Award No. 1608
Docket No. CL-1589

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Bruce Blake, Referee

PARTIES TO DISPUTE:

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

PERE MARQUETTE RAILWAY COMPANY

STATEMENT OF CLAIM: "Claim of System Committee of Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, for wage loss sustained by Miss Edna Allen, Clerk, Holland, Michigan, from January 28th, 1938 to August 4th, 1938 inclusive, through violation of Agreement Rules during this period as hereinafter outlined."

EMPLOYES' STATEMENT OF FACTS: "Prior to January 28th, 1938, there existed in the Freight Office at Holland, Michigan, a position covered by the scope and application of our Agreement, designated as Clerk, rate $5.29 per day, to which Miss Edna Allen, was the regular assigned incumbent, the duties of this position being as follows:

Issuing Expense Bills.
Sort and Mail portion of Expense Bill to receivers of L. C. L. Freight.
Prepare form No. 210, which consists of:
Statement of Storedoor delivery and pick-up for contract trucker.
Prepare Memorandum for Warehouseman, showing over, short and bad-order notations made on L. C. L. Waybills, by previous stations and transfers.
Issue Expense Bills on in-bound carload business.
Issue Waybill corrections on in and out-bound billing.
Issue out-bound billing.
Figure extensions on out-bound Shipping orders.
Compute tonnage for warehouse operation cost report and for out-bound cars for train tonnage rating purpose.

"Effective January 28th, 1938, the position above described was abolished, while all of the duties and work remained to be performed, these duties and work being assigned to the Agent, Chief Clerk, Three Telegraph Operator-Clerks and a Relief Agent, none of whom are covered by the scope and application of our Agreement.

"This claim has been appealed to the highest officer designated by the Carrier and payment has been declined."

POSITION OF EMPLOYES: "Rules No. 1, No. 2, No. 3, No. 56 and No. 64 of Clerks Agreement, effective May 19th, 1927 reads as follows:

of the employes holding the positions, among which Miss Allen's work was distributed, have always done all kinds of clerical work. The same is true of relief agents who are within the scope of the telegraphers' schedule.

"There is nothing whatsoever in the agreement between the Pere Marquette and the Brotherhood of Railway and Steamship Clerks which gives employes within the scope of the Clerks' Agreement an exclusive right to the performance of clerical duties. In 1938 neither the business done nor the amount of clerical work performed at Holland Station justified the Management in maintaining so large a station force. The Management was within its rights in abolishing the lowest rated clerical position and making a general redistribution of the work of the Station as it did. As the operator-clerks had always done clerical work, there was nothing to prevent the Management from requiring them to take over a portion of Miss Allen's duties (Award 615, Docket CL-550). As Miss Allen's position was established merely to take care of an overflow of work which normally would be performed by the agent, chief clerk and operator-clerks, the Carrier was within its rights in abolishing the position and returning the work to the source.

"It is respectfully submitted that the claim should be disallowed for the reason that there is nothing whatever in the Clerks' Agreement which guarantees any work to any clerical position. The Management has the absolute right to abolish positions as it sees fit and to distribute work as it sees fit, and a prohibition on that right may not be read into the Schedule.

"On February 17, 1939, the Vice President of the Pere Marquette informed Mr. W. E. Foran, General Chairman of the Brotherhood, that the claim for clerk Allen was disallowed. Thereafter, no action whatever was taken on this matter by the Brotherhood until March 1, 1941, after the lapse of more than two years. We submit that the Clerks' Organization should not now be permitted to renew the claim.

"WHEREFORE, the Management respectfully submits that the claim should be denied."

OPINION OF BOARD: There is no dispute in the facts out of which this claim arose. January 27, 1938 the Carrier abolished the position of clerk held by Miss Allen. The reason assigned for abolishing it was a marked decrease in the amount of the business done at Holland. The work attaching to the abolished position, however, remained sufficient to absorb seven and a half hours of the combined time of the agent, chief clerk, three operator clerks and another person holding a clerk's position. The agent and chief clerk were not within the scope of the current agreement between the Carrier and the Organization.

The agent and chief clerk were occupied four hours with duties formerly attaching to the abolished position.

While it is well recognized that the Carrier may abolish a position it cannot distribute the remaining work connected with it among a class of employes not covered by the agreement. Awards 385, 458, 637, 751, 1061, and 1404.

