Award No. 1092
Docket No. CL-1152

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Benjamin C. Hilliard, Referee

PARTIES TO DISPUTE:

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

THE NEW YORK CENTRAL RAILROAD COMPANY— BUFFALO AND EAST

STATEMENT OF CLAIM: "Claim of System Board of the Brotherhood on the New York Central Railroad Company, Buffalo and East:

"1. That the three (3) clerks' positions bulletined for bids in the Car Service Office, Buffalo, N. Y. in Bulletin No. 113 as Key-Punch, Sorting & Tabulating Machine Operator, rate of pay $120.20 per month and assigned to the System Per Diem Department, should be rated at $140.20, $145.20 and $150.20 per month in accordance with Memorandum of Agreement effective February 16, 1937 as amended by Mediation Agreement on wages effective August 1, 1937.

"2. That the requirements for employes qualifying for the three (3) positions as specified in Bulletin No. 113, and also as amplified by information verbally conveyed to the employes by Management, were imposed improperly and in violation of provisions of the Rules Agreement.

"3. That Bulletins No. 113 and No. 113-A be cancelled and the three (3) positions be correctly rebulletined for bids and assignments.

"4. That the three (3) employes assigned by Bulletin No. 113-A be compensated in full for wage losses sustained commencing with April 19, 1939 by reason of Management having violated provisions of the Rules Agreement and also of the Memorandum of Agreement bearing effective date of February 16, 1937."

EMPLOYES' STATEMENT OF FACTS: "An agreement was entered into by the parties bearing effective date of February 16, 1937 which established a scale of rates for the various sub-departments in the Car Service Office.

"This agreement, as amended by subsequent Mediation Agreement on wages effective August 1, 1937, established rates of $140.20, $145.20 and $150.20 for positions in the System Per Diem Department.

"On April 12, 1939 Management issued Bulletin No. 113 advertising for bids three (3) clerks' positions at the rate of $120.20 per month, each designated as Key-Punch, Sorting & Tabulating Machine Operator. Employes awarded these positions were assigned to perform System Per Diem work.

the employes rejected this proposal. However, this is another illustration of the fairness of the management in attempting to amicably settle the whole controversy. As we already have stated, there is nothing in the agreement which even by implication requires the management to compensate employes for time receiving instruction in a new kind of work in which they previously had acquired no experience or training; consequently, part 4 of the employes' claim covering wage losses commencing April 19, 1939, should be denied.

Management's Comments on 'Employes' Comments on Carrier's Position':

"The employes refer to these machine operators having been occasionally used 'to assist the regular force engaged in assorting work—a purely manual operation': Assorting work is a lower classification of work and not work of the System Per Diem Department. The employes assigned to the machines formerly worked in the Assorting Department. The agreed-upon rates for the assorting work are $90.20 and $100.20 per month.

"The employes also refer to Award No. 236: Management can see no similarity between the circumstances in the instant case and those in the case covered by Award No. 236. No position in the System Per Diem Department was abolished and the additional positions of machine operators introduced a new method of handling the work in the Car Service Office. While there were no positions of similar kind or class in the seniority district where created, as has been fully set forth the management was liberal in selecting a rate which was $10.00 higher than the minimum rate for positions of a similar class or kind at Utica.

"The management reiterates its statements and contentions as more fully set forth in its Position."

There is in evidence a Memorandum Agreement between the parties with respect to wage rates, bearing effective date of February 16, 1937, also a collective agreement covering rules and wages bearing effective date of September 1, 1922.

OPINION OF BOARD: The facts and the contentions of the parties are sufficiently set forth in their respective submissions.

The record shows that the parties hereto, by Memorandum Agreement effective February 16, 1937, established rates of pay for positions in the System Per Diem Department, each respectively performing a majority of the work now performed on each of the positions here involved, and that such rates were then $130.00, $135.00, and $140.00 per month. It is also shown that by the application of the National MediationWage Agreement effective August 1, 1937, such rates of pay now are $140.20, $145.20 and $150.20 per month, respectively.

