

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

H. Nathan Swaim, Referee

PARTIES TO DISPUTE:

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

HOUSTON BELT & TERMINAL RAILWAY COMPANY

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

(a) The Carrier is violating the Clerks' Agreement by assigning the Bill Clerk at the Local Freight Office on a 365 day annual basis. And

(b) Claim that the correct annual assignment is 306 days, and correct rate of pay \$203.48 per month. And

(c) Claim that the Bill Clerk be paid at the rate of time and one-half for all Sundays and holidays involved until the violation is corrected.

EMPLOYEES' STATEMENT OF FACTS: On November 16, 1940 an agreement between the Carrier and the Brotherhood became effective, from which we quote the following:

"It is agreed that all 365 day assignments, not necessary to the continuous operation of the Carrier, will be reduced to 306 day assignments and the rate will be adjusted so that the earnings will be the same as received for 365 days."

At the time the agreement became effective the following positions were assigned on a 365 day annual basis:

POSITIONS	OFFICE
Bill Clerk	Freight Agent's
Utility Clerk	" "
Chief Cotton Clerk	" "
Cotton Clerk	" "
Prepay & Expense Bill Clerk	" "
Chief Rate Clerk	" "
Chief Clerk to Agent	" "
Secretary to Agent	" "
Janitor	" "
Warehouse Foreman	Warehouse
Asst. Warehouse Foreman	"
Line Desk Clerk	"
Loading Clerk	"
Truckers (5)	"

to the basis of a 365-day assignment, as herein explained; namely, from \$170.60 to \$203.49 per month, or an increase of \$32.89 per month, so the incumbent of the position would be paid, **in accordance with the Agreement**, for the Sunday and holiday work.

The Employees are asking the Board to now declare the increased (365-day) rate of \$203.49 as the established monthly rate for a 306-day annual assignment and to allow additional compensation at time and one-half for time worked on Sundays and holidays. The claim for time and one-half is of course denied by the language of Rule 47, which specifically provides for only pro rata rate for Sunday and holiday work to "employees regularly assigned to work full time on Sundays and holidays," as was the position in controversy. The inequity of the claim for establishment of the \$203.49 rate as the proper rate for a 306-day annual assignment is apparent from the fact that the employee is entitled to extra pro rata compensation over the 306-day rate for the time worked on Sundays and holidays. Such additional compensation is already incorporated in the monthly rate; to now declare that rate as the proper rate for a 306-day assignment, thus giving the temporary Bill Clerk a salary of \$32.89 in excess of the established salary for Bill Clerks (\$170.60) would not only be contrary to the provisions of Rule 51, which provides that "The wages for new positions shall be in conformity with the wages for positions of a similar kind or class in the seniority district where created," but it would result in compounding the extra compensation for Sunday and holiday work, a condition clearly not contemplated by Rule 47.

The Carrier has conclusively shown that the work performed by the claimant was necessary to the continuous operation of the carrier. If the Board, contrary to this conclusive proof, should find in favor of the Employees, the Carrier protests, as inequitable and unjustified, any adjustment ante-dating the date on which claim was first filed by the Employees, viz., December 1, 1942.

It is clearly shown in the Carrier's Statement of Facts that both the Local Chairman and the General Chairman were supplied with copies of Bulletin No. 34, posting the position as a seven-day assignment. They did not at that time protest the assignment, as they should have done if they felt that the assignment was not proper, but instead waited until potential penalties (if any are found due) had substantially accumulated and then demanded an adjustment retroactive to date position was established. There was no change in the controlling agreement between the date position was established and date claim was filed. The Board should not put a premium on such handling by considering in this claim any part of the time involved prior to December 1, 1942.

Summary

The Carrier submits that it has proved:

- (1) that the work performed by the claimant was such that it was necessary to the continuous operation of the Carrier;
- (2) that the rate for the new position was determined exactly in accordance with the applicable rules, and the claim is inequitable.

and accordingly requests that it be denied.

OPINION OF BOARD: It seems to be conceded by the parties to this dispute that Claim (a) and (c) should be sustained if the work being done by the claimant on Sundays and holidays was "not necessary to the continuous operation of the Carrier."

