Award No. 791
Docket No. CL-749

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Dozier A. DeVane, Referee

PARTIES TO DISPUTE:

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

SOUTHERN RAILWAY COMPANY

STATEMENT OF CLAIM: "Claim of Robert M. Brown, furloughed clerk, Knoxville, Tennessee, for the difference between the Storehouse Man's rate $3.68 per day and the Clerks rate of $4.35 per day, December 1, 1936, to February 2, 1937, inclusive, on account of not being used to perform clerical work in the office of Division Storekeeper, Knoxville, Tennessee, such work as in the past has been assigned to the clerical employes."

EMPLOYES' STATEMENT OF FACTS: "Effective December 1, 1936, Mr. Edward Caldwell, Apprentice Storekeeper (excepted employe) was assigned clerical duties in the office, preparing inventory, answering the telephone, writing out phone calls, transferring stock from slips to cards and checking invoices, work that is ordinarily performed by clerical employes."

There is in evidence an agreement between the parties bearing effective date of September 1, 1926, from which Articles 2 and 3 thereof read:

ARTICLE II.

"SENIORITY—RULE 4: (a) Seniority will be effective and will date from the last time entering the service on the respective Seniority District in the respective classes of service embraced by this agreement.

"NOTE: Seniority as above specified for respective classes is intended to apply to groups on respective seniority districts; i. e., clerks to clerical positions covered by schedule on their respective seniority districts; ticket and waybill assorters to such positions on their respective seniority districts.

"(b) Where necessary extra clerks may be employed on the following basis. At yard offices one extra clerk may be allowed to every five regular positions. An extra board will be maintained showing the seniority of the extra clerks. Said extra clerks will accumulate seniority to yard office positions only and when they are assigned to a regular yard office position they will be allowed their accumulated seniority on the division roster.

"(c) At yard offices where there is not sufficient extra work to justify the employment of an extra clerk, call boys may be used as extra yard clerks and will be allowed seniority as provided above for the extra clerks.

"Letter of July 13, 1937, addressed to Mr. L. F. DeRamus, General Manager, by Mr. G. A. Link, General Chairman, in regard to claim for increase in rate of pay of per diem clerk, Cincinnati, Ohio, from $5.00 to $5.20 per day:

'Appeal is taken from the decision of Superintendent, Mr. R. C. Reid, in the claim for an increase in the rate of pay on position of Per Diem Clerk, occupied by Mr. J. Gross, from $5.00 to $5.20 per day, as of April 14, 1937, *the date claim was filed with Mr. W. F. Jennings, Agent, Cincinnati, Ohio.'

' * * * .

'I will thank you to advise if you will not instruct that the principle of the above rule be applied in this case and the rate of the Per Diem clerk position be increased to $5.20 per day and that Mr. J. Gross, the present incumbent be allowed the difference between the two rates *as of April 14, 1937.'

"Letter of September 4, 1937, addressed to Mr. L. F. DeRamus, General Manager, by Mr. G. A. Link, General Chairman, in regard to the claim of Mr. W. W. Henegar, clerk, Meridian, Mississippi:

'Please advise if you will not instruct that payment be made in accordance with the above since August 20, 1937, *the date Mr. Henegar filed claim with Agent, Mr. Crenshaw * * *.'

"Letter of October 2, 1937, addressed to Mr. O. B. Keister, General Manager, by Mr. G. A. Link, General Chairman, in regard to claim for the restoration of a clerical position at Brevard, North Carolina:

' * * * we request that the clerical position abolished several years ago at the rate of $4.35 per day, plus the increase of five cents (5¢) per hour be restored and bulletined in accordance with the provisions of the Clerks' Agreement and that the successful applicant be reimbursed for all monetary loss suffered as of July 29th, *the date the matter was formally handled with Superintendent, Mr. Cooper.'

"From the above, it will be obvious to the Members of the Board that there can be no doubt as to the existence of the understanding referred to. It will also be obvious that the claim in behalf of Mr. Brown, not having been filed until February 8, 1937, or several days after the work for which pay is claimed ceased to exist, is clearly barred by the understanding.

"At this point carrier calls attention to the 'Opinion of Board,' contained in this Board's Award No. 571, Docket No. CL-548, covering claim of R. B. Earnhardt, furloughed clerk, Spencer, North Carolina, in which the understanding involved in the instant case was recognized.

"In conclusion, carrier respectfully submits that the claim filed in behalf of Mr. Brown should be denied, and requests that the Board so decide."