The duties of the positions consisted mainly of posting and checking in the handling of credit accounts. The posting work, as distinguished from the work of checking and taking exceptions where necessary, consumed at least two-thirds of the time of each of these clerks. On April 12, 1939, the carrier installed Key-Punch and Tabulating Machines in this office, and by Bulletin No. 113 advertised for bids for three (3) Clerks' positions to operate the machines, which positions were assigned to perform System Per Diem work. This bulletin also stipulated certain requirements of employes qualifying for the positions, but we will now deal with the question of the proper rate of pay therefore, and will treat with stipulated qualifying requirements later.

The main question involves the right of the carrier to reduce arbitrarily agreed upon rates of pay for certain clerical work, when carrier has installed an improved mechanical device for performing the same work theretofore performed by clerks without the use of machines. This Board has

heretofore held that this cannot be done under such circumstances. See Award No. 864, Docket TE-827. The principle established in Award No. 864 is hereby reaffirmed.

The record indicates that the Chief Personnel Officer of the carrier recognized that carrier could not change these rates arbitrarily under the conditions here obtaining, for on April 8, 1939, he directed a letter to the General Chairman, in which he advised, among other things, that:

> "Mr. Metzman withdrew the bulletin and cancelled the arrangements for filling the jobs until rates could be negotiated."

If the carrier desired to reduce the rates of pay as it did subsequent to its letter above cited, carrier should have concluded negotiations thereon in the orderly manner provided for in the current agreements and the Railway Labor Act. Having failed to do this, carrier thereby violated those agreements, and it must now reestablish the former rates that were in effect prior to the installation of the machines and reimburse affected employes retroactively to the date of violation, viz., April 19, 1939.

Moreover, Rule 43 has a direct bearing on the action taken by the carrier in reducing the rates of pay for the positions or work here involved. It is shown by the petitioner and admitted by the carrier that when the rates of pay of the positions here involved were established, 66-2/3 per cent of the duties attaching thereto consisted of "posting" work as distinguished from checking, etc. All of this posting work is now performed by machines, the carrier paying $120.20 per month to the operators thereof.

This is contrary to the principle established by this Board, with respect to the proper application of Rule 43 of the current agreement between the parties, in Award No. 236, wherein it was held that where a majority of the work remains, positions may not be abolished and lower rates created for that work. The carrier violated Rule 43 when it required these machine operators, rated at $120.20 per month, to devote practically all of their time to work which comprised two-thirds of the duties of positions formerly paying $140.20, $145.20, and $150.20 per month.

Another question with respect to rates of pay for new positions, and which may eventually have an indirect bearing herein, results from the action of the carrier in its implied contention as to the application of Rule 37 (b). This rule provides that rates of pay for new positions shall be in conformity with the rates for positions of similar kind or class **in the seniority district where created.** Because there were no such positions in this seniority district, carrier adopted and established the rate of $120.20 per month which is the rate for certain employes operating the same kind of machines at Utica, on an entirely different seniority district, and at a point approximately 200 miles from where the machines here in question are located.

When establishing rates of pay for new positions, if there are no comparable positions in that seniority district, as contemplated in Rule 37 (b), the parties are required to negotiate and agree upon rates therefore. Carrier cannot arbitrarily adopt and apply rates which are in effect in other seniority districts. However, the parties are privileged to adopt such rates from other districts if they can mutually agree thereon.

It is significant to note that the carrier in this case adopted the same rate of pay for the positions here involved that it is paying to certain key punch operator positions in Utica. While we do not assume to say what the rates of the positions here in question should be, if later changed in negotiations by agreement, we perceive no reason why the carrier should be permitted to adopt arbitrarily the rates at Utica rather than the rates at New York City, at which latter point the record shows that the carrier pays $130.20 per month to certain of its Key Punch Operators.

Moreover, it is shown in the record that the rates of pay established for Key Punch Operators at both Utica and New York City, were accomplished through negotiations and by agreement between the parties. The rates the carrier is now paying for Key Punch Operators were not so established at Buffalo.

