

Award No. 1725
Docket No. CL-1725

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Edward M. Sharpe, Referee

PARTIES TO DISPUTE:

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

ERIE RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes that the Carrier violated the rules of the Clerks' Agreement when on March 28, 1940 it abolished position of O. S. & D. Clerk at Suspension Bridge, N. Y. and assigned the duties thereof to employees lower rated, and

That carrier shall be required to re-establish position of O. S. & D. Clerk at Suspension Bridge, N. Y. with a rate of pay of not less than \$5.60 per day, and

That position shall be bulletined, awarded and assigned to senior qualified applicant and such applicant and all other employees affected be reimbursed for all wage loss sustained retroactive to March 28, 1940.

EMPLOYES' STATEMENT OF FACTS: Effective April 16, 1933, position of Claim and Demurrage Clerk at Suspension Bridge, rate \$5.20 per day, was abolished. At that time the duties on the position were substantially as follows:

Handle all claims between patrons and auditor of freight claims.
All correspondence pertaining to claims.
Keep a record of all "Over and Short and Damage" shipments.
All correspondence pertaining to OS&D shipments.
Making inspections and reports on carload shipments.
Worked from one hour to one and one-half hour each day on demurrage records of cars in Suspension Bridge territory.

As a result of an increased volume of business, the position was restored and advertised under Bulletin No. 38 dated September 28, 1939 as O. S. & D. Clerk at Suspension Bridge at a rate of \$5.00 per day. The rate was protested by the Brotherhood of Railway Clerks on September 28, 1939. The duties on the position were substantially as follows:

Handle all claims between Patrons and Erie R. R. Auditor of Freight Claims.
Handle all correspondence pertaining to freight claims.
Keep a record of all Over, Short and Damage shipments at Suspension Bridge.
Handle all correspondence relative to O. S. & D. shipments.
Making inspections on concealed L. C. D. Freight.
Making inspections on all damaged carload freight.

5. During 1939 an additional position was required because of the increase in L. C. L. pick-up and delivery service which increase came about because some other railroads abandoned their service while we continued ours. This new position was first worked September 26, 1939 and when these other railroads again entered into the pick-up and delivery service our business decreased and the new position of September 26, 1939 was abolished March 28, 1940.

6. The rate of \$5.60 suggested by the employes is arrived at by taking a \$5.20 rate abandoned in 1938 and adding to this rate 40 cents, based on the Mediation Agreement of 1937. It is our position that this Mediation Agreement of August 1, 1937 was applicable only to such positions as existed at that time and that any subsequent new positions established would be subject to consideration as defined in Rule 37 which says:

"In establishing the salaries for new positions, full consideration will be given to the duties, responsibilities and rates of pay of analogous positions (of similar kind and class) in comparable localities."

This rule does not obligate the Management to go beyond the station where the service is performed if there is a comparable position at such station. This is demonstrated by the history as cited in attached Exhibits "A" and "B."

OPINION OF BOARD: This claim is in respect to a position of O. S. & D. Clerk at Suspension Bridge, New York. A similar claim was presented in Docket No. CL-1581, resulting in Award 1578. The circumstances of the two cases are so similar that the claim as stated in Award 1578 is here repeated:

"Statement of Claim: 1. Claim of the System Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, that the Carrier violated the principles contained in the Clerks' Agreement when it failed and refused to establish a rate of pay on position of Claim and O. S. & D. Clerk of \$5.60 per day. Covered by Clerical Advertisement No. 38 of September 28, 1939 on the Buffalo-Rochester Division of the Erie Railroad at Suspension Bridge, New York.

"2. Claim of the employe filling this position be paid the difference between what he has earned and what he would have earned had he been paid at the rate of \$5.60 per day for all the time worked on the position, and any and all other employes affected, be reimbursed in a like manner."

"The Opinion of Board, last Finding, and Award, of Award No. 1578 also are quoted.

"OPINION OF BOARD: Based upon all of the facts in this case, the Board feels that the position in question, when it was established effective either July 31, 1939, as stated by the petitioner, or in September 1939, as stated by the Carrier, was a new position and the rate therefor should have been established in accordance with the provisions of Rule No. 37. The Carrier so argues and the rebuttal argument of the petitioner would indicate that the latter now is in agreement thereon; however, the parties are in disagreement as to the position or positions which are comparable with the position in dispute, as provided for in the rule. The Board therefore, reaffirms the principle established by its Award Nos. 1074 and 1201, and remands this dispute to the parties for settlement in accordance therewith. If not so settled, the dispute may be resubmitted to the Board upon a more adequate record.