OPINION OF BOARD: During the period December 1, 1936, to February 2, 1937, inclusive, the force in the office of the Division Storekeeper at Knoxville, Tennessee, was engaged in the work of completing an inventory of materials and supplies as of November 30, 1936. Edward Caldwell, apprentice storekeeper—not covered by the Clerks' Agreement—was used to assist in this work. This case had its genesis in a dispute as to whether the work in question was covered by the Clerk's Agreement

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*(Underscoring ours.)

or whether Caldwell could be used. The dispute continued until long after the work was completed, but it is now conceded that the work in question did come under the Clerks' Agreement, and the only question remaining is whether claimant Brown is entitled to compensation as claimed.

Carrier contends that the claim should be denied upon any one of three grounds; viz.: First, that the claimant was not qualified for the position, therefore his claim is void; second, the claim was not handled in accordance with the requirements of the second paragraph of Rule 19 of the Agreement; and third, the claim was not made until after the apprentice storekeeper had been withdrawn from the work in dispute and a claim for retroactive payment, prior to the date claim is filed, cannot be made under an understanding shown to exist on this property and to have been observed at least since 1929.

As to the first defense advanced by the carrier, it is only necessary to point out that Brown was denied the position upon other grounds, and the question of his qualification was not raised until long after the work in question had been completed. It is admitted on the record that Brown was entitled to the work by reason of his seniority. The qualification of an employe to a particular position is a condition precedent which the carrier may assert as between employes of the same class when it assigns an employe of that class to a position. However, no reasonable interpretation of the seniority rule, wherein the carrier reserves the right to assign qualified employes to positions, would permit such reservation to be used as a defense against a claim for the violation of an agreement upon other grounds (See Award 685).

The precise grounds upon which carrier bases its second defense is not clear. The second paragraph of Rule 19 of the Agreement relied upon is as follows:

> "Employes feeling an injustice has been done them, or having a grievance, may always submit their case to their superior officer for consideration and review, and shall have the privilege of appealing to the next ranking officer, provided such appeal is made in writing within thirty (30) days after the reviewing officer has rendered his decision."

As pointed out by Referee Swacker in Award 595, there is sharp conflict of authority as to whether Discipline and Grievance rules, such as the one here invoked, are applicable to cases of this character. However, the conclusion we have reached makes it unnecessary to again review that question here.

The record in this case shows that under date of February 8, 1937, Division Chairman Fielden, of the Clerks' organization, addressed a letter to Division Storekeeper Turner, Knoxville, Tenn., filing this claim on behalf of Mr. Brown. The claim was thereafter progressed up to and including the highest officer of the carrier to whom such cases may be appealed and was declined by each carrier officer in succession. Assuming that Rule 19 is applicable to cases of this character, no violation of the second paragraph of said rule is shown between the date the claim was filed by Division Chairman Fielden with Division Storekeeper Turner on February 8, 1937, and the time it reached the highest officer of the carrier to whom such cases may be appealed. In fact, we do not understand that carrier claims any violation of the rule in the successive appeals from Division Storekeeper Turner to the highest officer of the carrier to whom such cases may be appealed.

In their presentation of this claim on behalf of Brown, the Brotherhood claimed that Mr. Barnes, a member of the Local Protective Committee, handled this matter verbally with Division Storekeeper Turner immediately

after apprentice Caldwell was assigned to the clerical duties, and that he handled it verbally on several occasions between December 1, 1936 and February 1, 1937. Turner denied any recollection of Brown's claim ever having been handled with him by Barnes, and there is a definite conflict in the record upon this point. However, that is immaterial as the record shows that the question in dispute, until the matter reached the highest officer of the carrier to whom such cases may be appealed, was **whether the work belonged to the Clerks' organization.** Brown's claim was wholly incidental to the controversy until it became necessary to make a claim to raise the real question in issue. It then became necessary to use Brown as the claimant as he was the employe qualified for the work under the seniority rule.

Carrier now contends, however, that if the matter was handled at all between December 1, 1936, and February 8, 1937, the employes' representative permitted to lapse the period in which Brown might have made an appeal and, therefore, the claim is barred under Rule 19. We do not so interpret the second paragraph of this rule. While it prescribes no form in which claims shall be submitted and specifies no time in which they shall be filed, the appeal provision of the rule is not set in motion merely by verbal discussions of claimed violations of an agreement. The appeal to this Board is based upon the claim filed by Division Chairman Fielden on February 8, 1937, and assuming Rule 19 applicable to cases of this character, the appeal provision is not applicable to anything that transpired prior to the time the claim was filed by Division Chairman Fielden. As heretofore stated, no claim is made as to its violation subsequent thereto.

Carrier's third defense is based on an understanding, claimed to exist and to have been observed at least since 1929, that no claim for retroactive payment, prior to the date claim is filed, will be made. The work in question was performed between December 1, 1936, and February 2, 1937. The claim was filed February 8, 1937, and if the claimed understanding is effective and applicable it is a complete bar to the claim.

