Award No. 2893
Docket No. CL-2846

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

James M. Douglas, Referee

PARTIES TO DISPUTE:

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

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

(Wilson McCarthy and Henry Swan, Trustees)

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

(1) That the Carrier violated, and continues to violate, the Clerks' schedule when it refuses to assign Miss Sara Angell position of Stenographer, rate $7.07 per day, which she bid for and was assigned to under Bulletin No. 129, June 18, 1943.

(2) That the Carrier be required to pay Miss Sara Angell one day's pay account not allowed to return to service until she had secured a release from company physician after returning from sick leave.

(3) That the occupant, or occupants, of the position which was awarded to Miss Angell by Bulletin No. 129, be paid the difference between what they received and what they would have received at the proper rate of $7.07 per day.

EMPLOYES' STATEMENT OF FACTS: Miss Sara Angell, Stenographer in the Consolidated Machine Bureau, General Office, Denver, Colorado, with seniority date of October 27, 1936, was regularly assigned to position of stenographer in the Consolidated Machine Bureau, which position paid $7.07 per day. She was granted sick leave on the advice of her physician from August 11 to September 21, 1943. She reported for work on September 21 and was advised that she could not return to work until she had received a release from the company doctor. She secured this release the next day and returned to work the following day, losing one day's pay.

Upon returning to work, Miss Angell was not assigned to the position she left when she went on leave of absence, but was assigned to another position which paid $6.71 per day, altho Miss Angell was allowed her proper rate of $7.07 per day. The incumbent of the position Miss Angell left did not receive the rate of $7.07 per day, but was paid the rate of $6.71 per day.

This case was handled up to the court of last resort on the property and no agreement being reached, the organization requested the Carrier to join with them in submission to the Third Division, National Railroad Adjustment Board.

At present the rates for stenographers range as follows:

1	@	$5.97
5	@	6.09
1	@	6.43
5	@	6.71
6	@	7.07

Actual operations since establishment of the Bureau in 1939 have resulted in the senior employes being given the highest rates in their particular group, that is, whether in the stenographic group, computing group or key punch group.

It will be noted from the above there are at present 18 stenographers in the department at five different rates ranging from $5.97 to $7.07 per day, and it is permissible under the Memorandum of Agreement of June 2, 1941, to assign stenographic work, regardless of character, to any stenographer in the district.

Claimant Angell bid on and was assigned a vacancy in the $7.07 group under bulletin dated June 15, 1943, as quoted in Carrier's Statement of Facts. Claimant thus continuing in the Consolidated Machine Bureau, any charge that Carrier could not assign her stenographic work of any character is without foundation.

OPINION OF BOARD: Sara Angell, employe, before going on her vacation and absence on account of physical disability had been assigned as Stenographer to the Chief Clerk, Freight Accounts. Upon her return she was given different work which ordinarily had been performed by a stenographer paid at a lower rate, although employe was continued at her regular rate of $7.07 per day.

The effect of Carrier's contention that it was authorized to do this is that employe has been returned to the same position because Carrier was required merely to return employe to one of the positions of **stenographer** and was not required to return her to the same work.

Carrier bases its contention on the supplemental agreement creating the Consolidated Machine Bureau adopted as of March 1, 1939, and later renewed. Prior to the formation of the Bureau each department head and subdepartment head had under his jurisdiction a number of stenographers, typists and other machine operators. All these employes were taken away from their old positions and transferred to the new Bureau which constituted a new and separate seniority district. A new seniority roster was set up. The evident purpose of creating the Bureau was to have a consolidated or centralized office for pooling stenographic and computing work, as Carrier asserts. Carrier argues that under the new arrangement no stenographer, for instance, was to have regularly assigned definite duties after the Bureau was once formed but each stenographer was to perform any duty which from time to time might be assigned to her. To support this argument Carrier relies on Section 4 (a) of the supplemental agreement, which states:

> "The management will be permitted to assign stenographic, typing, computing, and key punch work, regardless of character, to any employe in the district assigned to and capable of performing such classes of work."