The Carrier suggests that the claim is barred because Miss Allen failed to exercise her seniority rights. No position has been mentioned to which a claim of seniority right could have been successfully maintained by her. The Carrier also urges that the work attaching to her position was distributed among employes who for many years had performed work of similar character without protest or objection by the Organization. The Railway Labor Act carries no limitation which bars claims by reason of lapse of time. Nor does long established custom, acquiesced in by the Organization, bar a claim based on a violation of the agreement. Awards 137, 422, 561, 615, and 735.

The Carrier contends:

> "Lastly, in the event an award is made in favor of the Employes, it should be diminished by any amounts which Miss Allen received from any source during the period the position was discontinued."

This contention finds support in the decision of the First Division of this Board, Award 5862, wherein it was said:

"Unquestionably if these cases were pending in a court of law, the claimants would, under proper limitations, be required to account for any money earned in other employment. This seems to be conceded by all the referees who have considered the question, and citation of authority of courts on the subject is not considered necessary. This established rule applies to every character of case when the breach of a contract involving personal service is involved. There may have been the grossest of violation, attended by circumstances justifying punitive damages, and yet, whatever the ground for the damages assessed, there must be credited, as against compensatory damages, any money received by the plaintiff from other employments during the period covered by the breach and for which damages are allowed. The reason back of this rule is not difficult to find. It rests on the proposition that if there had been no breach of the contract the plaintiff would have earned a certain sum. If by reason of the breach he is deprived of any part of that sum, he is entitled to have the same paid as damages so that he might be made whole; but if, during that period, he earns money from other sources a less sum is required to make him whole, and his damage is lessened to that extent. A rule such as this, resting in justice and sound common sense, and evolved through the centuries required in the development of our system of laws, should not be disregarded unless the plain language of the agreement so requires.

"We are unable to see why this legal principle should not be applied to the case before us. It may be said that we have here a plain provision of the contract providing for payment, in a certain way, for a specified violation, and that no mention is made of any deduction. This is not different from the ordinary contract of employment. Such a contract may or may not be for a specified time, but the compensation is either fixed by the contract or an agreement to pay a reasonable wage or salary is implied by law. Rarely is anything said about a breach, because none is contemplated; and rare indeed would be the instance where the parties discuss the minutia of the methods to be employed in compensating one party in cases of a breach. When the breach occurs the law steps in and prescribes the method of compensation in damages. Here we have a contract between the carrier and the employe. Under it the carrier undertakes to protect the employe in his right to work under certain rules of seniority. The carrier violates that agreement, the employe is not permitted to work at times when he had the right to do so and he suffered damage thereby to the extent of the days lost, or the payments provided to be made. That is his claim for damage and so far he is on solid ground; but then comes the law which says to him: your right to damage is clear, but when your contract was breached by the carrier it became your obligation to secure other employment, and if you did so, and received compensation therefor, you must credit the amount received on your claim, because you are not damaged beyond the difference between what you would have received from the carrier and what you actually received from other sources during the same period. You are not entitled to receive compensation from two sources for the same day, unless the wage you actually received is less than you were entitled to receive from the carrier. We see nothing unsound in this position. Under it the carrier is made to comply with the monetary terms of his agreement, the employe is saved from loss, and exact justice is meted out to the parties concerned. In the application of this principle liberality should be exercised in favor of the employe. He should not be held too strictly to his legal obligation to seek other employment. Practical considerations of residence and family conditions should be considered."

The principle announced in the foregoing quotation was applied by the Third Division in Award 1314. The Organization resists this contention of the Carrier upon authority of Cases 85 and 87 of Decisions of Railway Adjustment Board No. 1 and Decisions 943 and 1618 of Train Board of Adjustment, Western Division. In those cases it is held that the employe is entitled to recover the amount he would have earned had he not been laid off without deduction of wages actually earned from other sources during the period he is laid off. However sound those decisions may be they have been superseded by the decisions of this Board above mentioned, i. e., Award 5862 of the First Division and Award 1314 of this Division. Under the rule adopted by these awards, claimant is entitled to recover in the amount of her net loss of **wages.** In other words she is entitled to recover the amount she would have received from the Carrier during the period she was laid off less such sum as she **actually earned in other employment** during that period. It appears from the record that Miss Allen earned $10.00 during the time she was laid off.

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 agreement in laying off claimant and assigning duties appertaining to her position to employes not within the scope of the agreement.

AWARD

Claim sustained in the amount claimed less $10.00.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 25th day of November, 1941.