has held the position.

The position in question was created on January 16, 1925. Nearly two years later the organization protested the rate, and correspondence and discussion continued until April 1927, when the general chairman asked the vice-president and general manager for a conference on this and other cases. The vice-president and general manager referred the matter to Mr. Torian, his then assistant. Carrier's record shows that General Chairman Harper visited Mr. Torain on April 20, 1927, and that they talked of arranging a conference at a mutually convenient time, but that no conference was then held.

Between April 1927 and September 1934 when the case was revived, several significant things happened in respect to the relations between the parties, and these events are interwoven with the later history of this case.

The Railway Labor Act of 1926 provided that Boards of Adjustment be created by agreement between any carrier or group of carriers or the carriers

as a whole and their employees. The parties to this dispute were negotiating about the formation of such a Board from June 8, 1926, to sometime in August 1926, the issue between them being whether to form a System Board which the carrier proposed or a Regional Board which the employees' organizations were urging. Not until two and one half years later, in February 1929, were the employees advised of the failure of the national conferences in regard to the formation of regional boards. Meanwhile, the carrier's proposal to form a system board had not been withdrawn and the matter of a board, and presumably also of pending cases on the property, had remained in statu quo.

Meanwhile dispute had arisen concerning the right of the Brotherhood of Railway and Steamship Clerks, the petitioners in the instant case, to represent the clerical employees of this carrier, and bargaining relations between the Brotherhood and the carrier were broken off in July 1927. Litigation on the question of representation continued until May 1930.

On February 11, 1928, the Federal District Court ordered reinstatement of the Brotherhood, but the carrier carried the case up to the Supreme Court of the United States where a decision was handed down on May 26, 1930, upholding the decision of lower Courts and finally establishing the Brotherhood as the legal representative of the clerical employees of this carrier.

In September 1929 while the question of clerks' representation was still pending on appeal in the Federal Courts, employees representatives advised the carrier that they were ready to proceed to form a system board, but no conference was held until September 10, 1930; that is to say, about three and one half months after the decision of the U. S. Supreme Court finally settled the representative status of the Brotherhood of Railway Clerks.

In conferences concerning a board, dispute centered on the question whether disputes arising subsequent to May 20, 1926, the effective date of the Railway Labor Act (employees' contention) or only those subsequent to September 1, 1930, (carrier's contention) should be handled by the Board when created. No agreement was reached in conference held on September 10, 1930, January 13, 1931, and March 9, 1931.

On March 17, 1931, the U. S. Board of Mediation came into the picture with former Governor Colquitt as mediator, but on July 24, 1931, mediation in respect to a Clerks' System Adjustment Board failed and carrier by letter of August 29, 1931, declined to arbitrate. Thereafter, Grand President Harrison of the Brotherhood conferred with officers of the carrier in an effort to reach a compromise and the employees' committee thought one had been reached, but it did not culminate, and no system board was ever formed.

After discontinuance of bargaining relations with the Brotherhood, it appears that there was an Association of Clerical Employees on the property and on August 20, 1927, the management granted the Association a wage increase of $100,000 per year, and in the process of distributing that sum rerated the various clerical positions.

The rate of stenographer to the terminal trainmaster at El Paso, the position now in dispute, was raised from $4.79 to $5.00 per day, and the rate of stenographer to the agent, which rate the petitioners claim to be the rightful one for the position in dispute, was raised from $5.19 to $5.25 per day.

On January 1, 1928, the position of terminal trainmaster was superseded by the position of general yardmaster, and on June 18, 1928, Mrs. Lillian Salem, the claimant in this case, was employed as stenographer to the general yardmaster at the $5.00 rate which petitioners want advanced to $5.25 as of June 18, 1928.

The case was submitted to the Board on September 24, 1935, and a statement with exhibits was presented October 23, 1935.

Carrier's brief with exhibits was presented October 19, 1935, and oral hearing was had on February 13 and 14, 1936, after which supplementary briefs and exhibits were submitted. When it became necessary to call in a referee, carrier requested a further hearing of the parties with the referee sitting with the Division, which hearing was held on July 8, 1936.