This provision, according to Carrier, has put all positions in the Bureau, or all positions in each class of work at least, on the same level so far as identity of duties is concerned. We do not agree.

Such an interpretation is not consistent with the provision of the supplemental agreement which established varying rates of pay within each class of work. It is also directly contradictory to paragraph (b) of the same Section 4, which provides:

"It is recognized that rearrangement and transfer of work will necessarily result in order that the highest rated positions will be assigned to work justified by the rate of pay."

This provision expressly recognized that the various positions would be assigned regular duties.

To understand fully these provisions of the supplemental agreement we must bear in mind that the purpose of such agreement was to provide for the organization of a new department and to take care of any problems that might arise upon assigning old employes to new positions in a new seniority district. Therefore paragraphs (a) and (b) of Section 4 must speak as of the date the Bureau was organized. Both have to do with incidents pertaining to its organization. Paragraph (b) expressly refers to "rearrangement and transfer of work" which would occur only at the time the Bureau was first formed. To be in harmony (a) and (b) must be read together, otherwise they are conflicting. When considered together it becomes clear that (a) also speaks as of the time of the organization of the Bureau. Its purpose was to permit the assignment of any character of work to any employe in the new district who was assigned to and capable of performing such work, regardless of what her previous character of work may have been before. Had it been the intention of the parties to place the positions permanently on the same level so far as the work of each was concerned, such would no doubt have been expressly provided. However, there is nothing in the supplemental agreement to indicate that after the work of each new position was once assigned such work would thereafter be interchanged at will among the various positions. Rule 50 of the main agreement covers the situation due to a temporary increase in the volume of work.

Carrier stresses the fact employe bid in a position that was bulletined ". . . for position OF STENOGRAPHER at rate . . ." But the bulletin also contained the notation, "Vice Helen R. Broderick. . . ." It is our view that employe bid in the position of stenographer with the same duties which had been performed by Helen Broderick.

We do not believe the later readoption of the supplemental agreement in the form it was originally drawn affects the interpretation we have given Sections 4 (a) and (b). It is true that at the time of re-adoption the Bureau had been organized and in operation for more than two years. When readopted there could have been no need for "rearrangement and transfer" of work, yet those terms remained. When readopted the supplemental agreement re-established the rates of pay for the Bureau as of the later date.

It is our conclusion that the supplemental agreement does not affect the right of the employe to return to the same work she was doing before she left on her sick leave, that is, to her former position.

Employe should be reimbursed for the loss of one day's pay caused by the Carrier's demand she undergo a physical examination by the Company doctor before she could return to work. There is no rule cited to us which requires this examination. That Carrier may have a right to require a physical examination before originally employing a person has no bearing on the situation before us. Under circumstances which are not present here Carrier may have such a right as to one returning from sick leave under Rule 65 which requires Carrier to afford reasonable protection to the **health** and safety of employes. Where, for example, contagious diseases are involved an examination might properly be required to prevent harm to other employes. That matter can be decided if it arises. Such is not the case here.

In Award 362 this Division passed on the question of requiring a physical examination as a condition to returning to employment after a leave of absence where the Agreement was silent on such a matter. There it was ruled the Carrier had no such absolute right but that circumstances might justify the requirement in particular cases. It was found to be a

reasonable requirement in that case because the facts showed there was reason to believe the employe was still disabled at the time and he would return to duties of a hazardous nature. In this case Carrier concedes that if employe had been treated for her sickness by a Company doctor a physical examination would not have been demanded.

Employe asserts there is no existing practice of demanding an examination where an employe has been out of service less than 90 days. Carrier answers that it has always reserved the right where there was reason to question the physical condition of the employe, irrespective of the period of absence from service. Even if such is the practice, which we do not decide, Carrier has failed to show sufficient facts as to employe's physical condition to justify an examination. Under the circumstances Carrier had no right to hold employe out of service for such reason.

Our decision on Item (1) of the claim likewise determines Item (3). It follows that the occupant or occupants of Sara Angell's position during her absence are entitled to be paid the difference between what they actually received and the regular rate of $7.07 per day.

The claim should be sustained in its entirety.

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

Claims sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 25th day of April, 1945.