Award No. 1586
Docket No. CL-1480

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Lloyd K. Garrison, Referee

PARTIES TO DISPUTE:

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

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY (COAST LINES)

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood

(1) That the Carrier violated the rules of the Clerks' Agreement when it assigned and required A. L. Krug, Bakersfield, California Division Store to perform clerical duties while occupying position of Store Helper and being paid a rate of 51 cents per hour prior to January 13, 1937;

(2) That the Carrier further violated the rules of the Clerks' Agreement when on January 13, 1937, it established a rate of $4.37 per day on position No. 215—Clerk, Bakersfield Division Store;

(3) That the Carrier shall now be required to establish and maintain a rate of $6.21 on said position No. 215; and

(4) That said A. L. Krug shall be reimbursed for wage losses suffered as a result of said agreement violations represented by the difference between rates paid and rates he should have been paid as follows:

(a) November 22, 1935 to January 13, 1937 the difference between 51 cents per hour and $5.81 per day (72⅝ cents per hour);

(b) January 13, 1937 to July 31, 1937 the difference between $4.37 per day and $5.81 per day; and

(c) August 1, 1937 to date the Carrier establishes the rate of $6.21, the difference between $4.77 per day and $6.21 per day, less any amounts paid to Mr. Krug by the Carrier as a unilateral and arbitrary attempt to dispose of said claim for proper classification and rate of pay for duties assigned to and required of Mr. Krug."

EMPLOYES' STATEMENT OF FACTS: "Employes desire to give the Board the benefit of certain facts pertinent to their claim extending back to the year 1930. It is desired to place particular emphasis upon two points:

"(1) Group 3 employes, such as Store Helpers, Store Laborers and other non-clerical employes were without the protection of a collective bargaining agency for the period from July 1, 1927 to August 1, 1933, upon which latter date they were placed within the purview of the Clerks' Wage and Working Agreements by memorandum between the duly accredited representatives of the employes, the Association of Clerical Employes, and the Carrier.

to negotiation, but was handled in accordance with the Schedule to the best of the Carrier's ability, with privilege of appeal to this Board by the Organization. Realizing that the Organization's contention amounts to a demand that the Schedule be opened up to negotiation every time a rate is to be applied to any of the thousands of clerical positions on this property, the Carrier is sure the Board will see the impracticability inherent in an attempt to apply this article of the Schedule. If it were intended that every rate to be applied were to be renegotiated, it certainly would have been so provided explicitly in the Schedule.

"In conclusion, it is respectfully submitted that it has been shown that a proper rate has been applied to the present clerk's position, and at no time has the handling in issue been in contravention of any of the rules of the Schedule, and the Board is requested to so find and to decline the claim in its entirety."

OPINION OF BOARD: It is conceded by both sides that the clerical position whose correct rate is in issue is a "new position" within the meaning of Article XII, section 5 of the Agreement, which reads as follows:

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

It is also conceded by both sides that there are no "positions of similar kind or class in the seniority district" in which the new position has been created.

I

The first question is: has this Board power to fix a rate in the absence of similar positions in the district with which the new position may be compared? We think that the answer must be No. The Board has authority to construe and enforce agreements but not to make them. If similar positions in the district existed, and the carrier fixed a rate which was not in conformity with them, the agreement would of course be violated. The Board could then set aside the improper rate and remand the case for further negotiation. Whether the Board could also, as intimated in Award 1074, if negotiations failed, fix a proper rate by application of the standard laid down by the rule, we need not here decide. For in the case before us there is no standard to apply. Award 1074 made it clear that, if the Board could prescribe the rate, it could do so only by applying the standard. There being no standard applicable here, the Board cannot fix a rate without exceeding its power.

Awards 283, 1092, 1540 and 1541 were, however, cited to the contrary. Because of the importance of this issue, we deem it desirable to review these Awards.

Award 283 (no Referee)

In Award 283 all the comparable positions in the seniority district had been abolished before the new position in question was created. The Board, without a referee, fixed for the new position a rate of $6.03, in lieu of the rate of $5.45 which had been fixed by the carrier. The Award on its face, therefore, seems to admit the proposition that, where there are no comparable positions in the seniority district, the Board has power to fix the rate of a new position. But the file discloses the following facts, each of which seems likely to have been taken into account by the Board in arriving at its disposition of the case: (1) The carrier in its submission admitted that the rate of $5.45 which it had fixed was improper, based on further studies of the duties of the position; and the carrier proposed a revised rate of $5.72. (2) The carrier not only came before the Board admitting error; the carrier also raised no question of the Board's power to correct the error. (3) The employes contended for a rate of $6.18, but in the negotiations prior to the submission of the case they had offered to settle for $6.03. This

was the figure which the Board allowed. (4) During the course of the negotions, prior to submission of the case, the Division Superintendent had made a calculation of the duties of the new position which indicated that they were equivalent in roughly equal proportions to the duties of the two former positions which had been rated at $6.18 and $5.88 respectively. Adding these together and dividing by 2 gives a rate of $6.03. The record does not show whether the employes arrived at their settlement figure of $6.03 by any such calculation; they may have proposed that figure because it so happened that among the old positions which had been abolished there were seven which carried a rate of $6.03, and the employes may have thought that the new position was sufficiently like one or more of these abolished positions to warrant a settlement offer of $6.03. In any event, the figures furnished by the Division Superintendent, which were in the record before the Board, were a strong indication that the employes' settlement offer of $6.03 had been reasonable.

