

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Fred W. Messmore, Referee

PARTIES TO DISPUTE:

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

THE CHESAPEAKE AND OHIO RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that the position of Freight House Foreman, 23rd Street, Newport News, Virginia, be rated at not less than \$9.50 per day, that it be re-advertised at this rate, and all employes who have suffered wage loss be compensated for any and all such wage loss sustained, retroactive to July 21, 1941.

EMPLOYES' STATEMENT OF FACTS: On July 21, 1941, Mr. L. C. Spengler, Superintendent of the Newport News-Norfolk District, issued bulletin No. 348 advertising position of Freight House Foreman, 23rd Street, Newport News, Virginia, at a rate of \$6.65 per day, and on July 26, 1941, issued Addendum to Bulletin No. 348 awarding the position to Percy James.

The Division Committee, being of the opinion that the rate was considerably below the rate which should have been placed on the position, filed claim with the Superintendent that a rate of \$8.03 or a higher rate should have been established (the \$8.03 rate plus the general wage increase secured in 1943 would now be \$8.75 per day), the Superintendent declining the claim, holding that this position had been established for a number of years, and that there had been no increase in the duties and responsibilities that would justify an increase in rate.

The claim as set forth under Statement of Claim above was appealed to Mr. Parrish, Vice-President, and in conference July 5, 1945, a rate of \$8.75 per day was agreed to for the position. However, the parties were unable to agree on that part of the claim dealing with the retroactive adjustment and reimbursement of employes affected. It was, therefore, agreed that the rate agreed to would be placed into effect and the remainder of the claim submitted to your honorable Board for disposition.

CARRIER'S STATEMENT OF FACTS: On December 18, 1931, position of Freight House Foreman at 23rd Street Freight Station, Newport News, Va., rate \$6.25 per day, was abolished.

On July 21, 1941, position of Freight House Foreman at 23rd Street Freight Station, Newport News, Va., was re-established, rate \$6.65 per day. This rate was arrived at by adding to the rate of \$6.25 per day in effect when the position was abolished in December, 1931, the general increase of 40¢ per day granted all employes, effective August 1, 1937.

As result of a general increase of 80¢ per day, effective December 1, 1941, the position was increased to \$7.45 per day.

As result of a general increase of 72¢ per day, effective December 27, 1943, the position was increased to \$8.17 per day.

has been so extended that the carrier is justified in believing the employes have concurred in its acts, and in this belief the carrier at the demand of the employes increases rates of pay, it is too late thereafter for the employes to demand of this Board that positions, long out of existence at the time the increase in pay was granted, or the work of these positions, should be restored under the increased rates of pay.

"While all the elements of a technical estoppel are perhaps not present, nevertheless, we are of the opinion that the doctrine of laches should preclude the claimant from now obtaining from this Board the rights it asserts."

The claim of the employes should, therefore, be declined.

OPINION OF BOARD: The record discloses that prior to 1932 there existed a position of foreman, 23rd Street freight warehouse, Newport News, Va., rate \$6.25 per day. December 18, 1931, this position was abolished. Approximately ten years thereafter the position of foreman, 23rd Street Station, Newport News, Va., was advertised for bids, rate \$6.65 per day. This rate was fixed by virtue of a general wage increase of forty cents per day effective August 31, 1937. Subsequent wage increases increased the position to \$8.17 per day from and after December 27, 1943. By negotiation, as a result of a grievance filed by the Clerks' Committee, this position was rated at \$8.75 per day effective July 1, 1945. This claim involves the question as to whether or not there should be a retroactive adjustment of 58 cents per day on this position from July 1, 1945 to July 21, 1941.

Rule 44 of the applicable Agreement provides:

"No positions shall be abolished and new ones created under the same or different titles covering relatively the same class or grade of work which will have the effect of reducing rates of pay or evading the rules of this agreement."

Rule 46-(a) provides:

"The rates of pay for new positions or positions abolished and later re-established shall be in conformity with the rates of pay for positions of similar kind, or class, in the seniority district where created."

The Carrier asserts it complied with the foregoing rules and that in the seniority district here involved, a position of like kind or class, comparable to the position in question was that of foreman, freight station, Norfolk, Va. The Carrier makes the comparison in its submission as heretofore appears, which discloses the number of employes, the amount of tonnage handled, the increase thereof as time progressed until the rate of pay for the position was determined. That in view of the situation the Carrier negotiated with the Clerks' Committee under Rule 15 of the applicable agreement, which provides:

"When there is a sufficient increase or decrease in the duties and responsibilities of a position, the compensation for that position will be subject to adjustment by mutual agreement between the Management and the General Chairman.

"Except when changes in rates result from negotiations for adjustments, the changing of a rate of a position for a particular reason shall constitute a new position, unless mutually agreed otherwise between the Management and the General Chairman."

and as a consequence, the rate of \$8.75 per day was agreed upon due to the increased duties accruing to the position in the process of time. The employes contend that Rule 15 constituted no part of the negotiations between the parties as evidenced by correspondence appearing in the record; that the employes negotiated the rate of pay on the comparable positions of foremen

of merchandise piers and the wage scale pertinent to such position and wage increase allotted thereto, which furnished the basis of the agreed to wage of \$8.75 per day. It is also pointed out by the employes that in 1931 the freight station foreman was under the supervision of the general foreman and assistant general foreman of the merchandise piers, while in 1941 and thereafter, he had full responsibility for the freight house, and was subject to the jurisdiction of the general agent; that due to the increase in duties, negotiations with reference to the rate of pay began immediately.

The effective agreement No. 6 between the parties is in evidence.

It is apparent when the position in question was abolished, it was due to an economic depression and the continuance thereof rendered such position useless. In 1941, there was an up-surge in business obviously due to an existing war, and to meet abnormal wartime demands the position was bulletined. Thereafter, in less than five months, this country was directly involved. Needless to say, the increased duties and responsibilities of positions in most all industries became immediately apparent. This fact was recognized by the immediate negotiations between the parties in the instant case.

A question presented—Is the position in question a re-established position as the carrier contends, that it was bulletined under the same title, the same location, with the rate of pay allowed incident thereto, or is it a new position as contended for by the Organization, due to the increased duties and responsibilities.

To abolish means to destroy. See Awards 2239, 2808.

We have found no prior award of this Board laying down a comprehensive formula for determining whether a particular position once discontinued and subsequently restored, is to be treated as new, or re-established. It does appear, however, that the element of the intervening time has been considered an important circumstance in resolving such questions. Award 3010. In Award 2808, the position had been abolished 11 years. In Award 2732, 12 years, and in Award 2215, 15 years. See Award 3010, supra.

In Award 3010, this Board said:

"Here likewise there was no reservation as to its future intentions on the part of the Carrier at the time the positions were discontinued; ten years, or more, elapsed before any steps were taken to restore them."

In the instant case, the position had been abolished approximately 10 years, and it took a national emergency to occasion its resurrection. It is apparent, under the record and the circumstances, increased duties and responsibilities immediately attached to it.

We believe that when the position in question was bulletined in July 1941, it was a new and permanent position under the rules of the applicable agreement and the record. Therefore, if the claimant was entitled to have the rate of his position made comparable with that of the foreman of the merchandise piers, in July 1945, the higher rated work, then under the agreement he was entitled to the higher rate for the full period of time here involved.

For the reasons given herein, we conclude upon the record as a whole, the claimant is entitled to retroactive pay in accordance with the amended claim presented.

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 as contended for by the Brotherhood.

AWARD

Claim sustained as stated in the Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 10th day of March, 1947.