"FINDINGS: 'That Rule No. 37 was applicable to the position here involved as of the date it was established.'"

"AWARD

The proceeding is remanded to the parties for negotiation of the appropriate rate of pay, on the basis of the requirements of Rule No. 37 of the current agreement, such rate to apply for the period the position in question was in existence."

In the above award the claim of the employe was for the re-establishment of the position of O. S. & D. Clerk at Suspension Bridge, New York, at a rate of \$5.60 per day. This Division of the Board by unanimous agreement held that the position when established in July or September 1939 was a new position and that the rate of pay for such position was governed by Rule 37 of the Agreement.

This holding of the Board was contrary to the theory advanced by claimant. Under such circumstances, and because of the lack of evidence upon which a determination of a proper wage for a new position could be established, the matter was remanded to the parties for a settlement of the dispute in accordance with Rule 37.

In the instant case claimant presented the claim upon the same theory as in Docket No. CL-1581, namely, for the re-establishment of the position of O. S. & D. Clerk. When this claim was presented and argued before the Board claimant did not have the advantage of the Award in Docket No. CL-1581.

Because of these circumstances there is insufficient evidence for this Board to make a finding as to the proper wage under Rule 37.

It is the position of claimant that the matter should be remanded to the parties and pursue the same procedure as in Award No. 1578. It is the position of the carrier that claimant failed in both instances to provide a basis warranting the upholding of his claim and that he has completely exhausted his rights to have this claim given further consideration.

The procedure of remanding the matter for further handling and more complete finding of facts is not a new experience for this Board. In Award No. 1074 it was said:

"'When new positions are created,' this governing rule specifies 'compensation will be fixed in conformity with that of existing positions of similar work and responsibility in the same seniority district.' In circumstances where an old position is transformed into a new one, as in this proceeding, the application of the rule may lead to an increase or a decrease in the rate of compensation fixed for the new position as compared with that paid on the old, and it does not necessarily preclude the establishment of the same rate of compensation for the new position as prevailed on the old. The rates on existing positions of similar work and responsibility in the same seniority district constitute the controlling factor. In other words, the actual rates of compensation on the new positions will depend entirely upon a fair and reasonable application of the standards prescribed in the rule to the facts of each particular case.

"It is the function of the carrier, in the first instance, to establish the rate in conformity with these standards; upon protest of the employes, the process of negotiation must be pursued. And if, with continued disagreement after negotiation, it may be assumed to be an appropriate function of this Board, upon finding a violation of the governing rule, to approve or prescribe the rate deemed to conform to that rule, such action can only be taken upon a record adequate not only to disclose the fact of violation but to determine the proper rate in the circumstances. The present record is clearly inadequate for this purpose; nor does the claimant request such action. Accordingly, this proceeding will be remanded to the parties for the deter-

mination of the proper rate of compensation for each of the positions involved, in conformity with the standards prescribed in Article II (b) of the Agreement."

In Award No. 1201 it was said:

"It is the function of the carrier, in the first instance, to establish the rate in conformity with these standards; upon protest of the employes, the process of negotiation must be pursued. And if, with continued disagreement after negotiation, it may be assumed to be an appropriate function of this Board, upon finding a violation of the governing rule, to approve or prescribe the rate deemed to conform to that rule, such action can only be taken upon a record adequate not only to disclose the fact of violation but to determine the proper rate in the circumstances.

"The present record is inadequate for this Division to make such determination since it lacks a sufficient portrayal of the responsibilities, work and rates of pay of other positions deemed to be of similar kind or class in the seniority district involved, likewise it is not reasonably reconcilable in respect to the actual responsibilities and work of the new position of Report Clerk. In these circumstances the case must be remanded to the parties for negotiation of the appropriate rate of pay on the basis of the governing rule."

In the instant case the record is inadequate for this Division to make a proper determination of the issue involved. Under the authority of the awards as above cited, this dispute is remanded to the parties for settlement in accordance with Rule 37.

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 Rule No. 37 was applicable to the position here involved as of the date it was established.

AWARD

The proceeding is remanded to the parties for negotiation of the appropriate rate of pay, on the basis of the requirements of Rule No. 37 of the current agreement.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 26th day of February, 1942.