Certain of the exhibits, which are extensively duplicated in the petitioners' and the carrier's briefs, set forth the respective positions of the parties both as to earlier and later phases of the case, with considerable conciseness. Wherever practicable, original statements are quoted or summarized. The following are among the more significant supporting documents contained in the record:

NOTE.—"P" indicates documents in Petitioners' exhibits. "C" indicates documents in Carrier's exhibits. "P–C" indicates documents in both exhibits.

C. January 9, 1925, copy of requisition and authorization for additional clerk for Terminal Trainmaster at $4.79 per day, effective January 16, 1925.

P. December 6, 1926, letter from M. W. Phillips, Division Chairman, G. H. & S. A., and P. E. Whisner, Division Chairman, Southern Pacific, to C. R. Morrill, Supt., G. H. & S. A., and L. U. Morris, Supt., Southern Pacific, to-wit:

"Your attention is respectfully directed to the existing disparity in the rate of pay for position of stenographer to the Terminal Trainmaster as compared with those of like nature in the seniority district where created.

"Position No. 3 was established effective January 16, 1925, as a six day assignment, hours 8 a. m. to 5 p. m., at the rate of $4.79 per day. Under rule No. 54, article 11, of the G. H. & S. A. agreement and rule No. 1, Article 5, of the S. P. Company agreement, it is provided that rates of pay for new positions shall be in conformity with rates paid for similar positions with duties of like nature in the seniority district where created.

"It can hardly be presumed that there would be any radical difference in the duties or responsibilities of the stenographer to the Terminal Trainmaster and the stenographer to the Agent, and yet you will find that the rate of $5.19 per day is paid for the latter position.

"It is our contention that the rate of $5.19 per day should also be made to apply to the position of stenographer to the Terminal Trainmaster and that adjustment be made for all time during which the lower rate of $4.79 has been applied.

"If, in your opinion it is necessary that an investigation be held to further develop all of the facts in this case, we should be pleased to have you gentlemen name a date to suit your convenience."

P. December 9, 1926, letter W. R. Mann to Phillips, to-wit:

"Your letter of December 6th, in reference to rate of pay for position as stenographer, Terminal Trainmasters office, El Paso. Eee no grounds for your contention. If anything, rate should be reduced, as am sure that this stenographer does not perform the work performed by the stenographer in this office who receives the same rate."

P. December 15, 1926, Phillips to Mann, to-wit:

"Referring to your letter of December 9th in regard to the rate of the stenographer to the terminal trainmaster:

"Our committee does not understand the reference which you have made to your personal stenographer, inasmuch as the position is in no way involved in this dispute and, being in an entirely separate seniority district, would not admit of any comparison with the position under discusson. We take the view that the rate and duties of the stenographer to the Asst. Superintendent are no more relevant to this subject than would be those of the stenographer to the Division Accountant or the Stenographer in the Insurance Department.

"The point that this committee desires to make is that the position of stenographer to the Terminal Trainmaster was created in violation of Rule 54, Article 11, of the Clerks' the rates prevailing for positions of similar kind or class in the seniority district where created.

"We have only two positions in the same seniority district from which a comparison may be drawn namely, the stenographer to the Agent, which carries the rate of $5.19, and the claim department stenographer which carries the rate of $5.07.

"Our investigation has convinced us that the rate of $4.79 which was assigned to the Stenographer to the Terminal Trainmaster could not have been based upon the assumption that lesser duties or responsibilities would be required than on either of the above named positions.

"However, if such were the case we should be pleased to have you direct our attention to those particular features of the work performed by the two higher paid positions which are not also performed by the stenographer to the Terminal Trainmaster, and which call for such an outstanding differential, as we have been unable to justify this discrimination in rates."

P. December 17, 1926. Morrill to Phillips, to-wit:

"Your letter of December 15th, in reference to stenographer, Terminal Trainmaster, El Paso.

"As this work is in no way similar to the duties assigned to the stenographer in Freight Agent's office, proper comparison could not be made, but as the work is similar to that of the Assistant Superintendent's stenographer, as well as the Master Mechanic's, we cannot agree with you in reference to increased rate for Terminal Trainmaster stenographer."

