Award No. 2218
Docket No. CL-2258

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Fred L. Fox, Referee

PARTIES TO DISPUTE:

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

CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RY. CO.

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes that the hourly rate of pay for position of Tractor Operator at the Leota Street, Indianapolis, Ind., Storehouse shall be 66½¢ per hour retroactive to May 13, 1942.

EMPLOYES' STATEMENT OF FACTS: On May 13, 1942 the carrier established a new position at the Leota Street Storehouse, Indianapolis, Ind., classified as tractor operator, to which a rate of 64½¢ per hour was arbitrarily applied.

Leota Street Storehouse is included within the Central seniority district of the Stores Department. There are no positions of tractor operator in this seniority district, however, there are tractor operator positions requiring relatively the same class of duties and responsibilities in the Beech Grove, Ind. seniority district which is located in the vicinity approximately five miles from the Leota Street Storehouse, that carry an agreed upon rate of 66½¢ per hour.

There is no position in the Beech Grove district, the Eastern district, the Western district or the Central district of the Stores Department rated at 64½¢ per hour embracing similar duties or responsibilities.

POSITION OF EMPLOYES: Rules 6 and 29 of our current agreement read as follows:

Rule 6—Seniority Districts

"Each of the following departments or units is hereby established as a seniority district:

Stores Department—Office of

Beech Grove General Storehouse
(a) Clerical force
(b) Laboring force
Eastern District
Western District
Central District"

5. THE FIXING OF A PROPER RATE FOR THIS JOB IS OUTSIDE THE JURISDICTION OF THE THIRD DIVISION.

The Carrier makes this statement with all due respect, reflecting the provisions of the Railway Labor Act under which the Board functions. The members are so familiar with these provisions that it is totally unnecessary to dwell upon them here.

It may be appropriate to mention also the issuance by the President of the United States on October 3, 1942, of an Executive Order to control inflationary tendencies, and which provided among other things that no increase in wage rates shall be made without advance notice to and approval of such increase by the National War Labor Board.

SUMMATION:

The Carrier went beyond the strict obligation of any agreement with the Employes in voluntarily establishing a rate higher than that previously paid for the operation of a tractor at Leota Street, and the rate of 64½¢ is fair and liberal.

There is no obligation by rule or otherwise to pay a rate still higher, specifically, the Beech Grove rate demanded.

There is no reason in logic or equity for doing so.

The Carrier's effort to settle the dispute by compromise was rejected by the Employes, and the offer withdrawn.

The Board must bear in mind that an important principle is involved—namely, that there is no uniform level of rates in effect at the various places over the railroad where we maintain a Stores organization, and that the established rate structure is a composite one that has grown up over a long period of years, including the results of collective bargaining dating back to the orders of the United States Railroad Administration some 25 years ago, and subsequent orders of the United States Railroad Labor Board and various negotiated and arbitrated wage settlements in subsequent years.

Under this well known background the mere fact that there is a difference in the rates paid at different points does not establish such differences as inequalities that should be extinguished by bringing up all the lower rates to the level of the higher rates, and this is not required by any rule or other obligation or commitment.

The present case in this respect has an importance far exceeding the bare monetary difference between the rate paid and the rate demanded.

We have mentioned the point that the Third Division does not fix rates, and that wage rate changes are subject to the President's "freezing order" of October 3, 1942.

We respectfully ask that the claim be denied, and request the privilege of appearing before the Board if an oral hearing is conducted.

OPINION OF BOARD: This dispute involves the rate of pay of a tractor operator at Leota Street Storehouse in Indianapolis, Indiana, in the Carrier's Central Seniority District. For many years, prior to May 13, 1942, a tractor was operated at this storehouse by various employes who were classified as store helpers, and whose wage rate is now 62¼¢ cents per hour. On May 13, 1942, the Carrier established the position of tractor operator at this point, and fixed a wage rate of 64½ cents per hour therefor. The position was assigned to the senior applicant, the petitioner herein. The petitioner protested the wage rate, claiming that the rate should be 66½ cents per hour, to make the same conform to the rate paid for the same work at Beech Grove, in another seniority district, but located in the environs of Indianapolis and about five miles from Leota Street Storehouse, and claimed to be in the same "locality," within the meaning of Rule 29, which, it is said, controls, and which, for convenience, is here quoted.

"Rule 29—NEW POSITIONS

The wages for new positions shall be in conformity with the wages for positions of similar kinds or class in the seniority district where created, except that in the Locomotive, Car and Stores Departments the wages for new positions shall be in conformity with the wages for positions of similar kind or class in the seniority district in the same locality where created. When the duties of two positions are combined the highest prevailing rate on either position shall apply."

