

Award No. 2881

Docket No. CL-2892

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Henry J. Tilford, Referee

PARTIES TO DISPUTE:

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

THE WESTERN PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood of Railway Clerks that P. J. Calcaterra, Stockton, be compensated for wage loss sustained account of action of Carrier in holding him on position of Check Clerk, Wharf Warehouse, Stockton (rate \$5.96 per day) longer than necessary to arrange transfer to position of Assistant Cashier, Stockton (rate \$7.00 per day).

EMPLOYEES' STATEMENT OF FACTS: Prior to October 31, 1942, P. J. Calcaterra was incumbent of position of Check Clerk (rate \$5.96 per day) at Stockton Wharf Warehouse.

Through Western Division Clerks' Circular No. 168-42 of October 31, 1942, Calcaterra was assigned to position of Assistant Cashier (rate \$7.00 per day) at Stockton Freight Station. He was transferred to position of Assistant Cashier on November 12, 1942. Calcaterra was paid at the rate of \$5.96 per day until November 11, 1942.

POSITION OF EMPLOYEES: The following rules are cited from the Agreement effective October 1, 1930:

"Rule 10. Employees assigned temporarily to higher rated positions shall receive the higher rate. Employees assigned temporarily to lower rated positions shall not have their rates reduced.

"A 'temporary assignment' contemplates the fulfilment of the duties and responsibilities of the position, whether the regular occupant is absent or present; merely assisting a higher rated employe during a temporary increase in the volume of the work does not constitute a temporary assignment."

"Rule 31. Notice of new positions or vacancies (except laborers') shall be posted promptly in places accessible to all employes in the seniority district where they occur, for a period of five days, circular to show location, title, reasonable definition of the work, hours of service and rate of pay. Employees eligible for such positions may file their applications with the designated official within five days from the first 8:00 A. M. after date of issue of the original notice. Applicants must state their seniority date, title of their present position, qualifications, experience and training, if any, in the line of work of the position applied for. Assignment shall be made within ten days from the date of the original notice and the name of the successful applicant shall be posted promptly.

Authority for the position of Assistant Cashier in my office was given to me about October 15th and at that time I was unable to find a qualified extra man to place on this position, and to help out I made an arrangement with Bill Clerk L. J. Houghtalling, who is also local representative of Clerks, to help out in the Cashier's office all possible until we could get someone to place in this position. This was done and I paid Houghtalling Assistant Cashier rate of \$7.00 per day starting October 16th and running through and including November 10th, after which day Calcaterra reported.

Mr. Houghtalling helped out in the Cashier's office between October 16th and November 10th inclusive, as stated above, and was paid at Assistant Cashier's rate of \$7.00 per day instead of \$6.90, which was his regular Bill Clerk's rate. However, he kept up the billing in addition to some cashier work. This was due to our inability to find anyone qualified to work the position of Assistant Cashier."

The wording of the claim indicates that the employees are of the opinion that Calcaterra should have been transferred on October 31st because that is the date which assignment circular was issued. There is nothing in the schedule which requires the immediate transfer to a position bid in. In the actual handling of situations of this kind this is not practicable. The designated official for issuing circulars involving the assignment of clerical employees is the Division Superintendent at Sacramento and it is necessary for the circulars to be posted in all stations at which clerks are employed between San Francisco, California and Reno, Nevada, a distance of about 350 miles. The circular appointing Calcaterra to the position of Assistant Cashier was issued at Sacramento on Saturday, October 31, 1942. Correspondence is not handled by the Agent's office on Sunday and, of course, this circular was not available at that point until Monday, November 2, 1942.

As indicated by the above quoted letter from the Agent immediate steps were taken to provide relief for Calcaterra. In view of the manpower situation, Carrier feels that the fact that he was transferred to the position and performed work thereon commencing November 11, 1942 is evidence that he was not held on the position occupied longer than necessary to arrange transfer to position bid in.

Award No. 2179, Docket CL-2208 supports the Carrier in its contention.

Carrier requests that the claim of the employees be declined.

OPINION OF BOARD: It appears from the record that the Trucker, F. J. Ennis, to whom the Carrier, on November 11, 1942, assigned the position of Check Clerk, Wharf Warehouse, Stockton, California, in order that P. J. Calcaterra might take the position of Assistant Cashier to which he had been assigned on October 31, was "an experienced railroad clerk qualified to perform the duties of Check Clerk at the Wharf Warehouse." Ennis obtained his employment as a Trucker on November 2, and the Carrier's sole excuse for not promptly assigning him to the Check Clerk position is that Carrier did not discover that he was qualified for it until November 10. It will be observed that Carrier does not state that it could not have discovered Ennis' qualifications prior to November 10, although it does point out that "Applicants for positions of trucker are not required to immediately file written applications for employment" and that prior to November 10, "it was the understanding of all concerned that he was an inexperienced railroad man."

None of the previous awards construes a rule containing a provision identical with the second paragraph of Rule 31, reading:

"Employee so assigned, if held by the Railroad on other work, or position occupied, longer than necessary to arrange transfer to position bid in, shall receive the rate of the position so held but not less than the full wage of the position bid in."

Award No. 2174 (cited by both parties) in construing rules relating to the bulletining of new positions and vacancies, but containing no provision limiting the period which the assigned employe might be withheld from enjoying the emoluments thereof, held that an assignment to a position "does not carry with it the right to **immediate transfer** to it. However, this does not leave the time of **transfer** to the caprice of the carrier. The transfer must be made within a reasonable time. What is a reasonable time must be determined from the facts and circumstances of the particular case" and that since there was nothing in the record to indicate that the Carrier had arbitrarily or capriciously withheld the transfer the assigned employe was not entitled to recover.

The Petitioner asserts that the purpose of the second paragraph of Rule 31 was to meet arguments of the Carrier similar to those later upheld in Award 2174. We concur in this view; and it is obvious that if the rule is to have the intended effect it should be strictly construed against the Carrier. Moreover, it is proper from the standpoint of justice that the burden of showing that the transfer was not withheld longer than necessary should be upon the Carrier since it alone has the power to facilitate the transfer.

It would seem apparent that the Carrier could have filled the position of Check Clerk by November 3rd, the day following Ennis' employment. At least it was not shown that it was impossible for it to have done so; and applying the principles above enunciated we find that Calcaterra should recover the difference between the wages paid him and what he would have earned as Assistant Cashier during the period, November 3 to November 11, 1942, inclusive.

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 Carrier violated the Agreement.

AWARD

Claim sustained as indicated in the Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 6th day of April, 1945.