P. December 21, 1926. Phillips to Morrill, to-wit:

"Referring to your letter of December 17, in regard to the rate of the Stenographer to the Terminal Trainmaster.

"It is noted that you have chosen to go outside the seniority district, in which the position under discussion was created, for a comparison of rates and duties, rather than draw the comparison from the two stenographic positions available in the same seniority district, and which could readily afford a basis for this parallel.

"Even though the rate of the Stenographer to the Joint Terminal Trainmaster were based upon the rate paid to the Stenographer to the GH&SA Assistant Superintendent, it would still remain to be explained why the rate of the Stenographer to the Southern Pacific Company Assistant Superintendent was not considered. This position on the Pacific Lines carries a rate of $146.00 per month.

"I cannot agree to the establishment of any positions in the terminal station or yard office based entirely on rates prevailing on the Atlantic System for you are aware of the fact that all rates in the joint terminal were, in effect, compromise rates as between those prevailing on the Atlantic System and the higher rates carried on the Pacific Lines.

"No serious exception was taken by any of the parties representing the two managements, at the time of the conference which established the local terminal rates, as to the propriety of arriving at a medium of the higher Pacific System rates and the lower rates of the Atlantic System. We see no reason why that arrangement should be set aside in the creation of positions subsequent to the merger, and only GH&SA rates considered.

"Since you insist that the two stenographic positions in the same seniority district do not afford a proper basis of comparison I am quite ready to prepare an anaylsis of rates paid to Terminal Trainmaster's stenographers on both the Atlantic and Pacific Systems, and draw a medium between the two. However, I do not believe that it would be fair to go outside the seniority district, as for instance, into the Mechanical Department and the Superintendent's office, for a basis of comparison while positions of identical nature exist on both systems in the same departments."

P. December 22, 1926. Morrill to Phillips, to-wit:

"Letter of December 21st, in reference to the above subject.

"As stated in previous correspondence the position at Octavia Street does not in any way compare with the work of the Stenographer in Freight Station, and we do not care to consider change in salaries."

P–C. December 28, 1926. Letter W. H. Harper, General Chairman, to J. G. Torian, Assistant to Vice President and General Manager, to-wit:

"The position of Stenographer to Terminal Trainmaster at El Paso was established effective January 16, 1925, and the rate of pay fixed at $4.79 per day. Under Rule 54 of the Agreement, the rate of the position should have been in conformity with the rates of similar positions in the same seniority district. There are only two other stenographic positions in the same seniority district, stenographer to Agent at $5.19 per day, and Claim Department stenographer at $5.07. It is believed that Division officers will agree that the duties of the position in question are no less exacting and carry no less responsibilities than do the $5.19 and $5.07 stenographic jobs in the same seniority district.

"It is the position of the Committee that the rate has been fixed at $4.79 per day in violation of Rule 54 of the Agreement, and claim has been made that the rate of the position should be fixed at $5.19 per day, effective as of January 16, 1925, and that proper adjustments should be made to cover underpayment at the improper rate. The claim has been handled by Division Committees with Division officers, and has been declined on the basis that the $4.79 rate is in conformity with one stenographic position in each of two other seniority districts other than the district in which the

position in question is located, which we hold to be improper and out of keeping with Rule No. 54. We are yet of the opinion that there is a proper basis for the claim as made, and desire to handle the matter with your office on appeal. Will you please review the file, and advise us as to your position, naming a date for conference, if you do not find it agreeable to allow the claim?"

P–C. December 31, 1926, Torian to Harper, to-wit:

"Your letter of December 28th.

"The position of stenographer to terminal trainmaster was properly rated when put on and the present rate has been in effect for two years. We cannot entertain grievance cases that are not presented within a reasonable period and doing so could only lead to post mortem investigations of an unsatisfactory character."

P–C. January 4, 1927. Harper to Torian, to-wit:

"Your letter of December 31st, above subject.