The work being done was the work of a Bill Clerk, which, in this particular case, apparently consisted chiefly of billing outbound freight, consisting mostly of oil. We have many awards by this Division in which we have

held that the work of a Bill Clerk, including the preparation of waybills for outbound shipments and the signing of bills-of-lading, was not necessary to the continuous operation of the Carrier. See Awards Nos. 1619, 1622, 1623 and 1846.

The Carrier insists that here the Sunday work was necessary to comply with the O. D. T. dated May 4, 1942. If that were true, it still would not make it necessary to the continuous operation of the Carrier, as that phrase has been interpreted by this Division.

A more troublesome question is presented by Claim (b) of this docket, which claims that the correct rate of pay is \$203.49 per month for 306 days.

On November 16, 1940, an agreement between the parties became effective, providing that:

"It is agreed that all 365-day assignments, not necessary to the continuous operation of the carrier, will be reduced to 306-day assignments and the rate will be adjusted so that the earnings will be the same as received for 365 days."

To facilitate the movement of oil, and as an aid to compliance with the order of the O. D. T., the Carrier decided to establish a temporary position of Bill Clerk. On June 18, 1942, the Carrier bulletined this position as a new temporary position of "Bill Clerk" with assignment of seven days and with "Rate of Pay: \$203.49—based on 7-day assignment." At that time there were three Bill Clerk positions at the station with a wage rate of \$170.60 for a 306-day assignment, and a Chief Bill Clerk with a rate of \$196.10. Copies of the bulletin of the new position of Bill Clerk were furnished to the Local Chairman and the General Chairman. On June 23, 1942, the claimant was assigned to the position on his bid. The Organization made no protest on the rate of pay until December 1, 1942, when the General Chairman, by letter, demanded that the rate of \$203.49 be paid on the basis of a 306-day assignment and the occupant be paid for Sundays and holidays at the rate of time and one-half.

The employees contend that the Memorandum Agreement effective November 16, 1940, worked prospectively both as to requiring assignment of only 306 days on all new positions not necessary to the continuous operation of the Carrier, and also as to making a rate fixed on such new positions on the basis of a 365-day assignment apply to a 306-day assignment.

We cannot agree with this second contention of the employees as applied to the facts of this case. The Memorandum Agreement provided for the adjustment of the rate so that the earnings will be the same as received for 365 days. We think the Agreement referred to rates then being paid for 365-day assignments.

Neither do we agree with the contention of the employees that the rate fixed in this case by the Carrier was understood by the parties as being a flat rate of \$203.49 per month.

Rule 51 of the applicable Agreement provided that the wages for new positions shall be in conformity with the wages for positions of a similar kind or class in the seniority district where created. There were three Bill Clerk positions in this seniority district, each with a rate of \$170.60 per month on a 306-day assignment. The bulletin advertised this new position at a rate of "\$203.49—based on a 7-day assignment," exactly the same daily rate as was then being paid to the other three Bill Clerks in the seniority district. We cannot escape the conclusion that this fact was realized both by the claimant when he bid for the position and by the Organization when copies of the bulletin were furnished to the Local Chairman and General Chairman of the Organization.

To permit the Organization at this time to say that the claimant can only be regularly assigned to work 306 days but must be paid on the basis of the daily rate for Bill Clerks, times 365, would not only be unfair to the Carrier, but to other members of the Organization. It would result in this claimant receiving a higher rate of pay than any other Bill Clerk in that seniority district, including the Chief Bill Clerk. We cannot believe that any of the parties to this dispute intended any such unfair result.

We must conclude that the monthly rate fixed by the Carrier, bid on by the claimant, and approved by the continued silence of the Organization for more than five months, was the existing daily rate for Bill Clerks, times the number of days per month the employe was regularly assigned to the work. Since this could only be $25\frac{1}{2}$ days per month, on the basis of a 306-day assignment, the correct rate of pay for the position was \$170.60, the same wages then being received by the other Bill Clerks in that seniority district.

FINDINGS: That both parties to this dispute waived hearing thereon;

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 as contended in Claim (a).

AWARD

Claim (a) and (c) sustained. As to Claim (b)—The correct annual assignment is 306 days. The correct rate of pay is \$170.60 per month.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 10th day of August, 1943.