

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 ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY**

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that the Carrier violated the Clerks' Agreement when:

(1) It required E. T. Benson, Class 2 Day Baggage-man, rate \$6.35 per day, to go into the ticket office at the Chanute Passenger Station at 6:00 P. M. daily and take over and assume the ordinary, normal and regular assigned duties of a Ticket Clerk position, rate \$7.41 per day, which ticket clerk work during the hours 9:00 A. M. to 6:00 P. M. are assigned to Day Ticket Clerk Position No. 355, rate \$7.41 per day, and failed and refused to compensate Mr. Benson at the proper rate of the position and work which he performed, i. e., \$7.41 per day; and,

(2) It required Mrs. V. J. Hunt, Stenographer, rate \$6.45 per day, to go into the ticket office at the Chanute Passenger Station between the hours of 1:00 P. M. and 2:00 P. M. daily and take over and assume the ordinary, normal and regular assigned duties of ticket clerk Position No. 355, rate \$7.41 per day, and failed and refused to compensate Mrs. Hunt at the proper rate of the position and work which she performed, i. e., \$7.41 per day; and,

(3) Claim that Day Baggage-man Benson shall now be paid at the rate of \$7.41 per day instead of \$6.35 which he was paid for all time required to perform the higher rated work, from date so assigned, until the violation is corrected, and that Mrs. Hunt shall now be paid at the rate of \$7.41 per day instead of \$6.45 per day, which she was paid, for the one hour period daily when required to perform the higher rated work, from date so assigned until the violation is corrected.

EMPLOYEES' STATEMENT OF FACTS: At Chanute Passenger Station there is assigned Position No. 355, Day Ticket Clerk, rate \$7.41 per day with assigned hours 9:00 A. M. to 1:00 P. M. and 2:00 P. M. to 6:00 P. M. on week days and from 10:00 A. M. to 1:00 P. M. and 4:00 P. M. to 6:00 P. M. on Sundays and Holidays. Need for the services of a Ticket Clerk at Chanute extend over a period of at least twelve hours, barring late trains, or from 9:00 A. M. to 9:00 P. M. on week days and from 10:00 A. M. to 8:00 P. M. on Sundays. In order to protect the ticket clerk work during the one hour lunch period and following the close of the Day Ticket Clerk's tour

The Carrier has not been served with nor permitted to see a copy of the Employees' submission, consequently it is not informed with respect to the alleged facts, contentions or allegations which the Employees' ex parte submission may contain. The Carrier, therefore, has dealt only with those contentions and allegations presented to it by the Employees and such other matters as in its considered judgment are pertinent to the dispute. The Carrier, however, reserves the right to present evidence in rebuttal of any allegations, facts, or contentions that may be made by the Employees in their ex parte submission or to any other submission which the Employees may make to your honorable board in this case.

OPINION OF BOARD: The question for decision is whether claimants, a baggageman and a stenographer, who regularly performed the duties of Ticket Clerk, a higher rated position, for stated hourly periods daily are entitled to be paid the higher rate of that position for the actual time they performed such duties.

Petitioner relies mainly on Article XI, Section 3-a, which provides that employees temporarily or permanently assigned to higher rated positions shall receive the higher rate while occupying such positions.

Carrier takes the position this rule does not apply because the claimants were not assigned either temporarily or permanently to the position of Ticket Clerk. Carrier argues that the duties performed by claimants as Ticket Clerk were part of their regular assignment of duties which went to make up the day's work. Carrier claims the right to assign the Ticket Clerk's duties to claimants under Article II, Section 3, which allows, subject to certain provisos, employees of any class to perform the duties of any other class "without change in classification".

But we do not believe that rule is applicable to the question before us. It must be read in connection with the other sections of the same article which define the employees who are considered clerks under the agreement and those considered non-clerical. It deals with the subject of classification of employees, not rates of positions.

What was said in Award 2270 in reference to the application of classification cases to a rule for preservation of rates identical with Article XI, Section 3-a, is peculiarly pertinent here:

"The classification cases cited by the Carrier are not particularly helpful. They involve the question of whether a given position involves enough work of a higher rated classification that the position should be reclassified, while our case involves the question of how much of the work of a higher rated position must an employee of a lower rated position do, and under which circumstances, before he can be said to have been temporarily assigned to the higher rated position. An employee might well be considered as being temporarily assigned to a higher rated position and still not make a sufficient showing to warrant a reclassification of his regular position."

And see Awards 751, 1276.

Carrier contends for another reason claimants were not assigned to the position of Ticket Clerk. While Carrier concedes claimants sold tickets, were responsible for the proceeds of their sales, answered inquiries, and kept the ticket office open, still Carrier says they were not full-fledged ticket clerks; they did not fulfill all the duties and responsibilities of the position for these short periods each day they were required to perform such work.

This contention is not well taken. So far as we can find from the record claimants performed all the duties required of them while acting as Ticket Clerk. Furthermore, in Award 751 this Board held the daily assignment of three hours' work of a higher rated position to a lower rated employee was a violation of the intent of a rule for preservation of rates the same the rule here.

The decision in Award 1440, under a rule for preservation of rates the same as we have here, is also decisive of this dispute. There an employe was assignee to a higher rated position from 1:00 P. M. to 2:00 P. M. each regularly assigned work day. This Board held the employe was entitled to receive the higher rate of pay. While Award 101 apparently takes the opposite view of a similar situation, we believe Award 1440 announces the correct decision and we will follow it.

Although the record shows claimants were assigned to Ticket Clerk's work in January and February 1943 respectively, the instant claim was not filed until January 20, 1945. There is mention made that an earlier claim filed on behalf of Claimant Benson in February 1943 but no appeal was taken from Carrier's denial of it. Petitioner contends the earlier claim, although not pursued after Carrier's denial, was notice of protest to the Carrier, and the present claim should be allowed retroactive to its date. We cannot agree. The failure to pursue that claim indicated apparent acquiescence in Carrier's denial, and satisfaction with the asserted long established practice which Carrier alleges was followed by the parties. Although concurrence in a practice does not change unambiguous provisions of a contract it does, under certain circumstances, affect the right to claim retroactively benefits which have been waived by positive conduct. Such is the situation here.

We are of the opinion the claim should be sustained, but only from January 20, 1945, the date of its institution.

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 Employees involved in this dispute are respectively carrier and employees 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 Carrier violated the Agreement.

AWARD

Claim (1, 2 and 3) sustained from January 20, 1945.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, the 7th day of April, 1947.