"It is a matter of fact and record that the rate of the position in question is lower than the rates paid on the only other two stenographic positions in the same seniority district, and we are yet of the opinion that there is a proper basis for the claim as made, under Rule 54 of the Agreement. If the rate is improper, the fact that the underpayment has continued for a considerable period only accentuates the cause for complaint. We would be glad to have you reconsider the matter, and discuss the claim in conference with us."

P–C. January 6, 1927, Torian to Harper, to-wit:

"Your letter January 4th. There is no proper basis for claim filed in this case and, as stated in my letter of December 31st, we cannot entertain grievances that are not presented within a reasonable period."

P–C. April 12, 1927. Harper to G. S. Waid, Vice President and General Manager, Southern Pacific Lines, Houston, Texas, to-wit:

"We have a number of unsettled cases pending which we have been unable to settle in our negotiations with Mr. Torian's office, and we desire to present, for your review and consideration, the cases listed below, all of which, from the employees' viewpoint, are of such outstanding merit as to justify consideration at your hands:

Seven Day Assignment—Houston.
Change in Rate of pay, General Foreman—San Antonio.
Rate of Pay, Stenographer to Terminal Trainmaster—El Paso.
Rate of Pay, J. E. Jones—New Willard.
Overtime Rate, Caboose Supplymen—Lufkin.
Rate of Pay, Warehouse Clerk—Corpus Christi.
Rate of Pay, Warehouseman—Luling.

"We have asked for Grand Lodge assistance in the settlement of our unsettled cases now pending, and it has been suggested that it might be possible to arrive at a basis for mutually satisfactory settlements, if we could secure an audience with you for further discussion of the cases. We would, therefore, be glad to have you review the files in the above named cases, and name a date upon which you can meet the executive Committee of our System Board together with Vice President, Mr. R. P. Dee, for that purpose.

"Will you kindly advise and oblige?"

C. April 19, 1927. Torian to Harper, to-wit:

"Your letter of April 12th to Mr. Waid has been referred to me for final handling. Suggest that you call upon me, following which will arrange conference date to meet your committee."

Mr. Torian attached the following memorandum to this Exhibit:

"Following the suggestion contained in Mr. Torian's letter of April 19, 1927, General Chairman Harper called on Mr. Torian on April 20, 1927, at which time he was advised that conference could be arranged for at some mutually agreeable date, but this conference was never held or again

requested and nothing further was heard of the case until Harper, after permitting the case to lie dormant for a period of over seven years, wrote his letter of September 20, 1934 (this letter being included in Exhibit 2), attempting to reassert the case under its original caption. Attention is directed to the following language extracted from General Chairman Harper's letter of September 20, 1934:

'* * * The above styled case constitutes a claim under rule 54 of the Agreement for an adjustment in the rate of pay on a stenographic job in the El Paso Yard Office * * *',

showing conclusively that in attempting to resurrect the case Harper did not present it on the same basis that he has presented it to this Board. The remainder of the correspondence found in Exhibit 2 dated subsequent to September 20, 1934, also confirms this statement."

P-C. September 20, 1934. Harper to Torian, to-wit:

"The amended Railway Labor Act provides that disputes, 'including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carier designated to handle such disputes, and that such disputes may be referred to appropriate division of the National Adjustment Board, if settlement is not effected by agreement in conference.'

"The above styled case constitutes a claim under Rule 54 of the Agreement for an adjustment in the rate of pay on a stenographic job in the El Paso Yard Office. The rate of the position (new when created) did not conform to the rates paid on similar positions in the same seniority district. You declined the claim on the basis that the rate in effect had been applied for two years before the claim for adjustment was filed. We took the position that the claim was fully sustained by the rule, and that the Company could not validate an improper rate by applying it for two years in violation of the rule. The claim is still pending and unadjusted. We accordingly request that you meet our Committee in conference to discuss the claim further and settle it by agreement, if possible. It will be appreciated if you will name a conference date for that purpose."

P–C. September 22, 1934. Torian to Harper, to-wit:

"Your letter September 20th, 1934.

"This case was originally presented by you under date of December 28, 1926, to which reply was made under date of December 31, 1926. You again wrote me under date of January 4, 1927, and I made reply under date of January 6, 1927, and no further action was taken by you. A situation in which no action has been taken since January 1927 cannot, under any course of reasoning, be considered as pending. It is therefore our position that this is not a pending case."