Employes' representatives admit the existence of an understanding that no demands will be made for retroactive payments on certain claims prior to the date claims are filed, but deny that the understanding is either applicable to or effective in cases of this character. The Board has carefully considered the contentions of both parties and concludes that the agreement is not applicable here. The cases cited by the carrier (or most of them, at least) in which the agreement has been applied are cases where the wrong rate of pay was applied to specific classes of work—clearly cases of error which should have been as well known to the employe as to the carrier. This case originated in a disagreement between the parties as to whether certain work came under the Clerks' Agreement. Carrier refused to assign a clerk to do the work and gave it to an employe not covered by the agreement. If it was in error—as it now admits it was—the penalty imposed is the payment of the loss of compensation to the employe entitled to the work under the Agreement. There is no rule in the Agreement requiring the employe to file a claim within any specified time, and cutting him off for failure to do so, and in the absence of such requirement—no question of laches being raised—the Board holds that claimant is entitled to compensation as claimed.

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 the carrier violated the current agreement as indicated in the opinion, and the claim of Robert M. Brown should be sustained.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 16th day of January, 1939.

DISSENT ON AWARD 791

A close study of the "Opinion of Board" strengthens the first impression that the reasoning proceeds from a conclusion, seeking strength by placing interpretations upon rules and understandings between the parties, which would not have been suggested by an analysis of the rules and understandings, under the facts of the case, seeking a conclusion.

In the second paragraph of the Opinion the referee states the grounds upon which the carrier opposes the claim as: First, that the claimant was not qualified; second, that the claim was not handled in accordance with Rule 19; third, that the claim for pay prior to the date of filing the claim is repugnant to an understanding existing on the property at least since 1929. The order in which the grounds of the carrier's opposition are stated is the choice of the referee, as will be apparent by reference to the letter of August 9, 1937, quoted in full under the caption "Statement of Facts and Position of Carrier." There the carrier stated that the first advice received of Mr. Brown's claim was the letter of Division Chairman Fielden, dated February 8, 1937, of which it said that Mr. Brown's claim was barred "by the understanding which has existed between us for many years that in making adjustments the Company will not go back of the last check of its Time Inspector, and in filing claims the clerical employes will not go back of the date claim is filed." The carrier further stated in the next paragraph of the letter "without prejudice to our rights under the understanding * * * I also call your attention to the fact that Mr. Brown did not possess qualifications necessary." It will be noted in that portion of the record reproduced in this Award the carrier makes no reference to Rule 19. The carrier's reference to Rule 19 appeared in a supplemental argument in the following language:

> "There is no evidence of record that Mr. Brown ever filed a claim for the work in question or for pay on account of not having been used to perform the same, or that such a claim has been filed or appealed in the manner required by the second paragraph of Rule 19 of the clerks' agreement, and, having failed to claim the position, carrier fails to understand employes' contention that he was entitled to have consideration given his claim as would have been done in filling a vacancy."

As to the carrier's first defense (that of lack of qualification), the referee says it is only necessary to point out that Brown was denied the position upon other grounds and that the question of his qualifications was not raised until long after the work in question had been completed. Brown was not before the carrier for consideration for the job until February 8, six days after the work had been completed. The referee says, however, in the seventh paragraph of the Opinion that between December 1, 1936 and February 1,

1937, the only question handled was whether the work belonged to the Clerk's organization and that Brown did not appear as a claimant until it became necessary to make a claim to raise the real question in issue. By his own reading of the record, therefore, Brown was not before the carrier for consideration until after the job was completed. There is nothing in the record to suggest that Brown's qualifications were not challenged immediately. Certainly they could not have been challenged before he became a claimant.

The referee next asserts that it is admitted on the record that Brown was entitled to the work by reason of his seniority. The letter of the carrier above referred to of August 9, 1937, addressed to the General Chairman, stated that Brown was not the senior furloughed clerk on the Division. The carrier persisted in this position throughout the hearing of this case before the Board. In a later supplemental argument the carrier stated that further investigation had revealed the error of the source from which it first secured Mr. Brown's seniority datum and that Mr. Brown was in fact the senior furloughed employe on the Division. There is no admission in the record that Brown was entitled to the work by reason of his seniority. The effective agreement between the parties is clear, that seniority is secondary to qualification for the position sought. In other words, rights flow to **senior qualified** employes (See Rule 5 (g), quoted in the Award). Had Brown made timely claim for this work, therefore, he would have been entitled to it only if he were qualified. If he were not qualified the benefits would have flowed to the next man in seniority rank who did possess qualification.

On the point of qualifications it is to be noted in the second paragraph of "Position of Employes," the statement "Mr. Brown is the senior qualified furloughed clerical employe claiming this work." That the employes deemed the question pertinent is evidenced by the fact that in a subsequent rebuttal they devoted a page of argument and three exhibits to a showing of Brown's qualifications—and effort that, in the writer's opinion, failed to overcome the showing made by the carrier that Brown did not possess the requisite qualifications.