The exception stated in the rule gives rise to Petitioner's claim, and distinguishes this claim from those of a like nature considered in many awards of this Board, in cases where the exception was not in the rule considered.

There are four seniority districts in the Carrier's Stores Department, to-wit: Beech Grove Storehouse; Eastern District; Central District; and Western District. Beech Grove Storehouse is geographically surrounded by the Central District, and the Eastern, Central and Western Districts cover lines of railway leading out from the central point of Indianapolis. Prior to May 13, 1942, there were no tractor operators working in the Central Seniority District, although at least one other store—at Brightwood in Indianapolis—was operated by helpers. Tractor operators worked at the Beech Grove Storehouse. In these circumstances, Petitioner claims that Beech Grove should be held to be in the same "locality" as Leota Street and, while not contending that Rule 29 covers, in all respects, the case presented, does insist that "* * * as the rate for the position in question is one to be negotiated, the only equitable basis for solution is the rate assigned for the identical positions located in the adjacent district which in this case is the Beech Grove District."

As we understand our powers, we can only fix rates of pay where the interpretation of a rule applicable thereto is involved, the alleged violation of which creates a cause for dispute. Where there is no rule governing a case, the rate of pay is a question for negotiation, and we are not permitted to fix a rate, even though equitable considerations might prompt us to do so. We think this is a case which should be remanded for negotiation between the parties, for the following reasons.

We do not think Rule 29 permits us to go outside of the Seniority District, in finding a comparative basis for a wage rate. The pertinent portion of the rule reads: "* * * except that in the * * * Stores Department, the wages for new positions shall be in conformity with the wages for positions of similar kind or class in the seniority district in the same locality where created." We think the expression, "same locality," should be limited to a locality within the seniority district and not outside; the rule says so, and to give it a different interpretation would be to read additional language into the rule, and this we are not permitted to do, even if to do so would bring about what we may believe to be an equitable solution of a particular dispute. Generally speaking, it would seem that the same working conditions and cost of living would be the same in two sections of the same city and its suburbs, but conditions justifying some distinction as to a wage rate, as between the two locations, may exist; and we cannot, on this record, say they do not exist. The equities of the situation, in favor of the petitioner, are not so clearly shown as to justify us, by construction, in reading into the rule something not plainly intended, even if we could do so in any case, which we strongly doubt.

This Board should guard against the temptation to make a contract where the parties themselves, through inadvertence or otherwise, have failed to do so. The seniority district is, generally, made the unit for all contracts. For the most part, employes obtain their seniority rights and rates of pay with reference to the seniority district in which they work; that there may be

exceptions, in cases of system seniority in certain classes of work, does not detract from the general rule. This principle was probably in mind when it was, as we think, provided in the Agreement that, as to new positions, rates of pay should be fixed for storehouse employes in conformity with wages paid for positions of similar kind or class in the same seniority district, with the added language "in the same locality where created," and which we construe to mean in the same seniority district.

There being no tractor operator working in the Central Seniority District, when that position was created for the Leota Street Storehouse, on May 13, 1942, there was no position in that district with which the rate of pay for the newly created position could conform, as required by Rule 29; and, therefore, that rule cannot be applied to the situation before us. This being true, the dispute is properly one for negotiation between the parties.

We think our disposition of the case is in line with numerous awards of this Division. Award 1074 was a case where the rule involved read as follows:

> "When new positions are created, compensation will be fixed in conformity with that of existing positions of similar work and responsibility in the same seniority district."

But for the exception noted, the rule quoted closely approximates Rule 29 of the current agreement now under consideration. New positions were created and there was a dispute as to the rates of pay which negotiations between the parties failed to settle and the controversy was presented to this Board. The case was remanded to the parties for negotiation, on the ground that the record being considered was inadequate as a basis for determining the rate of pay and, in the Opinion of the Board, it was stated:

> "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."

Rule 29 contains an exception which differentiates, in some respects, the present case from that considered in Award 1074, but not as to the principles announced in the above quotation. This principle has been applied, in substance and effect, in numerous awards. See Awards 1143, 1201, 1255, 1467 and 1586. The award last cited is particularly applicable to the situation before us. In that case, it was conceded that there were no positions of similar kind or class in the seniority district in which the new position had been created, and the pertinent part of the Opinion of the Board deserves quotation:

> "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."

The opinion also distinguishes other awards claimed to be in conflict, and held them inapplicable. In view of all the foregoing discussion, we are of the opinion that the case should be remanded to the parties for further negotiation.

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 Board has no present jurisdiction to fix the rate of the new position, and that the dispute be remanded to the parties for further negotiations.

AWARD

Claim remanded for further negotiations.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 23rd day of June, 1943.