Award No. 3694
Docket No. CL-3627

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Joseph L. Miller, Referee

PARTIES TO DISPUTE:

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

ERIE RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that the Carrier violated the Clerks' Agreement when it failed and refused to compensate employe Frank Aldendorf, Chicago, Illinois at Checker's rate of pay during the period December 29, 1945 to March 9, 1946 and

That the Carrier shall now compensate Aldendorf the difference between the Delivery Clerk's rate of 90¼c per hour and the Checker's rate of 95¼c per hour during the period indicated above.

EMPLOYES' STATEMENT OF FACTS: Prior to August 31 1945, Frank Aldendorf was employed as a Checker, rate 95¼c per hour at the 14th Street Freight Station, Chicago, Illinois. On or about August 31, 1945, Aldendorf sustained a personal injury as a result of which he was off duty until October 17, 1945 when he resumed service as a special O. S. & D. Checker, at his regular Checker's rate of pay.

On or about December 7, 1945 because of his physical condition he was instructed by the Agent to report to company physician. This he did, and on December 28th, the company physician, Dr. A. T. G. Remmert advised the Agent that Aldendorf should not be assigned to work that required much standing on his feet, walking, or lifting.

On December 29, 1945, Aldendorf reported for work at 7:00 A.M., and at 9:00 or 9:30 A.M. the General Foreman instructed him to work the Team-track and the Boilers for the day, and from that date he was assigned to perform Delivery Clerk's work, although his seniority entitled him to work regular Checker's position and receive the Checker's rate of pay during the period.

On or about May 13, 1946 Aldendorf made final settlement with the Personal Injury Claim Department and signed the usual release required in personal injury cases.

POSITION OF EMPLOYES: There is in effect between the parties an agreement bearing an effective date of December 1, 1943, amended July 1, 1945, which contains the following rules:

Rule 34 (Preservation of Rates) reads as follows:

"Employes temporarily assigned to higher rated positions shall receive the higher rates while occupying such positions; employes

whatsoever, and including, but without limitation of the foregoing, all liability for damages of every kind, nature or description that has arisen by reason of or may hereafter in any manner grow out of any and all personal injuries, whether known or unknown, permanent or otherwise.'

"With this information we believe that this claim should be withdrawn and the file closed. Will you please advise.

Yours very truly,

(Signed) P. W. Johnston."

There is no merit to this claim now filed with the Third Division because the settlement and release on May 13, 1946, covers all factors including loss of pay and reduced earning power in connection with claim filed for alleged personal injury and loss of wages by Aldendorf.

OPINION OF BOARD: The Organization in this case bases its claim on Rule 34 of the Agreement which says, in part, "employes temporarily assigned to lower rated positions shall not have their rates reduced."

Frank Aldendorf, a checker at the Carrier's 14th Street Freight Station in Chicago, hurt his leg on August 31, 1945. After treatment, he continued to do his regular work until September 7. Then he was off until October 17. From that date until December 15 he was given lighter work as a clerk in the Agent's office. He lost his position as a result of another employe exercising seniority, but on December 17 he was given a similar position in the freight house. On December 27, Alderdorf consulted a company doctor after complaining his leg was still bothering him. The next day he reported he still had to have light work. On December 29 he was made a team track delivery clerk and, on February 6, 1946, a delivery clerk in the freight house, rate 90¼ cents an hour, five cents less than he had been receiving for his previous work. On March 9, 1946 he returned to his old job as checker, at his old rate.

The Organization on March 12, 1946 approached the Carrier with the claim now before us.

The Carrier depends largely for its defense on an agreement Aldendorf signed on May 13, 1946, after settlement of his injury claim. That agreement, or release, said in part:

"* * * do hereby for myself, my executors, administrators and assigns, release and forever dicharge ERIE RAILROAD COMPANY and all other lines or companies leased, operated or controlled by or allied with it or them and each of such lines or companies, together with their and each of their successors and assigns, and Trustees, if any, from all debts, **CLAIMS AND DEMANDS OF EVERY KIND WHATSOEVER, AND INCLUDING, BUT WITHOUT LIMITATION OF THE FOREGOING, ALL LIABILITY FOR DAMAGES OF EVERY KIND, NATURE OR DESCRIPTION** that has arisen by reason of or may hereafter in any manner grow out of any and all personal injuries, whether known or unknown, permanent or otherwise."

We have before us here for interpretation only the Agreement between the Organization and the Carrier. Did the Carrier violate the Agreement when it temporarily assigned Aldendorf to a lower rated job and reduced his pay while he held it? It did. It may appear inequitable to so hold. Aldendorf wasn't able to perform his regular work. He evidently chose light work voluntarily, after consulting physicians, in preference to laying off until his leg permitted him to resume his regular job. (There is testimony to the contrary in the record but it is outweighed by the fact that he took the light work without protest at the time.) But this Board has held many times that it is no court of equity. Nor can it ordinarily overlook the terms

of an agreement just because an individual employe was willing to waive it. Had the Carrier wished to obtain equity in this case it should have consulted the Organization with a view to obtaining a waiver of Rule 34 at the time it proposed to reduce Aldendorf's rate.

As to the release Aldendorf signed blocking the prosecution of this claim:

The Carrier divides its argument into two parts. First, it contends that the release blocks an appeal to this board in Aldendorf's behalf because the claim grew out of Aldendorf's injury and no such claim could be made in Aldendorf's behalf after the all-embracing release was signed. Second, the Carrier contends that the loss in wages Aldendorf suffered while on light work was "included in . . . the final settlement" of the settlement accompanying the release. As to the first of these contentions, we must repeat what is said above about collective agreements having precedence over individual agreements (Order of Railroad Telegraphers v. Railway Express Agency, Inc., 321 U. S. 342, and many awards of this Board). As to the second, we see no reason why Aldendorf should be paid twice for the same claim. We therefore will permit the Carrier to deduct from the money to be awarded Aldendorf any amount it paid him, in settlement of his injury claim, **specifically** for the loss of earning he suffered by reason of the violation of the Agreement between December 29, 1945 and March 9, 1946.

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 Rule 34 of the Agreement.

AWARD

Claim sustained, as modified in the past paragraph of the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 3rd day of November, 1947.

DISSENT TO AWARD 3694, DOCKET CL-3627

No sound basis exists for declaring that "the Carrier violated Rule 34 of the Agreement." The record is replete with evidence that the only reason the claimant was not used on his regular assignment was because of an alleged injury and on the recommendation of both a Company and his own Doctor that he be placed on lighter work. The Opinion recognizes this factual situation, but irrespective of the Claimant's inability to perform his regular assigned duties, holds that the Carrier must pay him the regular rate of his position under the provisions of Rule 34. To hold that when an individual, under the circumstances here involved, cannot perform his assigned duties he must nevertheless be compensated therefor, is nothing more than an arbitrary decision devoid of any semblance of support under the rule cited.

/s/ A. H. Jones
/s/ C. C. Cook
/s/ R. H. Allison
/s/ R. F. Ray
/s/ C. P. Dugan