Under all the circumstances, it seems to this referee most probable that the case was disposed of by the Board as a fair compromise, and that it was not intended to announce a new principle of the right of this Board to fix the rates of new positions where there are no standards (of similar positions in the seniority district) which can be applied.

Award 1092 (with Referee Hilliard)

The Board ordered restoration of the rates which existed prior to the installation of key-punch and tabulating machines. After such installation, the employes were still performing a majority of the work which they did before. It was held that the carrier may not "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." Award 864 to that effect was relied on, and so was Award 236, to the effect that "where a majority of the work remains, positions may not be abolished and lower rates created for that work." The conclusion was that the carrier should "restore the rates of pay which were arbitrarily reduced when these machines were installed."

This Award proceeds on the theory, not that new positions were created and improperly rated, but that the rates of old positions were arbitrarily reduced. There were certain passages in the opinion about the establishment of rates for new positions when there are no comparable positions in the district, but these passages were only dicta and certainly were not intended to announce any new principle such as the employes are here contending for.

Awards 1540 and 1541 (with Referee Bushnell)

In Award 1540 the Board approved "as a fair and reasonable application of the standard prescribed in Rule 5" (the "new position" rule) a rate fixed by the carrier which was a composite of the rates of two abolished positions. There were apparently no existing positions in the seniority district which were similar to the new position. The case was peculiar in the following respects:

(1) The new position was avowedly a composite one. It was given a composite and hyphenated title, and its rate was bulletined as being composed of so much for the time to be spent on the one set of duties and so much on the other. (2) The duties of the new position were derived exclusively from the duties of the two former positions, the only dispute being as to the relative quantities. (3) The station in question had been abolished some two years before the case was heard by the referee, so that the claim was only for reparation. (4) In Award 1541, which was heard and decided at the same time, and which involved another rate controversy between the same parties, it appeared that the parties had made special agreements expressly contemplating composite positions and providing composite rates for

them. While these agreements were not directly applicable to the controversy in Award 1540, the fact that the parties had made them may well have influenced the disposition of the case.

In Award 1541, the agreements were not in force during part of the period in controversy, and the rate of the new position was approved by the Board as proper without reliance on the agreements, but, as in the previous case, the fact of their existence must have had some effect on the outcome. As in Award 1540 the claim was for reparation only, the position in question having been abolished some time previously.

Clearly these Awards are not authority for the proposition that the Board itself can fix the rates of new Positions.

II

The next question is: granted that this Board has no power in the case before us to fix the rate, is the Board also without power to set aside the rate fixed by the carrier and remand the case for further negotiations? The answer to this question depends upon what the obligations of the carrier are in fixing the rate of a new position in cases where there are no similar positions within the district.

The Carrier would certainly be obligated upon request by the employes, under the Railway Labor Act, to endeavor in good faith in negotiations with them to arrive at a rate which would be mutually satisfactory. The record shows that this obligation was sufficiently discharged. It is true that in June, 1937 the carrier declined to make a joint check of the work being done on the new position, and in this respect the carrier was in the wrong, because a joint check might have brought about agreement as to the precise nature and quantity of the different items composing the duties of the new position, and such an agreement might in turn have facilitated agreement upon a proper rate. But the request for a joint check seems not to have been renewed since it was first made; there is no mention of it in the 1939 negotiations; and no practical end would be served by directing one now, since both parties are agreed that somewhere in the neighborhood of 70% of the work of the new position is work which used to be done by the former position of Combination Clerk, the rate for which is the rate which was finally applied to the new position. The nature of the balance of the work is in dispute, the employes asserting that all of it consists of work which used to be done by the higher rated Chief Clerk, while the carrier asserts that only a little over half of it is in that category. But however this may be, it is clear from the record that the accounting and principal supervisory duties which used to be performed by the Chief Clerk no longer remain, so that the functions of the new position which are derived from the old position of Chief Clerk do not represent a complete cross section of the old. Certainly under these circumstances the action of the carrier in finally assigning to the position the rate of the former Combination Clerk, which the new position more closely resembles than any other, cannot be said to be so arbitrary or capricious as to constitute a possible violation of the carrier's duty to negotiate in good faith.

Nor is there anything in the record to indicate that in discontinuing the old positions and establishing the new one the carrier's object was to reduce rates and evade the application of the rules contrary to the provisions of Article XII, section 6.

Under these circumstances we think that there is nothing which this Board can do.

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 Board has no jurisdiction to fix the rate of the new position, and that there is no ground for setting aside the rate fixed by the carrier and remanding the case for further negotiations.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 13th day of November, 1941.