C. March 29, 1935. Letter, Harper to Marshall, to-wit:

"I regret to note from your letter of March 27th, your file 218.68, that you have declined the above claim as being without basis.

"It is believed that the basis, or lack of basis, for this claim rests on the facts as to just what duties have been performed by Clerk Brandin during the period in question. In order that these facts may be accurately developed and recorded, request is made in behalf of Mr. Brandin that he be given a hearing as provided in rule 27. Will you please arrange hearing and advise as to its time and place so that necessary arrangements can be made for the presence of witnesses?"

P–C. July 10, 1935. Harper to Torian, to-wit:

"The above case was among those which we were unable to dispose of in our conference ending January 31st, 1935. It was understood at that time that a subsequent meeting would be had for the purpose of drawing a joint statement of facts preparatory to the submission of the case to the National Railroad Adjustment Board.

"In our conference of the ninth you stated that you would not consider this as being a 'pending and unadjusted' case under the terms of the Railway Labor Act, and that you therefore declined to join the

organization in its joint submission to the Adjustment Board. We cannot accept your decision that this case is without basis, and this is to advise that it will be submitted to the National Railroad Adjustment Board for its decision."

Attached to carrier's original submission are the following documents: U. S. Labor Board decisions 3915, 4756, and letter February 8, 1935, from R. B. Parkhurst, Secretary, Fourth Division, National Railroad Adjustment Board.

Later statements, submissions, and briefs by the parties with attached exhibits develop in extenso the history of the relations between the parties above outlined and voluminous affidavits concerning the merits of the claim.

PETITIONERS' POSITION.—Petitioners maintain that Rule 54 was violated when the position in dispute was created, that the violation has been continued since that time. They cite and emphasize their effort to secure a settlement of the claim before the interruption of bargaining relations, their effort after their reestablishment as the legal representatives of the Clerks to form a System Board, efforts to form regional boards having failed. They say their only hope of pressing this and other claims successfully on the property under the Railway Labor Act of 1926 was through an adjustment board and that they showed no lack of zeal in working for such a board. They point out that they took up the claim promptly when the Amended Railway Labor Act of 1934 provided a tribunal before which claims could be brought and advanced the claim as rapidly and persistently as possible.

On the merits of the claim, petitioners maintain that the duties of stenographer to the general yardmaster are of similar kind and class with the duties of the stenographer to the Agent and that there was no occasion at the time the position was created and there has been no occasion since to go outside the seniority district to find a position with a lower rate. In pressing the merits of the case before the Board, stress was laid upon the phrase "similar kind or class" as giving the management much less latitude than language used elsewhere in the agreement, such as "relatively the same class of work." Continuing this line of argument, petitioners say:

It is evident that in determining the rate of pay for a new position it is not necessary that the new position be precisely the same or even relatively the same, as to the duties or importance, as the position, with which comparison is made. All that the rule requires is a similarity in kind or class.

In the instant case there are many points of similarity between the new position in the General Yardmaster's office and the one in the Agent's office with which comparison is made:

Both are primarily stenographers; both are employed in a more or less personal capacity to the head of a department; and take dictation from such department head; each opens the mail, answers without dictation such of the correspondence as they are capable, secures and attaches the subject file of other correspondence for the ready reference of the department head.

Each makes a stenographic record of question and answer investigations conducted by their respective employers. Each maintains the files of their respective offices and performs other routine duties peculiar to their respective positions, many of which are not only similar but almost identical. In these various ways the two positions are very similar; so much so, that it cannot be said it was necessary to go outside the immediate seniority district to find a position of reasonable similarity, and in so doing the Carrier has violated the spirit and intent and the plain language of the rule.