As to the carrier requiring employes to learn to operate new type of machines of the kind here involved on their own time, without compensation therefore, it is undisputed in the record that such is a departure from the practice of many years standing on this railroad when similar machines have been installed. It most certainly is contrary to the specific provisions of Rules 4 and 7, as well as the spirit and intent of the current agreement.

However, the record indicates that the carrier realized that such position taken by it was untenable, for on June 22, 1939, the officer in charge agreed to pay the three employes who qualified for the positions in question under assignment Bulletin No. 113-A, retroactively to the date they first performed service thereon, if it would settle the question in its entirety.

The employes would not accept this proffered settlement, because there still remained the questions of the arbitrary reduction in rates of pay, and the other improper qualifications arbitrarily imposed by the carrier in Bulletin No. 113, which resulted in employes being prevented from the normal exercise of their seniority rights as provided for in the current agreement.

From the entire record in this case, we find that the carrier should not only be required to restore the rates of pay which were arbitrarily reduced when these machines were installed, but that in order to permit deserving employes who were denied the opportunity to secure the normal and proper exercise of their seniority rights as a result of the further arbitrary action of the carrier as indicated by Bulletin No. 113 of April 12, 1939, carrier shall now be required to re-bulletin the three positions in question at the proper rates of pay under the provisions of Rule 9, and make assignments thereto under the provisions of Rules 4 and 7.

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 employe involved in this dispute are respectively carrier and employe 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 agreements as contended by the employes.

AWARD

Claim sustained in its entirety.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 23rd day of May, 1940.

DISSENT TO AWARD 1092 IN DOCKET CL-1152

Opinions may and do differ as to the applicability of the memorandum Agreement effective February 16, 1937, establishing rates of pay for positions in the System Per Diem Department, to new positions (operators of Key-punch, sorting and tabulating machines) first established in April 1939.

The statement that the Carrier violated Rule 43 is unwarranted because the record shows that when the three machine operators' positions were established, that no positions in the System Per Diem Department were discontinued. To the contrary, the work of the Department was expanded and the force was increased by three employes.

As to the statement:

> "Another question with respect to rates of pay for new positions, and which may eventually have an indirect bearing herein, results from the action of the carrier in its implied contention as to the application of Rule 37 (b). * * *."

The record contains no statement by the Carrier that the $120.20 rate was established under the provisions of Rule 37 (b); the Carrier's statement in that respect is that "While there were no positions of similar kind or class in the seniority district where created * * * the management was liberal in selecting a rate which was $10 higher than the minimum rate for positions of a similar class or kind at Utica," from which it would appear that the inference to be drawn was that the Carrier was not relying upon the provisions of Rule 37 (b).

The statement:

> "When establishing rates of pay for new positions, if there are no comparable positions in that seniority district, as contemplated in Rule 37 (b), the parties are required to negotiate and agree upon rates therefor. * * *."

is not justified by the provisions of the Agreement, not only as regards rates of pay for new positions, but as to reclassification of and rerating existing positions. It is the initial duty of the Carrier to establish the rate in conformity with the provisions of the Agreement; the Carrier is not required to negotiate and agree with the Employes on the rate, but the Employes, of course, have the right of protest. (See Awards 492, 644, 710, 894, 1074, 1075, 1076 and 1077.)

In addition to our disagreement with the Opinion Of Board giving application to the Memorandum Of Agreement effective February 16, 1937 to the positions in question, we hold that the Division, lacking any applicable rule of the Agreement to the circumstances, is not empowered to fix rates of pay for the positions here involved. This is particularly true as applying to the award in this case which sustains the claim for the establishment of different rates of pay for positions performing identical work in the same office, and where the record was lacking in any evidence justifying a differential of any amount as between the rates for the three positions.

/s/ R. H. Allison
/s/ R. F. Ray
/s/ C. P. Dugan
/s/ A. H. Jones
/s/ C. C. Cook