In the seventh paragraph the referee deals with the assertion of the Brotherhood that Barnes handled "this matter" verbally with Storekeeper Turner immediately following Caldwell's assignment on December 1, 1936, and handled it verbally on several other occasions between that date and February 1, 1937, and Turner's denial of any recollection of "Brown's claim" ever having been handled with him by Barnes; and he says on this point there is a "definite conflict in the record." He further says that until it reached the highest officer of the carrier to whom cases may be appealed the question was "whether the work in question belonged to the Clerks' organization." This statement of the referee definitely disposes of the "conflict in the record"; Brown's claim was not a subject of discussion while the job lasted—the referee says not until the matter reached the highest officer. The procedure would certainly bar appeal under Rule 19. True, the referee says the appeal provision is not set in motion by "verbal discussions" but this is to ignore that the rule contemplates just that as the initial handling of such matters by its requirement that the next step must be an appeal **in writing.** He ignores, also, his own pronouncement that the rule prescribes no form for the submission of claims, by proscribing verbal assertions of claim.

With respect to the understanding between representatives of employes and the carrier barring pay prior to date of filing claim therefor, the referee says the employes admit its existence but deny its applicability in cases of this character; and, he says, most of the cases (of its application) cited by the carrier involved the wrong rate of pay applied—"clearly cases of error which should have been as well known to the employe as to the carrier." Let's look at the evidence on this point. The evidence presented by the employes is a letter, dated September 22, 1937, written by a former General Chairman of the Clerks on this carrier to the present General Chairman in

connection with another case then before this Board. The pertinent paragraphs of that letter read:

"Your understanding, as expressed in the last paragraph of the brief, is correct in so far as it pertains to claims which are filed within six months after the date of the alleged violation; however, in cases where the claim was not filed until six months or longer after the alleged violation, I followed out the principle established under rule 20 (f) of your agreement. In other words, if a member did not file his claim until eight months after the alleged violation, I made no effort to collect back of the date the claim was filed.

" * * *

"I am at loss to understand why this question should be raised in connection with the Earnhardt case when the matter was handled by the local chairman, with the Storekeeper, on September 25, 1935."

The last paragraph of the "brief" referred to in the quotation contained a categorical denial of the existence of the "agreement or general understanding" claimed by the carrier, the existence of which the referee finds the employes now admit, though claiming for it a limited applicability.

The carrier's evidence of the application of the agreement is contained in that portion of the record reproduced in the Award except a letter, written to Assistant to Vice-President of the carrier, February 13, 1929, by the same former General Chairman, author of the letter of September 22, 1937, above quoted in part. The pertinent paragraph of the February 13, 1929 letter reads:

"You are correct in your contention that there can be no claim back of the date claim was filed, and, if you will reimburse Mr. Kirkpatrick for the difference between the messenger's rate and the clerical rate of $4.35 per day from July 23rd, 1928, which is the date the claim was filed, up to and including July 31st, 1928, which is the date the position was abolished, we will settle the claim on that basis."

When the 1929 letter was written there was no controversy with respect to the understanding; there was a controversy when the 1937 letter was written. It was the unqualified statement of the General Chairman to carrier's representative in 1929, "You are correct in your contention that there can be no claim back of the date claim was filed."

The carrier cites nine instances in which the understanding was operative. How many are susceptible, by any impartial consideration, of classification as cases of error when the wrong rate of pay was applied, etc? Not the first one; it doesn't disclose anything as to the nature of the claim. The second refers to difference in rate of pay but there is nothing in the reference to it that distinguishes it from the claim covered by this Award. The third instance cited covers a claim involving the identical circumstance that should have led to a denial of the claim in this case—abolishment of the position before claim was made (for more complete details of the claim involved in this third instance, see "Position of Carrier" in Award 571, Third Division). The fourth instance refers to claim for restoration of a position. The fifth deals with re-classification of a position. The sixth with adjustment of a rate of pay. The seventh, claim for increase in rate of pay. The eighth cannot be classified. The ninth was a claim for restoration of a position. What possible analysis of these cases would lead to the conclusion that they "(or the most of them at least)" are clearly cases where the wrong rate of pay was applied to specific classes of work—"clearly cases of error which should have been as well known to the employe as to the carrier"? Would such utter disregard of evidence suggest itself for any other purpose than to support a conclusion previously determined upon?

Because the Opinion appears to seek a way to avoid rather than to apply the rules of the Agreement and understandings subsisting (and admitted

to subsist) between the parties; and because it disregards evidence not useful to that purpose, I dissent from the Opinion and Award in this case.

/s/ GEO. H. DUGAN

The undersigned concur
in the above Dissent:

/s/ R. H. ALLISON

/s/ A. H. JONES

/s/ J. G. TORIAN

/s/ C. C. COOK