CARRIER'S POSITION.—*As to Jurisdiction.*—Carrier denies the jurisdiction of the Board, in the main, on the following grounds:

1. Case was not "pending and unadjusted" when the Amended Railway Labor Act was passed.

2. Case is outlawed by fundamental principles of law and the Texas Statute of limitations.

3. Case has not been handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes.

4. Rule 27 has not been observed. Harper's letter March 29, 1935, re Brandin, shows he recognizes that Rule 27 applies.

5. Rules of Board and provision of Amended Railway Labor Act have not been complied with.

6. Claim is not the same claim as was handled in 1926–1927.

7. Petitioners have not advised carrier about data submitted.

Merits of the Claim.—Without waiving its jurisdictional argument, carrier attacks the merits of the claim for the following reasons:

1. Rate for position same as that of other employees in same terminal who performed same class of work.

2. Fifteen employees have held position since its creation, some more than once, and none of them ever objected to rate.

3. Wages for new positions must conform to wages in the same seniority district only if established positions are of the same kind and class and carry the same character of duties. Not true in this case.

4. Rule 54 not being applicable within the same seniority district, carrier found two comparable positions in the same terminal, those of stenographer to assistant superintendent and of the master mechanic, and used the rate of those positions.

5. Claim never originated with any employee because employees were satisfied.

6. General Chairman's neglect of claim for seven years shows he did not take it seriously.

OPINION OF THE REFEREE.—The positions above stated are developed in great detail. The jurisdictional and factual issues are bandied back and forth in unbelievable minutiae, prolixity and tedium, but the whole case simmers down to three issues:

1. Is the case properly before the Board?
2. If properly before the Board, from what date should the claim run?
3. Upon what basis should the position be rated under Rule 54?

1. Question of Jurisdiction.—On this issue no useful purpose will be served by further hair splitting over elaborate details of legal and procedural technicalities. If we could ignore the fact that close upon the last contact shown and in the record between the parties over this and other cases back in April 1927, the carrier discontinued bargaining relations with petitioners and that the parties were in litigation until May 1930, and if we could ignore the further fact that they were preoccupied thereafter with questions pertaining to an adjustment board, the precise purpose of which was to handle issues of this kind, we could easily arrive at the conclusion that this case or its predecessor case, which was indubitably "pending and unadjusted", late in 1926 and early in 1927, was not pending and unadjusted on September 20, 1934, when again Mr. Harper presented it to Mr. Torian and that it is not "pending and unadjusted" now. Arguing in reference to statutes of limitations, whether in Texas or elsewhere, by ignoring the same facts we could arrive at the same conclusions. We should be compelled likewise to ignore the same facts to conceive of this case having been handled on the property during the period in question in the usual manner.

True, the Amended Railway Labor Act was not intended and should not be permitted to serve as an invitation to bring old cases indiscriminately, neither should it bar indiscriminately cases whose progress has been interrupted for a time by acts over which petitioners have no control. All of this line of reasoning applies to carrier's argument in respect to the procedural requirements of the law and rules of the Board for admitting or denying jurisdiction of cases.

Whether the claim is the same one that was advanced in 1926 and 1927 is a technical question which can best be considered, if consideration of this question is found essential, in weighing the merits of the claim in the light of all attendant circumstances. In respect to the last objection to accepting jurisdiction, omissions on the part of petitioners to furnish carrier with copies of data submitted it is of course the duty of petitioners to inform themselves of all the rules of procedure and etiquette to be observed in handling cases before the Board. Insofar as they may have erred in this regard they should of course be called to account. However, in the circumstances of the instant case this cannot be regarded as a substantial argument and in any case the omission has now been corrected in the process of advancing the case, and it is too late to predicate action upon it.

The operation of Rule 27 has been passed upon in connection with another case which came from this property concurrently with the instant case (CL–238). The circumstances of the two cases are not identical but the application of the Rule is the same. What Mr. Harper thought about the Rule in connection with Mr. Brandin's case is worthy of note, but not necessarily controlling.

In all the circumstances, which are notably exceptional, the Referee finds that the Board has the right and the duty to take jurisdiction of this case. Or, if we accept the contention that there are two cases, an earlier and a later one, it is the right and the duty of the Board to take jurisdiction of the issue in its entirety.

2. Conscious of the extraordinary lapse of time since this case arose, the Referee, notwithstanding the circumstances which amply explain the long pendency of the issue, has been disposed from practical and realistic considerations to seek a point of time not too far back at which in reason and equity the claim might properly terminate. Petitioners have in some measure taken account of such practical considerations in not pushing the pecuniary claim back of Mrs. Salem's incumbency of the position which began on June 18, 1928.

The nature of the case, involving as it does a rather technical application of a rule, makes it difficult if not impossible to differentiate the issue by periods of time except on grounds of expediency and convenience, as the petitioners have done in asking for reimbursement only for the present incumbent. The referee finds that the merits of this case, or to state it otherwise the merits of a possible earlier and later case, cannot be adequately determined unless the issue in its entirety is followed back to the time when the position was created on January 16, 1925. To be sure, there are two possible division points other than the practical one adopted by the petitioners which might be considered:

A. The time when the rate was increased from $4.79 to $5.00 at the same time that the rate which the petitioners claim to be the rightful rate was increased from $5.19 to $5.25 on August 20, 1927.

B. The date when the office of terminal trainmaster was superseded by the office of general yardmaster on January 1, 1928, might be taken, but this would have about the same practical effect as the date which the petitioners have fixed, that is June 18, 1928.

It is possible to argue that on practical grounds a difference of 25 cents between $5.00 and $5.25 might be justified, whereas a difference of 40 cents between $4.79 and $5.19 would not be justified. Inasmuch, however, as the case involves the application of a rule, the Referee is of the opinion that decision must hinge on the question whether there was sufficient dissimilarity between the two positions to justify going outside the seniority district for a rate, and not upon the question whether such difference, if any, merited a differential of 25 cents or 40 cents. The action of the carrier in narrowing the differential during the period in which relations with petitioners were broken off would tend to indicate it considered the previous differential to have been too great, but it would not affect the main issue.

The reference finds, therefore, that whatever merit the claim possesses under the rule pertains to the whole period covered by the dispute, both prior and subsequent to Mrs. Salem's incumbency.

3. This brings up to the final issue; that is to say, the correct rating of the position under Rule 54.

The wording of Rule 54 gives a strong persuasiveness to the arguments petitioners have advanced, and they have quite properly made the most of this wording.

The Referee has little knowledge of the circumstances under which Rule 54 was agreed to, but he cannot believe that the rule was intended to bar the reasonable classification of employees of the kind which an honest and efficient employer might be expected to make. The procedure followed in the rating of the position now in dispute does not appear to the Referee as seriously subject to censure, even though it might be decided that the Carrier erred in fixing the rate.

There is much testimony pro and con as to what Mrs. Salem now does and does not do in comparison with the stenographer to the agent and to the assistant superintendent, respectively. Much of what one party asserts, even under oath, is contradicted by the other, likewise under oath, and the affidavits as a whole are not impressive. Out of the welter of statements and counter statements, however, the Referee cannot escape the impression that there is a substantial difference between the duties performed by the stenographer to the general yardmaster and the stenographer to the agent, and that these differences are of sufficient magnitude to justify going outside the seniority district for a comparable rate.

Any evidence which might be adduced as to the earlier duties performed in the position in dispute would of necessity be extremely untrustworthy, if contradicted, primarily because of the lapse of time and the haziness of human recollection concerning events long passed.

The Referee is inclined to believe that a joint review and check of the present duties of this position, in comparison with the duties of other stenographers both in the same seniority district, and in the same terminal, would serve a useful purpose, but that an effort to run this joint check far back into the past would serve no useful purpose. The claim is therefore dismissed in its entirety, without prejudice to making a joint check and to reopening the case on its merits in respect to a period not to exceed six months prior to September 20, 1934.

AWARD

1. Jurisdiction: The Board has jurisdiction.
2. Term of the Claim as regards jurisdiction: From the time the position was created.
3. Rating under Rule 54: The Referee at this time does not find the rating to have been improper.
4. Status of Claim: Claim dismissed without prejudice to making a joint check and to reopening for a period beginning not to exceed six months prior to September 20, 1934.

By order of Third Division:

NATIONAL RAILROAD ADJUSTMENT.

Attest:

H. A. JOHNSON, *Secretary.*

Dated at Chicago, Illinois, this 17th day of September 1936.